NOTES

THE ATTORNEY GENERAL VETO

*Jeremy R. Girton**

Constitutional standing doctrine requires that a private party seeking to defend the validity of a state statute must possess a "particularized" interest in the statute's validity. When California officials refused to defend the constitutionality of Proposition 8, no one, not even the initiative's official ballot sponsors, could demonstrate standing in order to defend the statute in federal court. This outcome led many to assume that state attorneys general could easily invalidate popular initiatives through nondefense, establishing a new form of veto. By applying public choice theory to constitutional standing doctrine, this Note argues that only certain statutes will lack private-party defendants, because most laws distribute particularized private benefits. The group of statutes vulnerable to an attorney general veto includes statutes like Proposition 8, but also many environmental and campaign finance laws, among others. Importantly, statutes enacted both by the state legislature and via initiative are vulnerable to the veto. After discussing the circumstances necessary for an attorney general veto to occur and why initiatives have so far been the major targets, this Note discusses the normative implications of this power. This Note then reviews proposed reforms designed to limit the veto's use and concludes that structural modifications to formalize the process are the best solution.

INTRODUCTION

The Supreme Court's decision dismissing *Hollingsworth v. Perry* for lack of standing[1] was greeted with both praise and concern. While many lauded the decision for effectively nullifying Proposition 8, thus restoring the right of same-sex marriage to California, some critics expressed concern about the decision's future implications for direct democracy. Proposition 8 was a popular initiative, enacted by more than seven million California voters,[2] and standing was only lacking because the state's

* J.D. Candidate 2015, Columbia Law School.

1. 133 S. Ct. 2652, 2668 (2013) (vacating and remanding with instruction to dismiss Ninth Circuit appeal for lack of jurisdiction "[b]ecause petitioners [had] not satisfied their burden to demonstrate standing to appeal the judgment of the District Court").

2. Proposition 8 passed by a margin of nearly 600,000 votes—7,001,084 (52.3%) to 6,401,482 (47.7%). Debra Bowen, Cal. Sec'y of State, Statement of Vote: November 4,

attorney general had refused to defend the law in court. Commentators on both sides of the marriage-equality question worried that state attorneys general now had carte blanche to invalidate any initiative they chose, in effect establishing a new form of veto.[3]

Such concerns appeared to be validated when a rash of state attorneys general followed California's example and began refusing to defend their states' same-sex marriage bans.[4] The rise in such "refusals to

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2008, General Election 13 (2008), available at http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf (on file with the *Columbia Law Review*).

3. See, e.g., Kevin Drum, The Big Problem with the Supreme Court's Prop. 8 Decision, Mother Jones (June 26, 2013, 12:32 PM), http://www.motherjones.com/kevin-drum/2013/06/supreme-court-prop-8-ruling-problem (on file with the *Columbia Law Review*) (arguing *Hollingsworth* "basically gut[s] the people's right to pass initiatives that elected officials don't like and then to defend them all the way to the highest court in the land"); Bob Egelko, Did Toppling Prop. 8 Undercut Initiative Process?, S.F. Chron., http://www.sfgate.com/politics/article/Did-toppling-Prop-8-undercut-initiative-process-4630002.php (on file with the *Columbia Law Review*) (last updated June 30, 2013, 12:29 PM) (quoting same-sex marriage advocate California Lieutenant Governor Gavin Newsom's acknowledgment of concerns that *Hollingsworth* would weaken initiative process); John W. Suthers, Op-Ed., A "Veto" Attorneys General Shouldn't Wield, Wash. Post (Feb. 2, 2014), http://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3_story.html (on file with the *Columbia Law Review*) (characterizing nondefense of marriage statutes as new form of veto); Paul Waldman, Why the Prop. 8 Decision Should Make Liberals Uneasy, Am. Prospect (June 27, 2013), http://prospect.org/article/why-prop-8-decision-should-make-liberals-uneasy (on file with the *Columbia Law Review*) (supporting *Hollingsworth*'s immediate outcome, but cautioning "if the state doesn't have an obligation to defend its laws, you move the game to what could be a tilted playing field"). As one prominent scholar (and marriage-equality supporter) explained:

> I think [*Hollingsworth*] was clearly right as a matter of constitutional law, and I am tremendously pleased that the result will be that same-sex couples will soon be able to marry in California. But the long-term implications of the ruling are disturbing. The state should not be able to nullify an initiative passed by millions of voters simply by choosing not to defend it in court.

Erwin Chemerinsky, Op-Ed, Prop. 8 Deserved a Defense, L.A. Times (June 28, 2013), http://articles.latimes.com/2013/jun/28/opinion/la-oe-chemerinsky-proposition-8-initiatives-20130628 (on file with the *Columbia Law Review*).

4. At the time of printing, Democratic officials in several states (including Hawaii, Illinois, Kentucky, Nevada, New Mexico, Oregon, Pennsylvania, and Virginia) had announced they would not defend their states' same-sex marriage bans. See Robert Barnes, Virginia to Fight Same-Sex Marriage Ban, Wash. Post (Jan. 23, 2014), http://www.washingtonpost.com/politics/virginia-to-fight-same-sex-marriage-ban/2014/01/22/85a96a10-83ac-11e3-bbe5-6a2a3141e3a9_story.html (on file with the *Columbia Law Review*) (Virginia); Juliet Eilperin, Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban, Wash. Post: Post Pol. (July 11, 2013), http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban (on file with the *Columbia Law Review*) (Pennsylvania); Dan Hirschhorn, Kentucky Gov Will Defend Gay Marriage Ban After AG Refuses, Time (Mar. 4, 2014), http://time.com/12387/kentuck-gay-marriage-steve-beshear-jack-conway (on file with the *Columbia Law Review*) (Kentucky); Peter Jamison, Hawaii Governor Refuses to Defend Gay Marriage Ban in Court, S.F. Wkly.: The Snitch (Feb. 23, 2012, 10:50 AM), http://www.sfweekly.com/thesnitch/2012/02/23/hawaii-governor-refuses-to-defend-gay-

defend" has sparked academic discussion about the (often conflicting) dual roles of state attorneys general as popularly elected representatives and legal experts sworn to follow constitutional mandates.[5] But fundamental questions remain unaddressed: In what cases could the *Hollingsworth* scenario—in which an attorney general declines to defend

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marriage-ban-in-court (on file with the *Columbia Law Review*) (Hawaii); Kirk Johnson, Judge Blocks Motion to Defend Oregon Gay Marriage Ban, N.Y. Times (May 14, 2014), http://www.nytimes.com/2014/05/15/us/judge-blocks-motion-to-defend-oregon-marriage-ban.html (on file with the *Columbia Law Review*) (Oregon); Michael Martinez, Nevada Stops Defending Ban Against Same-Sex Marriage, CNN (Feb. 11, 2014, 3:31 PM), http://www.cnn.com/2014/02/11/us/nevada-abandons-ban-same-sex-marriage (on file with the *Columbia Law Review*) (Nevada); Barry Massey, N.M. Attorney General Says He Won't Defend State's Gay Marriage Ban, LGBTQ Nation (July 22, 2013), http://www.lgbtqnation.com/2013/07/n-m-attorney-general-says-he-wont-defend-states-gay-marriage-ban/ (on file with the *Columbia Law Review*) (New Mexico); Tammy Webber, Illinois Gay Marriage: State Prosecutors Refuse to Defend Gay Marriage Ban, Huffington Post (June 21, 2012, 11:53 AM), http://www.huffingtonpost.com/2012/06/21/illinois-gay-marriage-sta_0_n_1615170.html (on file with the *Columbia Law Review*) (Illinois); see also Jess Bravin, Gay Marriage Tests State Attorneys General, Wall St. J. (Mar. 7, 2014, 7:13 PM), http://online.wsj.com/news/articles/SB10001424052702304732804579423591152481248 (on file with the *Columbia Law Review*) ("More than half a dozen state attorneys general, all Democrats, have dropped their defense of anti-gay-marriage laws . . . ."). Attorneys general in other states have halted defending their statutes in response to precedent at the Court of Appeals level. See, e.g., Mary C. Curtis, Virginia Same-Sex Marriage Ruling Reverberates in North Carolina, Wash. Post: She the People (July 30, 2014), http://www.washingtonpost.com/blogs/she-the-people/wp/2014/07/30/virginia-same-sex-marriage-ruling-reverberates-in-north-carolina/ (on file with the *Columbia Law Review*).

Most Republican attorneys general continued to defend their state's same-sex marriage bans through to the appeal stage. See Edith Honan, State Attorneys General Forced into Spotlight on Marriage Debate, Reuters (June 2, 2014, 3:53 PM), http://www.reuters.com/article/2014/06/02/us-usa-gaymarriage-attorneysgeneral-id USKBN0ED22D20140602 (on file with the *Columbia Law Review*) (discussing decisions by officials in Indiana, Michigan, Texas, Utah, West Virginia, and Wisconsin to defend their states' bans); cf. Amicus Brief of Colorado, Alabama, Alaska, Arizona, Idaho, Louisiana, Oklahoma, South Carolina, South Dakota, & Utah in Support of Appeallants [sic] at 2–3, Baskin v. Bogan, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 WL 4359059 (7th Cir. July 21, 2014), available at http://scribd.com/doc/235114083/Amicus-Baskin-v-Bogan (on file with the *Columbia Law Review*) (expressing support for constitutionality of Indiana's same-sex marriage ban). But cf. Trip Gabriel, Pennsylvania Governor Won't Fight Ruling that Allows Gay Marriage, N.Y. Times (May 21, 2014), http://www.nytimes.com/2014/05/22/us/pennsylvania-governor-will-not-appeal-same-sex-marriage-ruling.html (on file with the *Columbia Law Review*) (discussing Republican Pennsylvania Governor Tom Corbett's decision not to appeal ruling invalidating Pennsylvania's same-sex marriage ban).

5. For an excellent summary of different state approaches to the nondefense question, see generally Katherine Shaw, Constitutional Nondefense in the States, 114 Colum. L. Rev. 213 (2014). Much of the other post-*Hollingsworth* scholarship not addressing the merits of the same-sex marriage issue has limited its standing discussion to initiatives. See, e.g., Scott L. Kafker & David A. Russcol, Standing at a Constitutional Divide: Redefining State and Federal Standing Requirements for Initiatives After *Hollingsworth v. Perry*, 71 Wash. & Lee L. Rev. 229, 231–32 (2014) [hereinafter Kafker & Russcol, Constitutional Divide] (arguing *Hollingsworth* significantly altered federal standing doctrine such that it has become incompatible with state approaches to standing in initiative cases).

a statute and *no one* is able to intervene in its defense—be repeated? Are only initiatives at risk, or could statutes enacted by legislatures be invalidated as well? By delineating the potential universe of statutes that could be invalidated in this manner, this Note seeks to explain how this "attorney general veto" operates in practice.[6]

To identify this universe of statutes, this Note takes a novel approach to standing doctrine: analogizing standing's "particularized interest" requirement to public choice theory's concept of "particularized benefits."[7] This Note argues that the attorney general veto could affect any law with particularized costs and generalized benefits (termed "entrepreneurial policies") because standing doctrine will categorically prevent such statutes from having private-party defendants in federal court. Thus, those who fear initiatives' invalidation through nondefense have misjudged the problem: The effectiveness of the attorney general veto does not depend on whether the statute was enacted via initiative or by the legislature, but rather depends on how the law distributes political costs and benefits among interested groups.

Part I of this Note summarizes standing doctrine, public choice theory, and how the two overlap. Part II.A lays out the two elements of the attorney general veto—entrepreneurial statutes and government nondefense—and discusses the role of politics in the nondefense calculus. Part II.B discusses the application of the attorney general veto to initiatives and referendums and argues that direct legislation has been disproportionately affected by the veto mainly because of its historical role in enacting entrepreneurial statutes. Lastly, Part III reviews the attorney general veto's normative implications, discusses alternative proposals for reform, and advocates for formalized pre-enactment judicial review as the most effective option.

I. A PUBLIC CHOICE VIEW OF ARTICLE III STANDING

Article III standing—the test for determining who can invoke the power of the federal courts—has been criticized as a manipulable doctrine lacking in consistent application.[8] This Part seeks to explain the

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6. As used in this Note, the term "attorney general veto" describes the refusal by state officials to defend the validity of a state law in a manner that, due to standing doctrine requirements, also prevents any private parties from intervening in the law's defense. In most states, the official responsible for making the nondefense decision is the attorney general, although as discussed infra in Parts II.A.2 and III.B, this is not always the case.

7. See infra notes 19–25 and accompanying text (discussing definition of "particularized interest"); infra notes 47–52 and accompanying text (discussing definition of "particularized benefits"); infra Part I.C (discussing analogy of these two terms).

8. See Kafker & Russcol, Constitutional Divide, supra note 5, at 231 (describing standing doctrine as "unsettled," with "deep fissures," "divides," and "gaping holes"); cf. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such."); Flast v. Cohen, 392 U.S. 83, 97 (1968) ("The 'many subtle pressures' which cause policy considerations to blend into the

doctrine's rules using the framework of public choice theory by analogizing standing's "particularized interest" requirement to public choice's concept of "particularized benefits." Part I.A reviews Article III standing doctrine, with a focus on the particularized interest requirement. Part I.B outlines public choice theory's transactional view of the legislative process and of the distribution of political costs and benefits. Tying these two concepts together, Part I.C argues that how a statute allocates political costs and benefits determines which private parties have standing to challenge or defend its validity.

A. *Article III Standing*

Constitutional standing doctrine is a self-enforced limitation on the federal courts' ability to decide a case.[9] It derives from Article III's limitation on the power of the federal judiciary to decide only "cases" and "controversies" and from the structure of the Constitution itself.[10] In order to establish standing, the party invoking federal jurisdiction must demonstrate three elements:[11] injury, causation, and redressability.[12] First, the party invoking federal jurisdiction "must have suffered an 'injury in fact'—an invasion of a legally protected interest" that is both

constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours." (footnote omitted) (quoting Poe v. Ullman, 367 U.S. 497, 508 (1961))).

9. Note that these limitations on standing apply only to cases in federal courts; suits in state courts are generally not subject to these standards. For a more detailed background discussion of constitutional standing requirements, see Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 113–23 (6th ed. 2009).

10. U.S. Const. art. III, § 2, cl. 1; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); see also Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); Diamond v. Charles, 476 U.S. 54, 61–62 (1986) ("Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.' This requirement ensures the presence of the 'concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."); Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 881 (1983) (describing standing as "crucial and inseparable element" of separation of powers).

11. This Note limits its scope to constitutional standing requirements derived from Article III—referred to simply as "standing" hereinafter—and does not discuss other "prudential" standing requirements. For discussion of such requirements, see generally Fallon et al., supra note 9, at 140–53; John C. Yang, Standing . . . in the Doorway of Justice, 59 Geo. Wash. L. Rev. 1356, 1361–68 (1991).

12. *Lujan*, 504 U.S. at 560–61.

"concrete and particularized"[13] and "actual or imminent."[14] Second, the injury must causally connect to an action by the defendant, rather than a third party.[15] Third, it must be "likely"—not merely speculative—that a favorable decision by the court could redress the injury.[16] Although often described as hurdles to potential plaintiffs, these three requirements apply equally to defendants appealing lower-court decisions.[17] Intervening parties may not need to establish standing if an aligned party satisfies the three requirements.[18]

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13. Id. at 560.

14. Id. (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (internal quotation mark omitted).

15. Id. at 560–61.

16. Id. at 561 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

17. See, e.g., Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) ("Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an 'actual controversy' persist throughout all stages of litigation." (quoting Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013))); Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.").

18. At the trial level, intervenors in federal court must satisfy Rule 24's requirements in order to intervene as of right or permissively, but this is generally a less stringent standard than Article III's standing requirements. See Fed. R. Civ. P. 24 (establishing requirements for intervention); see also Suzanne B. Goldberg, Private Parties, Legislators, and the Government's Mantle: On Intervention and Article III Standing 18 & n.57 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Working Paper No. 12-325, 2012), available at http://ssrn.com/abstract=2193601 (on file with the *Columbia Law Review*) (arguing courts' leniency in granting intervention status does not mean standing exists). But see United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985) (concluding intervention requirements are stricter than standing requirements). For direct legislation, courts have acknowledged that official sponsors generally have a right of intervention. See Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.").

Most jurisdictions have held that intervenors need not satisfy standing requirements at the trial level so long as another aligned party has standing, but some have required a separate standing source. Compare San Juan Cnty. v. United States, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) ("[P]arties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing 'so long as another party with constitutional standing on the same side as the intervenor remains in the case.'" (quoting San Juan Cnty. v. United States, 420 F.3d 1197, 1206 (10th Cir. 2005), vacated en banc, 503 F.3d 1163)), Ruiz v. Estelle, 161 F.3d 814, 830 (5th Cir. 1998) ("Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so."), Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994) ("An intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing."), Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989) ("[A] party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit."), and United

The scope of the injury-in-fact prong's requirement that the interest being invaded be "concrete and particularized" is often debated.[19] For example, invasion of an individual's purely aesthetic desire to observe an endangered species in the wild qualifies as concrete and particularized,[20] while a "generalized harm to the forest or the environment" does not.[21] In rare cases, taxpayers can allege sufficient injury from unconstitutional government expenditures of public funds,[22] but usually such claims are

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States v. Bd. of Sch. Comm'rs, 466 F.2d 573, 577 (7th Cir. 1972) ("The requirements for intervention, moreover, should generally be more liberal than those for standing to bring suit."), with Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996) ("We conclude that the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court."), and Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("[B]ecause an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as original parties.").

For academic discussion of this circuit split, see generally Carl Tobias, Standing to Intervene, 1991 Wis. L. Rev. 415, 436–44; Amy M. Gardner, Comment, An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors, 69 U. Chi. L. Rev. 681, 693–97 (2002); Juliet Johnson Karastelev, Note, On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join a Lawsuit?, 52 Duke L.J. 455, 464–68 (2002). *Hollingsworth* likely does not resolve this debate, as it only addresses the right of an intervenor to seek an appeal of an adverse judgment when no named party chooses to do so and does not address standing at the district-court level. See King v. Christie, 981 F. Supp. 2d 296, 307 n.9 (D.N.J. 2013) (finding *Hollingsworth* "did not directly address the issue of intervenor standing in general"); Vivid Entm't, LLC v. Fielding, No. CV 13-00190 DDP (AGRx), 2013 WL 3989558, at *1–*2 (C.D. Cal. Aug. 2, 2013) (permitting intervention by third party despite lack of standing and interpreting *Hollingsworth* narrowly as not requiring standing for intervention).

While an intervenor normally has the right to appeal an adverse final judgment by a trial court, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375–76 (1987), *Hollingsworth* makes clear that to do so the intervenor must have an independent particularized interest at stake. 133 S. Ct. at 2663 ("[E]ven when we have allowed litigants to assert the interests of others, the litigants themselves still 'must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.'" (second alteration in original) (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991))). But cf. Maine v. Taylor, 477 U.S. 131, 136 (1986) ("We previously have recognized that intervenors in lower federal courts may seek review in this Court on their own, so long as they have 'a sufficient stake in the outcome of the controversy' to satisfy the constitutional requirement of genuine adversity." (quoting Bryant v. Yellen, 447 U.S. 352, 368 (1980))).

19. For a heated example of such a debate, compare FEC v. Akins, 524 U.S. 11, 24 (1998) (holding injury's status as "widely shared" does not "automatically disqualify" it as generalized grievance), with id. at 34–35 (Scalia, J., dissenting) (arguing majority incorrectly defines generalized grievances as those that are "abstract," rather than those that are widely shared and "undifferentiated," criteria relied upon in earlier precedents).

20. *Lujan*, 504 U.S. at 562–63.

21. Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009).

22. See Flast v. Cohen, 392 U.S. 83, 103–06 (1968) (finding taxpayers had standing to seek injunction of public expenditures on textbooks for use in parochial schools in potential violation of Establishment Clause). But see Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593 (2007) (plurality opinion) (characterizing *Flast* as "narrow exception to the general rule against federal taxpayer standing").

disqualified as a "general interest common to all members of the public."[23] Such "generalized grievances" do not establish standing unless "the party seeking review [is] himself among the injured"; that is, unless the party additionally asserts a qualifying particularized interest.[24] Thus, private parties seeking to defend a statute's validity can only establish standing if they can show that they will suffer a particularized injury from the statute's invalidation—a "cognizable interest" in the statute's continued validity.[25]

One caveat to the generalized-grievance rule applies only to the states themselves. It has long been established that when a court declares a state law unconstitutional, the state suffers an injury in fact sufficient to satisfy standing, because the state's cognizable interest in the continued enforceability of its laws is injured by the judicial decision.[26] The scope of this enforceability interest was central to the outcome in *Hollingsworth*, especially after the district court declared Proposition 8 unconstitutional. When none of the state officials ordinarily charged with defending the law were willing to appeal,[27] the law's official ballot sponsors sought to do so, asserting both their own independent interest in the law's validity and the state's enforceability interest.[28] They argued that, because the elected

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23. Ex parte Lévitt, 302 U.S. 633, 634 (1937); accord United States v. Richardson, 418 U.S. 166, 176–77 (1974) (finding taxpayer's alleged injury from lack of information on CIA activities was "generalized grievance" and "plainly undifferentiated"); Frothingham v. Mellon, 262 U.S. 447, 487–89 (1923) (finding taxpayer lacked direct injury and his interest was "shared with millions of others").

24. *Lujan*, 504 U.S. at 563, 575. A commonly repeated purpose of this requirement is to ensure that generalized grievances are addressed through the political branches rather than through the courts, although some scholars have expressed skepticism that current standing doctrine effects that purpose. See, e.g., Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 297–300 (1988) (discussing how generalized-grievance requirement sometimes fails to serve these intended purposes).

25. See, e.g., Indus. Commc'ns & Elecs., Inc. v. Town of Alton, 646 F.3d 76, 80 (1st Cir. 2011) (finding property owners had standing to defend town policy that would have prevented construction of telecommunications tower near their property).

26. Hollingsworth v. Perry, 133 S. Ct. 2652, 2664 (2013) ("[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." (quoting Maine v. Taylor, 477 U.S. 131, 137 (1986))).

27. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) ("With the exception of the Attorney General, who concedes that Proposition 8 is unconstitutional, the government defendants refused to take a position on the merits of plaintiffs' claims and declined to defend Proposition 8." (citation omitted)), aff'd sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom. *Hollingsworth*, 133 S. Ct. 2652.

28. *Hollingsworth*, 133 S. Ct. at 2662–67 (discussing arguments for standing made by Proposition 8's sponsors).

officials had essentially abandoned their duty to defend the statute, the sponsors were empowered by California law to represent the state.[29]

In *Hollingsworth*, the Supreme Court disagreed, making two important clarifications regarding the scope of the state's enforceability interest. First, when a law is enacted via initiative or referendum, the law's official ballot sponsors do not share in the state's enforceability interest any more than other citizens.[30] The sponsors of Proposition 8 did not have an enforceability interest following enactment because "[t]heir only interest . . . was to vindicate the constitutional validity of a generally applicable California law," which constituted a generalized grievance.[31] A court affirmance of the statute's validity would not have "directly [or] tangibly benefit[ed]" the sponsors any more than it would have "the public at large"—making their interest generalized.[32] Although the sponsors argued that their role as official sponsors of the challenged initiative under state law made their interest in its enforcement "particularized," the Court concluded that such an interest would require the sponsors to have some role in the statute's enforcement, which they lacked.[33]

Second, the Court held that states cannot transfer their enforceability interest to nongovernmental third parties for purposes of establishing standing.[34] The Court rejected the argument made by Proposition 8's sponsors that they were "'authorized under California law to appear and assert the state's interest'" in the enforceability of the law.[35] The Court agreed that an "agent" of the state can appear in federal court to assert the state's interest, and, although that agent is "typically" the attorney general, state law can designate "other officials to speak for the State."[36] The Court noted, however, that such agency status had never been extended to "private parties," only to elected officials.[37] Because the

29. Id. at 2663 ("[Proposition 8's sponsors] assert that even if *they* have no cognizable interest in appealing the District Court's judgment, the State of California does, and they may assert that interest on the State's behalf.").

30. Id. ("Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. They therefore have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of California." (citation omitted)).

31. Id. at 2662.

32. Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992)).

33. See id. at 2663 ("Petitioners have no role—special or otherwise—in the enforcement of Proposition 8.").

34. Id. at 2667 ("[T]he fact that a State thinks a private party should have standing . . . cannot override our settled law to the contrary . . . . States cannot alter [the] role [of the federal judiciary] simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.").

35. Id. at 2664 (quoting Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011)).

36. Id.

37. Id. at 2665 (arguing intervenors in previous cases "were permitted to proceed only because they were state officers, acting in an official capacity" while Proposition 8 sponsors "hold no office and have always participated in this litigation solely as private parties"). In making this argument, the Court relied heavily on the amicus brief submitted

sponsors lacked an "agency relationship" with the people of California, they could not qualify as "de facto public officials."[38] The Court therefore reaffirmed that "standing in federal court is a question of federal law, not state law," meaning that states cannot convey their enforceability interest to private parties even through state statutes.[39]

By requiring parties to have a particularized interest in the enforceability of the statute at issue, the injury-in-fact requirement of standing doctrine limits the availability of a private defense to certain types of laws. For example, consider a hypothetical law establishing a tax break for every citizen who owns a Chihuahua. If such a law were challenged as unconstitutional, a concerned Chihuahua owner could intervene in its defense, asserting his or her particularized interest in retaining the favorable tax status.[40] In contrast, a law taxing corporate polluters in order to improve state air quality benefits all citizens in a nondifferentiable way.[41] If this law were challenged, it is unlikely any private party could

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on behalf of former Acting Solicitor General Walter Dellinger. See id. at 2667 (relying on amicus brief for argument); see also Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing at 19–30, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) [hereinafter Dellinger Brief], 2013 WL 768643, at *19–*30 (describing agency argument virtually identical to position adopted by Court in *Hollingsworth*). For more detailed discussion of *Karcher v. May*, the seminal case on the standing of elected officials to defend statutes, see infra notes 115–121 and accompanying text.

38. *Hollingsworth*, 133 S. Ct. at 2666; see also Kyle La Rose, Comment, The Injury-in-Fact Barrier to Initiative Proponent Standing: How Article III Might Prevent Federal Courts from Enforcing Direct Democracy, 44 Ariz. St. L.J. 1717, 1738 (2012) (arguing, pre-*Hollingsworth*, that state law must expressly authorize party to have standing to defend law and party must be elected official under *Karcher*). To support the finding that the sponsors lacked an agency relationship with California, the Court identified three elements of the Restatement (Third) of Agency that were not met by the sponsors: the principal's right to control the agent's actions, the agent's fiduciary obligation to the principal, and the principal's duty to indemnify the agent against expenses and other losses incurred by the agent in defending actions brought by third parties. *Hollingsworth*, 133 S. Ct. at 2666–67 (citing Restatement (Third) of Agency §§ 1.01 cmts. e–f, 8.14 (2005)).

39. *Hollingsworth*, 133 S. Ct. at 2667. Note that the California Supreme Court had weighed in on the question of whether the sponsors could properly assert the right of the state in federal court and had answered the question in the affirmative. Id. at 2666.

40. Cf. California ex rel. Lockyer v. United States, 450 F.3d 436, 439–41 (9th Cir. 2006) (finding Catholic healthcare providers had particularized interest in validity of statute protecting healthcare providers who refuse to provide or refer for abortions). For a deeper discussion of *Lockyer*, see infra notes 64–68 and accompanying text.

41. Cf. Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) ("[G]eneralized harm to . . . the environment will not alone support standing."). But see FEC v. Akins, 524 U.S. 11, 25 (1998) ("[T]he fact that [an injury] is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."). Under both the majority and dissent's approaches in *Akins*, a group of individuals that could show they suffered particularized injuries from a widespread mass tort would have standing to sue the tortfeasor. Compare id. at 24 ("[A widely shared] interest, where sufficiently concrete, may count as an 'injury in fact[,]' [such as] where . . . large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law."), with id. at 35 (Scalia, J., dissenting) ("The exemplified injuries are widely shared, to be sure, but each individual

establish standing to defend the statute, as a general interest in an improved environment is insufficiently particularized.[42] Thus, the availability of a private-party defense depends, at least in part, on whether the statute distributes benefits to a narrow, particularized group or a broad, undifferentiated group.

B. *Public Choice Theory*

Public choice theory provides a valuable framework for understanding how laws allocate costs and benefits. At its highest level, the theory seeks to explain the legislative process by applying economics to political science.[43] Public choice theory rests on the assumption that individual voters, interest groups, and politicians act rationally to promote their interests in a transactional political market.[44] Citizens and interest groups engage in a "quid pro quo process of exchange" that results in "demand" for particular policies.[45] Theorists posit that a piece of legislation's perceived allocation of costs and benefits is what drives the level of demand for its enactment.[46]

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suffers a particularized and differentiated harm. One tort victim suffers a burnt leg, another a burnt arm—or even if both suffer burnt arms they are *different* arms."). But the hypothetical injuries citizens might suffer if an environmental statute were deemed invalid would likely be too speculative for these injured citizens to establish standing to defend the law. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (concluding injury in fact cannot be "hypothetical").

42. Private citizens have frequently failed to meet standing requirements when attempting to enforce or defend environmental statutes. See, e.g., *Summers*, 555 U.S. at 494–97 (finding lack of standing for environmental group seeking to enforce forestry protections due to lack of concrete, particularized injury in fact); *Lujan*, 504 U.S. at 563 (finding lack of standing because plaintiffs seeking to enforce protections for endangered species failed to show "through specific facts" that they would be "directly" affected by harm to species apart from their "special interest" in subject of environmental protection). While the Court once recognized the cognizable interest of "all who breathe . . . air," see United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973), this expansive view of a particularized injury has likely been abrogated by *Lujan* and later cases. See Sierra Club v. Peterson, 185 F.3d 349, 361 n.13 (5th Cir. 1999) (acknowledging abrogation), rev'd on reh'g, 228 F.3d 559 (5th Cir. 2000). But see Massachusetts v. EPA, 549 U.S. 497, 518–23 (2007) (finding sea-level rise presented cognizable injury to Massachusetts, but limiting holding by noting "considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual").

43. See Dennis C. Mueller, Public Choice 1 (1979) ("Public choice can be defined as the economic study of nonmarket decisionmaking, or simply the application of economics to political science . . . . The basic behavioral postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximizer.").

44. Id. at 4.

45. Id. at 3 (emphasis omitted); see also William N. Eskridge, Jr. et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 54–60 (4th ed. 2007) (discussing public choice theory of legislative supply and demand).

46. Eskridge et al., supra note 45, at 56; see also Michael T. Hayes, Lobbyists and Legislators: A Theory of Political Markets 64–68 (1981) ("Wilson posits that the extent and

The costs and benefits of a law can be social or political, as well as economic.[47] Thus, costs and benefits of a law are sometimes difficult to measure, but public choice theory argues that either can be distributed to affect a broad or narrow segment of society. "Costs of a policy may be broadly distributed, such as a sales tax paid by all consumers, or may be concentrated on a small group, such as a license fee."[48] Benefits can be broadly distributed, such as improved air quality, reduced corruption, or better infrastructure, or they can be narrowly distributed, like tax reductions for film producers or subsidies for tobacco farmers.[49] Policies with generalized benefits usually garner minimal support from interest groups, as they lack any particularized incentive to participate.[50] Conversely, policies allocating benefits or costs in a concentrated manner generally engender well-organized support or opposition from the interest groups likely to be affected.[51] Because interest-group activity drives demand for legislation, on average, legislative demand is weakest for policies with particularized costs and generalized benefits ("entrepreneurial" policies) and strongest for policies with generalized costs and particularized benefits ("client" or "clientele" policies).[52]

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nature of organizational activity for any given issue will be a function of the perceived incidence of costs and benefits.").

47. For example, redistricting laws can impose political costs on groups of voters or political candidates; criminal laws can impose economic and social costs on criminals; and tax laws can impose economic costs on taxpayers. According to public choice theorists, any legislative cost or benefit that induces behavior of interest groups can affect the supply of legislation.

48. Eskridge et al., supra note 45, at 56 (emphasis omitted); Hayes, supra note 46, at 65 ("Costs of a given issue may be widely distributed, as with the general tax burden or rising crime rates, or narrowly concentrated, as when for example regulations are imposed on a single industry or a highway construction program destroys a particular community.").

49. See Eskridge et al., supra note 45, at 56 ("[B]enefits may be widely distributed or shared by all, such as the benefits of national security, or they may be concentrated in the hands of a few, such as state subsidies to tobacco farmers."); Hayes, supra note 46, at 65 ("Benefits . . . may be widely distributed (national defense, social security) or narrowly concentrated (a tariff on a particular product, or occupational licensing authority)."). Tax credits for specific groups are the prototypical example of a concentrated benefit. See, e.g., N.Y. Tax Law § 24 (McKinney 2014) (providing tax credit for film production).

50. See Eskridge et al., supra note 45, at 57 ("[S]upport is likely only if a policy entrepreneur is willing to push the proposal, rouse the inattentive public, and perhaps take the initiative in forming citizen groups offering purposive or solidary benefits to participants.").

51. See id. at 56–57 ("[B]ecause bills providing concentrated costs or benefits will affect smaller groups, they will on average stimulate more organizational activity than measures with distributed costs and benefits." (emphasis omitted)).

52. See id. (distinguishing "entrepreneurial" and "client" political climates); Hayes, supra note 46, at 66–67 ("Concentrated benefits combined with widely distributed costs will tend to produce . . . strong clientele support and no permanent organized opposition . . . . In [the] general benefit-specific taxation case, . . . the majority will impose its will on a minority, obtaining benefits . . . up to the capacity of the minority to pay for them.").

Public choice theory argues that this demand imbalance will produce suboptimal levels of entrepreneurial policies and an excess of clientele policies.[53] Thus, representative government will result in too few public goods—nonexclusive and indivisible benefits that are enjoyed by all in the society[54]—and too many policies that benefit small populations at the expense of the general public.[55] For example, the numerous historical efforts to prohibit smoking in public places and to impose taxes on the sale of tobacco products represent entrepreneurial policies because they impose costs on a concentrated population (users and manufacturers of tobacco products) in exchange for nonexcludable benefits to public health (reduced exposure to secondhand smoke). As such, antitobacco proposals regularly encounter significant opposition from powerful interest groups, often resulting in their defeat despite significant popular support for such policies.[56]

Viewing the legislative process in a representative democracy as a series of transactions in a political marketplace is an extension of the

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53. See Eskridge et al., supra note 45, at 59 ("[T]he public sector will tend to spend too much money on statutes that concentrate benefits on special interests while distributing their costs to the general, and often unsuspecting, public . . . . [It] will [also] tend to supply too few statutes . . . that distribute benefits broadly . . . .").

54. See Mueller, supra note 43, at 12–13 (defining public good as "characterized by indivisibilities in production . . . and the impossibility or inefficiency of excluding others from its consumption").

55. See Eskridge et al., supra note 45, at 59 (discussing this "pessimis[tic]" view of legislative process).

56. To illustrate how powerful opposition to these entrepreneurial policies can be, consider Proposition 29, an unsuccessful 2012 California initiative that would have increased the state's cigarette tax from $0.87 per pack to $1.87, resulting in $735 million in annual state revenue for research and health programs. Proposition 29: Imposes Additional Tax on Cigarettes for Cancer Research. Initiative Statute., Legislative Analyst's Office (Feb. 16, 2012), http://www.lao.ca.gov/ballot/2012/29_05_2012.aspx (on file with the *Columbia Law Review*). Tobacco-industry interest groups opposed to the measure raised nearly $46 million to defeat it, while proponents only raised $17.4 million. See Cal. Sec'y of State, Campaign Finance: Proposition 029—Imposes Additional Tax on Cigarettes for Cancer Research. Initiative Statute., Cal-Access, http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1324462&session=2011 (on file with the *Columbia Law Review*) (last visited Aug. 21, 2014) (reporting nonaggregate data on campaign expenditures by committees opposing and supporting proposal). The measure was defeated by a narrow margin, as was a similar 2006 proposal that generated nearly $66.7 million in opposition funding. See Cal. Sec'y of State, Campaign Finance: Prop 86—Tax on Cigarettes, Cal-Access, http://cal-access.ss.ca.gov/Campaign/Measures/Detail.aspx?id=1285369&session=2005 (on file with the *Columbia Law Review*) (last visited Aug. 21, 2014) (reporting nonaggregate data on campaign expenditures by committees opposing and supporting proposal). To compare, efforts to defeat these initiatives each raised more funds than California Governor Jerry Brown's successful 2010 campaign, which raised about $36 million in 2010. See Cal. Sec'y of State, Campaign Finance: Brown for Governor 2010, Cal-Access, http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1321867&session=2009&view=general (on file with the *Columbia Law Review*) (last visited Aug. 21, 2014) (reporting nonaggregate data on campaign donations to Brown campaign).

Madisonian concept of political factions.[57] The ability of a political minority to prevent the enactment of entrepreneurial policies is representative democracy's double-edged sword—it can prevent majoritarian abuse in some instances, but it can also prevent enactment of policies that are in the public interest but opposed by powerful special-interest groups. Similarly, political minorities may be more successful at protecting themselves by encouraging enactment of clientele policies, which may or may not be in the best interests of society overall. For better or worse, public choice theory predicts that representative democracy structures will produce, on average, an undersupply of entrepreneurial statutes and an oversupply of clientele statutes.

C. *Political Benefits as Particularized Interests*

Standing doctrine's description of what constitutes a "particularized interest"[58] in a statute's enforceability can be analogized to public choice theory's concept of "particularized benefits."[59] Because entrepreneurial policies provide only generalized benefits, few if any private parties will have a particularized interest in their defense sufficient to establish standing. In *Arizonans for Official English*, the Court considered such a policy, an Arizona statute declaring English "the official language of the State."[60] The law was immediately challenged by a state employee responsible for handling medical malpractice claims against the state; she regularly spoke to members of the public in Spanish as part of her job and feared repercussions if she continued to do so.[61] Before dismiss-

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57. Madison viewed representative democracy (as opposed to a direct democracy) as a method of preventing dangerous majority factions from overwhelming political minorities. See The Federalist No. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961) ("[A] pure democracy . . . can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.").

58. See supra notes 19–25 and accompanying text (discussing requirement that injury in fact must be "concrete" and "particularized").

59. This analogy is admittedly imperfect. As the Supreme Court articulated in FEC v. Akins, 524 U.S. 11, 23–24 (1998), just because a grievance is "widely shared" does not necessarily preclude it from being particularized. Generalized grievances that do not afford standing are "abstract and indefinite [in] nature," like the "common concern for obedience to law." Id. at 23 (quoting L. Singer & Sons v. Union Pac. R.R., 311 U.S. 295, 303 (1940)) (internal quotation marks omitted). Thus, a policy could theoretically distribute benefits broadly but in a manner that gives every beneficiary a particularized interest in their validity. Therefore, this Note attempts to define "entrepreneurial" policies more precisely than existing public choice literature. Entrepreneurial policies, as the term is used in this Note, are those that distribute benefits in a "generalized" manner—not just to a wide segment of the population—such that no individual or group can articulate a particularized interest in their validity beyond that of ordinary citizens.

60. Ariz. Const. art. XXVIII, § 1.

61. See Arizonans for Official English v. Arizona, 520 U.S. 43, 50 (1997) (discussing plaintiff's fear that law's instruction to "act in English" would result in job loss or other

ing the case on other grounds, the Court noted that the private parties that sought to intervene in the law's defense appeared to lack "[t]he requisite concrete injury" necessary to establish standing.[62] In a later suit addressing the same law, the Arizona Supreme Court recognized that the statute imposed costs on non-English speakers' ability to exercise their constitutional right to petition the government for redress of grievances and that the law's only proffered benefit was to "promote English as a common language"—most certainly a generalized benefit.[63] In so doing, the court confirmed that such a law does not benefit any private parties in a particularized way, but potentially imposes specific costs on individuals affected by its language restrictions. With no private individuals reaping particularized benefits from their enactment, entrepreneurial policies cannot be privately defended due to constitutional standing requirements.

Meanwhile, clientele policies will always have private defendants available, because there is a small group of political beneficiaries likely to lose if the policy is invalidated, even if they play no role in its enforcement. For example, in *California ex rel. Lockyer v. United States*, the Ninth Circuit considered whether two Catholic healthcare providers had a "significant protectable interest" in the validity of a federal law that prohibited government entities from receiving certain federal funds if they discriminated against healthcare providers that "refuse to provide, pay for, provide coverage of, or refer for abortions."[64] The court and all parties acknowledged that the law at issue was intended to benefit and protect this narrow group of healthcare providers.[65] The Ninth Circuit held that the healthcare providers had a significantly protectable interest in the law's validity, which was neither "undifferentiated" nor "generalized," allowing them to establish standing.[66] The court noted that, for the intervening healthcare providers, the law at issue provided "an important layer of protection against state criminal prosecution or loss of their medical licenses," such that if it were declared unconstitutional through litigation, "they will be more likely to be forced to choose between adhering to their beliefs and losing their professional licenses."[67] The court

sanctions "if she did not immediately refrain from speaking Spanish while serving the State" (quoting Ariz. Const. art. XXVIII, § 3(1)(a)) (internal quotation marks omitted)).

62. Id. at 66. This dictum was adopted in *Hollingsworth*. See Hollingsworth v. Perry, 133 S. Ct. 2652, 2665–67 (2013) (holding initiative ballot sponsors have only "generalized" interest in validity of their measure once enacted).

63. See Ruiz v. Hull, 957 P.2d 984, 1001–02 (Ariz. 1998) (finding lack of compelling interest sufficiently narrowly tailored so as to justify statute's restriction on speech).

64. California ex rel. Lockyer v. United States, 450 F.3d 436, 439–41 (9th Cir. 2006).

65. Id. at 441.

66. Id. (internal quotation marks omitted).

67. Id.

found this risk constituted an interest that was "sufficiently direct, noncontingent, [and] substantial."[68]

The statute in *Lockyer*, like the theoretical Chihuahua tax benefit discussed above,[69] is an example of a clientele policy that confers a particularized, concrete benefit on a small group of individuals (Catholic hospitals; owners of Chihuahuas) and distributes costs generally (reducing the availability of health services; reducing statewide tax revenue). When the constitutionality of a clientele policy is questioned, any potential policy beneficiary has standing to defend the law's validity and protect his benefit.[70] Conversely, the hypothetical tax on corporate polluters to improve air quality discussed above and the "official language" statute at issue in *Arizonans* distribute benefits generally (by improving statewide air quality; by promoting English) but impose costs on a small group (industrial polluters; non-English speakers) and thus are entrepreneurial statutes that could not be defended by private citizens.[71]

When it comes to private challenges to, and defenses of, state statutes, standing doctrine produces different results for entrepreneurial policies and clientele policies: The former usually cannot be privately defended, while the latter can. This dichotomy may be troubling, especially considering that public choice theory already predicts that representative government will underenact entrepreneurial policies and overenact clientele policies.[72] Thus, the decisions of state officials—the only individuals with the power to defend entrepreneurial statutes in federal court—to defend or not defend state statutes deserve special attention.

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68. Id. (alteration in original) (quoting Dilks v. Aloha Airlines, Inc., 642 F.2d 1155, 1157 (9th Cir. 1981) (per curiam)) (internal quotation marks omitted).

69. See supra text accompanying notes 40–42 (discussing example).

70. Clientele policies actually enjoy a double protection from constitutional challenge, because their generalized distribution of costs makes it unlikely any plaintiff could establish that she suffered an injury to a particularized personal interest due to the law's existence. In the example given, no plaintiff would suffer an injury from the Chihuahua tax break other than to her generalized, nondifferentiable interest in the state's fiscal health. See supra notes 22–23 and accompanying text for discussion of general rule against taxpayer standing and the limited cases in which such "fiscal health" concerns have been an exception.

71. Inverse to the double protection enjoyed by clientele policies, entrepreneurial policies suffer a double detriment, as there is a clearly identifiable group likely to suffer injury from the law's existence and thus motivated to challenge its validity.

72. See supra notes 53–56 and accompanying text (discussing this tendency). Some may argue that this dichotomy is an appropriate extension of the purposes of federal standing doctrine, which is to avoid embroiling the courts in otherwise political controversies. See Scalia, supra note 10, at 894 ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.").

II. THE ATTORNEY GENERAL VETO AND DIRECT DEMOCRACY

When a state statute is challenged in federal court, it is ordinarily up to the state's elected officials to defend its validity.[73] But sometimes, as in *Hollingsworth*, the relevant elected officials decline to defend the challenged statute. Since Article III standing requirements prevent private citizens from interceding in defense of entrepreneurial policies challenged in federal court, when elected officials decline to defend these types of statutes, the statutes could be entirely defenseless.[74] Their subsequent invalidation can be construed as a new form of veto, operating postenactment. Part II.A reviews the elements required for an attorney general veto to occur, using *Hollingsworth* as an example. Part II.B then discusses why direct legislation is especially susceptible to the attorney general veto because of its role in frequently enacting entrepreneurial policies.

A. *Elements of the Attorney General Veto*

In its simplest terms, an attorney general veto is possible when a lawsuit is brought in federal court[75] challenging an entrepreneurial policy, and the state's ordinary system of statutory defense breaks down. The policy could have been enacted either via direct or ordinary legislation, but, for reasons discussed in Part II.B, direct legislation has several features that make it somewhat more susceptible than ordinary legislation. To illustrate how the attorney general veto operates, this Note uses Proposition 8 as an example.

First, it is useful to review the procedural history of Proposition 8 and *Hollingsworth*. Proposition 8, officially known as the "California

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73. See Shaw, supra note 5, at 232–34 (reviewing roles of governor, attorney general, solicitor general, and secretary of state in nondefense decisions across states).

74. See, e.g., Scalia, supra note 10, at 892 ("[I]f all persons who could conceivably raise a particular issue are excluded [from federal court], the issue is excluded as well."). Some would consider the absence of any viable private-party defendant as evidence that the issue is by definition a political one. Speaking in the context of a plaintiff's lack of standing, Chief Justice Warren Burger noted:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.

United States v. Richardson, 418 U.S. 166, 179 (1974).

75. Article III's standing requirements apply only to federal, not state, courts. See supra note 9 (discussing this rule). Thus, an attorney general veto generally cannot affect cases brought in state courts. See Dellinger Brief, supra note 37, at 30–31 ("[B]ecause state courts are not bound by the Article III case-or-controversy requirement, a state can authorize initiative proponents, after an initiative is approved but before it takes effect, to file suit in state court against the Attorney General for a binding determination that the initiative is constitutional." (citation omitted)).

Marriage Protection Act," was enacted on November 4, 2008.[76] Its enactment immediately halted the performance of same-sex marriages in California[77] and triggered litigation challenging its constitutionality in both state and federal courts.[78] To the surprise of many, then-Attorney General Jerry Brown quickly announced that his office would not defend the initiative's constitutionality in court;[79] other state officials took the same position.[80] Proposition 8 thus presented an unusual, but not unprecedented, political scenario: All of the state's elected officials opposed the law, while a majority of voters had just enacted it. While supporters of the *Hollingsworth* plaintiffs praised Brown and his successor Kamala Harris for refusing to defend the statute, others criticized them for not doing their jobs.[81]

Almost immediately, the official ballot sponsors of Proposition 8 sought to intervene as defendants.[82] To many, they seemed like the most logical choice. As the California Supreme Court reasoned, the participa-

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76. See Cal. Const. art. I, § 7.5, invalidated by Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), aff'd sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

77. Same-sex marriages were first sanctioned in California in May 2008, after the California Supreme Court declared the state's existing ban violated the California Constitution. See In re Marriage Cases, 183 P.3d 384, 402 (Cal. 2008), superseded by constitutional amendment, Cal. Const. art. I, § 7.5. This ban (Proposition 22) was also enacted as a state statute via popular initiative, passing with more than 60% of the vote. See Bill Jones, Cal. Sec'y of State, Statement of Vote: March 7, 2000, Primary Election, at xxx (2000), available at http://www.sos.ca.gov/elections/sov/2000-primary/sov-complete.pdf (on file with the *Columbia Law Review*) (summarizing vote totals for ballot measures).

78. The state-court lawsuits that followed Proposition 8's enactment were consolidated into a single case, Strauss v. Horton, 207 P.3d 48 (Cal. 2009), in which the California Supreme Court declared the initiative a valid constitutional amendment that "carve[d] out an exception to the state equal protection clause." Id. at 104. The simultaneous federal lawsuit became *Hollingsworth*. See *Schwarzenegger*, 704 F. Supp. 2d at 928–29.

79. See Justin Ewers, California Attorney General Jerry Brown Asks Court to Overturn Prop 8, U.S. News & World Rep. (Dec. 22, 2008), http://www.usnews.com/news/articles/2008/12/22/california-attorney-general-jerry-brown-asks-court-to-overturn-prop-8 (on file with the *Columbia Law Review*) ("The decision is a major reversal for Brown, whose office argued against same-sex marriage in the spring . . . . In a brief filed on Friday, Brown abruptly changed sides, saying he had looked closely at state precedent and had concluded that he couldn't defend the new law.").

80. See id. ("[Attorney General Brown] acknowledged that the state is facing a constitutional crisis. Every branch of government—including the governor, a majority of state legislators, and the state's highest court—approves the rights of same-sex couples to marry, while a slim majority of voters have eliminated those rights.").

81. See, e.g., Joe Garofoli, Did Jerry Brown, Kamala Harris "Refuse to Do Their Jobs"?, S.F. Chron.: Pol. Blog (June 27, 2013, 3:27 PM), http://blog.sfgate.com/nov05election/2013/06/27/did-jerry-brown-kamala-harris-refuse-to-do-their-jobs/ (on file with the *Columbia Law Review*) (discussing supporters and critics of Brown and Harris's decision).

82. *Schwarzenegger*, 704 F. Supp. 2d at 928 ("Defendant-intervenors, the official proponents of Proposition 8 under California election law . . . , were granted leave in July 2009 to intervene to defend the constitutionality of Proposition 8.").

tion of the sponsors was "essential to ensure that the interests and perspective of the voters who approved the measure [were] not consciously or unconsciously subordinated . . . and that all viable legal arguments in favor of the initiative's validity [were] brought to the court's attention."[83] Nearly five years after Proposition 8 was enacted, however, the U.S. Supreme Court rejected this argument, holding that the ballot sponsors lacked standing to appeal, and in effect affirmed the district court's invalidation of Proposition 8.[84] Proposition 8 was subject to an attorney general veto because it qualified as an entrepreneurial policy, it was challenged in federal court, and California's ordinary system of statutory defense broke down.

1. *Entrepreneurial Policies.* — The first necessary element for an attorney general veto is that the policy be entrepreneurial in nature, which prevents private citizens from being able to establish standing to defend the policy.[85] Whether a policy qualifies as entrepreneurial can be a contentious question,[86] but Proposition 8 qualified because it generated generalized benefits and concentrated costs, just like the statute at issue in *Arizonans for Official English*.[87] The proffered "benefits" of Proposition 8 (all of which were rejected by the trial court as failing to constitute a rational basis for the law) were to: (1) preserve a traditional definition of marriage; (2) slow the pace of social change; (3) promote opposite-sex parenting; (4) protect the freedom of same-sex marriage opponents; and (5) treat same-sex couples differently from opposite-sex couples.[88] None of these "benefits" is limited to any group of private citizens to give them a particularized interest in Proposition 8's enforceability.[89] If no private individual or group has a particularized interest in the enforceability of a

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

84. See Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (vacating and remanding to Ninth Circuit with instructions to dismiss appeal for lack of jurisdiction).

85. See supra Part I.C (arguing entrepreneurial policies lack private-party defendants).

86. See supra notes 47–52 and accompanying text (discussing how political costs and benefits are often difficult to measure, and how generalized versus particularized distribution is often debatable question).

87. Legislative costs and benefits can be economic but also social or purely political. See supra Part I.B (discussing examples of legislative costs and benefits).

88. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998–1002 (N.D. Cal. 2010), aff'd sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom. *Hollingsworth*, 133 S. Ct. 2652.

89. See *Hollingsworth*, 133 S. Ct. at 2662 ("[P]etitioners had no 'direct stake' in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law."). The Court thus made clear that Proposition 8's sponsors, either as sponsors or private citizens, had no particularized interest in the enforceability of the measure such that the trial court's invalidation of the measure would constitute an injury in fact. Id.

law, by definition the law's benefits (whatever they might be) are distributed generally rather than upon a differentiable group.[90]

Proposition 8's repeal of marriage equality in California exerted concentrated political costs on a narrow segment of the population—same-sex couples who desired to marry.[91] This second defining feature of entrepreneurial policies ensured that potential challengers existed to satisfy Article III's standing requirements as plaintiffs in federal court.[92] Indeed, when the *Hollingsworth* plaintiffs initiated the suit in federal district court, they unquestionably satisfied Article III's injury-in-fact requirement.[93]

2. *Defense Breakdown.* — The second element of the attorney general veto is the breakdown of ordinary statutory defense mechanisms. In *Hollingsworth*, this began at the district-court level, when all of the named defendants refused to provide a defense.[94] Interestingly, the lack of defense by any of the named defendants at the trial level did not void the case of a constitutionally required "actual controversy" because, even though California's Attorney General conceded the law was unconstitutional, officials continued to enforce the law.[95] The state's ordinary defense mechanism further eroded when, after the district court

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90. In contrast, clientele policies benefiting a small group almost always have a universe of private citizens with a particularized interest in the law's enforceability, even if they play no role in its enforcement. See supra notes 64–68 and accompanying text (discussing *Lockyer* as example of clientele policy).

91. See *Schwarzenegger*, 704 F. Supp. 2d at 997 (describing effect of Proposition 8 as "excluding same-sex couples from marriage"); see also *Brown*, 671 F.3d at 1095 ("Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships, by taking away from them the official designation of 'marriage,' with its societally recognized status.").

92. See supra note 71 (discussing "double detriment" of entrepreneurial policies for standing purposes).

93. *Hollingsworth*, 133 S. Ct. at 2661–62. Plaintiffs filed their complaint on May 22, 2009, naming as defendants in their official capacities the Governor, Attorney General, Director of Public Health, Deputy Director of Public Health, Alameda County Clerk-Recorder, and Los Angeles County Registrar-Recorder/County Clerk. *Schwarzenegger*, 704 F. Supp. 2d at 928.

94. See supra notes 79–80 and accompanying text (discussing nondefense decision in *Hollingsworth*).

95. *Hollingsworth*, 133 S. Ct. at 2660. By continuing to enforce Proposition 8, California officials ensured that plaintiffs still suffered an injury in fact and that the causation and redressability prongs of Article III standing were met. For historical discussion of litigation-enforcement gaps at the federal level, see Aziz Z. Huq, Enforcing (but Not Defending) 'Unconstitutional' Laws, 98 Va. L. Rev. 1001 (2012) (discussing President Obama's decision to enforce, but not defend, Defense of Marriage Act). Continued enforcement preserved standing at the trial level, but, once plaintiffs prevailed, the initiative sponsors seeking appeal bore the burden of proving standing. See supra note 17 and accompanying text (discussing application of standing requirements to whatever party is invoking federal jurisdiction).

declared the law unconstitutional in August 2010, the state officials named as defendants declined to appeal the decision.[96]

State officials frequently decline to appeal adverse decisions, even ones that result in state laws being declared unconstitutional.[97] But *Hollingsworth* is an unusual example because the officials making the decision were openly hostile to the politics and constitutionality of the law at issue, presenting what many would term a conflict of interest.[98] Furthermore, California law did not empower any other official to defend the law's constitutionality without the permission of the attorney general.[99]

Two factual aspects of the *Hollingsworth* case have received attention from scholars and commentators but in fact were unnecessary for the veto to occur. First, the district court invalidated the entrepreneurial policy at issue. This action is not always required: If the state officials who felt the law was unconstitutional had simultaneously declined to enforce it, the case would have been rendered moot.[100] Absent this step, akin to a settlement, it appears that state officers cannot officially withdraw from a suit challenging the validity of a law they enforce unless other state officers remain to defend the case.[101] Second, Proposition 8 was enacted via

96. *Hollingsworth*, 133 S. Ct. at 2660.

97. See Juliet Eilperin, State Officials Balk at Defending Laws They Deem Unconstitutional, Wash. Post (July 18, 2013), http://www.washingtonpost.com/politics/state-officials-balk-at-defending-laws-they-deem-unconstitutional/2013/07/18/14cf86ce-ee2b-11e2-9008-61e94a7ea20d_story.html [hereinafter Eilperin, State Officials] (on file with the *Columbia Law Review*) (quoting former Maine Attorney General James Tierney as saying "[t]he simple truth is that AG refusal to defend happens all the time"). One of the most famous historical examples of attorney-general nondefense comes from the 1960s, when California Attorney General Thomas Lynch successfully argued that a ballot initiative invalidating the state's housing antidiscrimination laws was unconstitutional. See Brief of the State of California as Amicus Curiae at 3–10, Reitman v. Mulkey, 387 U.S. 369 (1967) (No. 483), 1967 WL 113956, at *3–*10.

98. Cf. Cal. Air Res. Bd. v. Hart, 26 Cal. Rptr. 2d 153, 159 (Ct. App. 1993) ("[T]he Attorney General properly may withdraw as counsel for his state clients and authorize them to employ counsel upon the appearance of a potential conflict between the public interest and the Attorney General's duty to defend cases in which the state or one of its officers is a party." (emphasis omitted)).

99. Compare Cal. Gov't Code § 12512 (West 2014) ("The Attorney General shall attend the [California] Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity."), with id. § 11040 (permitting employment of outside counsel by state agencies only with permission of Attorney General). Some states, however, do empower other officials to step in when the attorney general steps back. See infra Part III.B (discussing alternative defense mechanisms).

100. If Proposition 8 had not been enforced, plaintiffs would have been granted their marriage licenses and denied a qualifying injury in fact. Cf. Kafker & Russcol, Constitutional Divide, supra note 5, at 237 ("[I]t was undisputed that the couples seeking to marry had standing when they initiated the litigation in the district court, as Proposition 8 precluded them from marrying.").

101. See, e.g., Peter Jackson, Gov. Corbett, Kane Seek Release from Gay-Marriage Suit, Del. Cnty. Daily Times (Oct. 8, 2013, 11:34 AM), http://www.delcotimes.com/

initiative, but the outcome would have been the same even if it had been enacted through the traditional process. As discussed in Part II.B, certain factors make direct legislation more likely to be subject to the attorney general veto—for example, direct legislation is frequently used to enact entrepreneurial policies (often ones averse to the political interests of elected officials), and direct legislation undergoes unique barriers to enactment—but the veto can apply to traditional legislation as well. While these two elements were important for the *Hollingsworth* case, the only two requisite steps for an attorney general veto to occur are that an entrepreneurial policy must be challenged in federal court and the state's ordinary process of statutory defense must break down.

3. *The Role of Politics.* — Many have asserted that an attorney general's decision not to defend a statute is both a legal and political one.[102] Several factors make the defense calculation complex. First, the divided executive structure present in nearly every state government—establishing an independent attorney general not subject to control by the governor[103]—complicates the decision to defend.[104] Second, the

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general-news/20131008/gov-corbett-kane-seek-release-from-gay-marriage-suit (on file with the *Columbia Law Review*) (discussing attempts by Pennsylvania officials to withdraw from defense of same-sex marriage challenge based on official immunity).

102. See, e.g., Salvador Rizzo, Chris Christie's Administration Declines to Defend Gun Laws in Court Battle, Star-Ledger (Dec. 30, 2013, 1:42 PM), http://www.nj.com/politics/index.ssf/2013/12/chris_christies_administration_declines_to_defend_gun_laws_in_court_battle.html (on file with the *Columbia Law Review*) (quoting critics accusing elected officials of failing to defend state gun-control laws "so that the governor could improve his standing among conservatives in the run-up to the 2016 presidential race"). Most recent academic discussion of the duty to defend has focused on the President's duty to defend the constitutionality of federal statutes, not on the role of state attorneys general. See, e.g., Curt A. Levey & Kenneth A. Klukowski, Take Care Now: Stare Decisis and the President's Duty to Defend Acts of Congress, 37 Harv. J.L. & Pub. Pol'y 377, 377–93 (2014) (discussing President's duty to defend statutes); Michael Sant'Ambrogio, The Extra-Legislative Veto, 102 Geo. L.J. 351, 362–68 (2014) (same); Ryan W. Scott, Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases, 89 Ind. L.J. 67, 81–85 (2014) (same); Kathleen Tipler, Obama Administration's Non-Defense of DOMA and Executive Duty to Represent, 73 Md. L. Rev. 287, 295–99 (2013) (discussing political aspects of decision to not defend Defense of Marriage Act); see also The Attorney General's Duty to Defend the Constitutionality of Statutes, 43 Op. Att'y Gen. 325, 325 (Apr. 6, 1981) ("The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid."); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275, 279 (July 30, 1980) ("I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress.").

103. For more expansive discussion of how most states divide executive power among multiple independent actors, see Shaw, supra note 5, at 229–35.

104. See, e.g., Norman R. Williams, Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage, 154 U. Pa. L. Rev. 565, 571–89 (2006) (discussing executive review in a divided executive); Michael Signer, Commentary, Constitutional Crisis in the Commonwealth: Resolving the Conflict Between Governors

elected status of most state attorneys general can result in conflicts between their policy preferences and public duty to defend the state's laws.[105] Third, there is significant diversity among states in terms of how the role of the attorney general is defined; in some states the defense decision is subject to complex power-sharing processes between multiple officials.[106] Thus, while any entrepreneurial policy could be subject to an attorney general veto if the traditional process of statutory defense broke down, politically sensitive policies are particularly exposed because of the role politics plays in the nondefense decision.

Recently, state attorneys general have declined to defend politically disputatious laws[107] on topics like gay rights,[108] guns,[109] education,[110]

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and Attorneys General, 41 U. Rich. L. Rev. 43, 45–62 (2006) (discussing conflicts between governors and attorneys general in defense of state agencies); Michael B. Holmes, Comment, The Constitutional Powers of the Governor and Attorney General: Which Officer Properly Controls Litigation Strategy when the Constitutionality of a State Law Is Challenged?, 53 La. L. Rev. 209, 211–27 (1992) (discussing issues of nondefense in context of Louisiana abortion statute). Compare, for example, the federal unitary executive model, where the President has the ultimate authority over both defense and enforcement of statutes. See generally Vikram David Amar, Lessons from California's Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General, 59 Emory L.J. 469 (2009) (discussing impact of divided executive on handling constitutional questions at state versus federal level); Michael C. Dorf, The Relevance of Federal Norms for State Separation of Powers, 4 Roger Williams U. L. Rev. 51 (1998) (discussing applicability of structural constitutional norms like separation of powers to state governments); Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314 (2006) (discussing division of power within federal executive branch); William P. Marshall, Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive, 115 Yale L.J. 2446 (2006) (advocating for divided federal executive).

105. See Mary C. Curtis, North Carolina Attorney General Dislikes Laws He Must Defend, Wash. Post: She the People (Oct. 17, 2013), http://www.washingtonpost.com/blogs/she-the-people/wp/2013/10/17/north-carolina-attorney-general-dislikes-laws-he-must-defend/ (on file with the *Columbia Law Review*) (discussing North Carolina Attorney General's public comments on political wisdom of laws he must defend).

106. See Scott M. Matheson, Jr., Constitutional Status and Role of the State Attorney General, 6 U. Fla. J.L. & Pub. Pol'y 1, 26–30 (1993) (discussing different models of constitutional structure for state attorneys general).

107. See Eilperin, State Officials, supra note 97 ("[I]n a number of high-profile cases around the country, top state officials are balking at defending laws on gay marriage, immigration and other socially divisive issues—saying the statutes are unconstitutional and should not be enforced.").

108. For review of decisions by Democratic officials to decline to defend same-sex marriage statutes in California, Hawaii, Illinois, Kentucky, Nevada, New Mexico, North Carolina, Oregon, Pennsylvania, and Virginia, see supra note 4. Republican officials have engaged in the same behavior on the other side of this issue by declining to defend Wisconsin's domestic-partnership law. See Appling v. Doyle, No. 10-CV-4434, 2011 WL 2447704, at *3 & n.4 (Wis. Cir. Ct. June 20, 2011) (noting ballot sponsors were permitted to intervene because nominal government defendants were "now aligned" with plaintiffs in seeking invalidation of law), aff'd, 826 N.W.2d 666 (Wis. Ct. App. 2012), aff'd sub nom. Appling v. Walker, No. 2011AP1572, 2014 WL 3744232 (Wis. 2014). At the federal level, starting in 2011, Democratic officials prominently refused to defend the Defense of

immigration,[111] online privacy,[112] and abortion[113]—often triggering criticism.[114] The role of politics was particularly salient in the 1987 case *Karcher v. May*, in which an attorney general veto effectively invalidated a New Jersey law establishing a mandatory moment of silence in public schools. The statute (passed by the Democratic legislature over Republican Governor Thomas Kean's veto) was challenged as an unconstitutional forced religious observance by a group that included students, parents, and a public school teacher.[115] When none of the agencies

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Marriage Act when it was challenged in *United States v. Windsor*. 133 S. Ct. 2675, 2683 (2013).

109. See Rizzo, supra note 102 (discussing nondefense by New Jersey officials of state gun-control laws).

110. See Laura Vozzella, Cuccinelli Won't Defend School Take-Over Law Championed by McDonnell, Wash. Post (Sept. 3, 2013), http://www.washingtonpost.com/local/virginia-politics/cuccinelli-wont-defend-school-take-over-law-championed-by-mcdonnell/2013/09/03/af8469b8-14fb-11e3-880b-7503237cc69d_story.html (on file with the *Columbia Law Review*) ("Attorney General Ken Cuccinelli II will not defend one of Gov. Robert F. McDonnell's marquee education reforms against a looming legal challenge, saying he believes that legislation allowing the state to take over failing schools is unconstitutional.").

111. See Dan Goldblatt, Zoeller Won't Defend Portions of Indiana's Immigration Law, Ind. Pub. Media (July 31, 2012), http://indianapublicmedia.org/news/zoeller-defend-portions-indiana-immigration-law-33651/ (on file with the *Columbia Law Review*) (discussing nondefense by Indiana Attorney General Greg Zoeller of state immigration statute).

112. See Press Release, Elec. Frontier Found., Washington State Drops Defense of Unconstitutional Sex Trafficking Law (Dec. 6, 2012), https://www.eff.org/press/releases/washington-state-drops-defense-unconstitutional-sex-trafficking-law (on file with the *Columbia Law Review*) (discussing nondefense by Washington officials of state anti-sex-trafficking statute targeting internet service providers).

113. See Court Nixes NJ Abortion Law, CBSNews.com (July 26, 2000, 5:39 PM), http://www.cbsnews.com/news/court-nixes-nj-abortion-law/ (on file with the *Columbia Law Review*) (discussing nondefense of New Jersey law banning late-term abortions).

114. See, e.g., Hans von Spakovsky, Obama Drops Pretense, Administration Will Not Defend DOMA, Daily Signal (Feb. 23, 2011), http://dailysignal.com/2011/02/23/obama-drops-pretense-administration-will-not-defend-doma/ (on file with the *Columbia Law Review*) (criticizing President Obama's failure to defend DOMA as "judgment[] made not based on a determination of the availability of reasonable legal arguments, but based upon the policy preferences of the President"); Laura Vozzella, Va. Republicans Ready to Defend Same-Sex Marriage Ban, Wash. Post (Jan. 23, 2014), http://www.washingtonpost.com/local/virginia-politics/virginia-to-fight-same-sex-marriage-ban/2014/01/23/9e5aa210-8431-11e3-bbe5-6a2a3141e3a9_story.html (on file with the *Columbia Law Review*) (describing reaction to Virginia Attorney General's refusal to defend and desire by political opponents "to take legal action against the attorney general for what they described as his misuse of the office").

115. N.J. Stat. Ann. § 18A:36-4 (West 2014) (requiring public schools to permit students to observe one-minute period of silence each day for "quiet and private contemplation or introspection"), invalidated by May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983), and reconsidered, 578 F. Supp. 1308 (D.N.J. 1984), aff'd in part, appeal dismissed in part, 780 F.2d 240 (3d Cir. 1985), appeal dismissed sub nom. Karcher v. May, 484 U.S. 72 (1987); see also Kean Vetos Bill on Silent Period in Public School, N.Y. Times (Dec. 3, 1982), http://www.nytimes.com/1982/12/03/nyregion/kean-vetos-bill-on-silent-

named in the suit chose to defend the statute—"no doubt," the trial court noted, because the governor and attorney general had concluded the statute was unconstitutional[116]—the two leaders of the state legislature (both Democrats) intervened in the statute's defense.[117] After the district court determined the statute was unconstitutional and the Third Circuit affirmed,[118] an intervening election resulted in the two Democratic legislators losing their leadership positions.[119] On appeal to the Supreme Court, the Court held that the Democratic legislators could no longer represent the legislature's interests, and because their successors also declined to defend the statute, no party had standing on appeal.[120] The case was dismissed, leaving the law invalidated.[121]

More troubling than the *Karcher*-type scenario, where the attorney general veto resulted from a popular election, is a scenario where the policy in question imposes its political costs on the individuals responsible for making the statutory defense decision. Campaign finance reform laws and other "good-government statutes" seek to increase democratic accountability by limiting the power of government officials, reducing corruption, and curbing the influence of special interests. Because these laws tend to pit the political interests of elected officials against the interests of their constituents, the motivations of officials who decline to defend them are more open to criticism. For example, the 2011 decision by Nebraska Attorney General Jon Bruning to decline to defend the state's Campaign Finance Limitation Act (CFLA)[122] arguably

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period-in-public-school.html (on file with the *Columbia Law Review*) (discussing veto by Governor Kean and political climate).

116. *Cooperman*, 572 F. Supp. at 1563.

117. *Karcher*, 484 U.S. at 75.

118. Id. at 76.

119. Id.

120. Id. at 77–81.

121. Id. at 83 (dismissing for lack of jurisdiction).

122. The CFLA allowed candidates for nearly all state elected offices to become eligible for public funds if they abided by voluntary spending limits. Neb. Rev. Stat. §§ 32-1601 to -1613 (repealed 2014). In response to the 2011 Supreme Court decision *Arizona Free Enterprise Club v. Bennett*, Bruning officially opined that the CFLA was "likely" unconstitutional. See Op. Att'y Gen. No. 11003, at 4 (Neb. Aug. 17, 2011), available at http://www.ago.ne.gov/resources/dyn/files/592603zd0f5abb5/_fn/081711+AGO+Opinion+NADC.pdf (on file with the *Columbia Law Review*) ("The Court, in *Bennett*, held that [the] state's interest[s] [did not] justif[y] the burden imposed on privately financed candidates by the Arizona matching funds provisions. In our view, a court would likely reach the same conclusion with regard to the Nebraska public financing statutes and find them unconstitutional."). Had this scenario played out in California or any of a number of other states without Nebraska's complex mechanism for alternative statutory defense, the CFLA would likely have been subject to an attorney general veto. Bruning was instead required by Nebraska Revised Statutes § 84-215 to bring suit in state court challenging the CFLA himself, and the Nebraska Secretary of State was required to defend it. See State ex rel. Bruning v. Gale, 817 N.W.2d 768, 773–74 (Neb. 2012) (describing scheme). Such "actions to determine validity" are not required (nor even available) in most states. See Shaw, supra note 5, at 252 ("Nebraska's scheme appears genuinely sui generis.").

presented a conflict of interest considering Bruning's status as an elected official covered by the CFLA—in fact, Bruning was later found to have violated federal campaign finance law.[123] Thus, assuming politics plays even a minor role in the nondefense decision, entrepreneurial statutes that impose political costs on elected officials may be more susceptible to the attorney general veto than other entrepreneurial statutes. The normative implications of attorney general vetoes in these types of situations are more fully discussed in Part III.A.

B. *Direct Legislation as the Canary in the Coal Mine*

As discussed above, an entrepreneurial statute could be subject to an attorney general veto regardless of whether the law was enacted via popular initiative (like Proposition 8 in *Hollingsworth*) or by the legislature (like the statute at issue in *Karcher*). Nevertheless, the veto appears to be frequently used on initiative-enacted statutes, a phenomenon deserving of exploration.[124] This Note argues that any disproportionate impact of the attorney general veto on initiative statutes is a byproduct of the role direct democracy has historically played in enacting politically vulnerable entrepreneurial statutes, rather than a result of standing doctrine treating direct legislation and traditional legislation differently. Direct legislation is merely an early target of a potentially larger—and growing—phenomenon.

1. *Direct Democracy and Entrepreneurial Policies.* — Ever since the initiative and referendum (collectively, "direct democracy")[125] were first

123. The Federal Election Commission later fined Bruning and his campaign committee $19,000 for violations of federal campaign finance laws during his 2012 campaign for U.S. Senate. The violations included failing to file required documentation in a timely manner, failing to file a year-end disclosure report, and failing to disclose the financial activity of his exploratory committee. Bruning Fined for Campaign Finance Violations, Lincoln J. Star (May 13, 2013, 4:45 PM), http://journalstar.com/news/local/bruning-fined-for-campaign-finance-violations/article_bf75819d-1fc0-58af-b231-a0cd6dabab92.html (on file with the *Columbia Law Review*).

124. Although it is difficult to assess numerically the proportion of attorney general vetoes exercised over direct versus traditional statutes, many prominent cases have focused on initiatives. E.g., Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (reviewing ballot initiative prohibiting same-sex marriage); Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (reviewing ballot initiative establishing official state language); Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating California initiative nullifying antidiscriminatory housing laws); *Bruning*, 817 N.W.2d 768 (reviewing ballot initiative establishing campaign finance restrictions). One scholar identified nearly eighty pieces of direct legislation invalidated by court decision on various grounds up through 2008. See Kenneth P. Miller, Direct Democracy and the Courts 106 tbl.4.1, 225–44 app. (2009) (cataloguing cases).

125. The most commonly used direct-democracy mechanisms in the United States are the initiative (allowing for popular enactment of statutes) and referendum (allowing for popular repeal of statutes). See, e.g., Lisa Oakley, Cong. Research Serv., 95-288 GOV, Citizen Initiative Proposals Appearing on State Ballots, 1976–1992, at 1–2 (1995) (characterizing direct initiative, indirect initiative, referendum, and recall as "[t]he four varieties of direct democracy procedures"); David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States 1 (1984) [hereinafter Magleby, Direct

adopted in the United States,[126] they have been used to enact entrepreneurial statutes.[127] While the concept of direct democracy predates the existence of the United States,[128] it first rose to prominence during the

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Legislation] ("While there are other forms of referendums, the popular referendum [is] generally considered in conjunction with the initiative."). An initiative is the process by which a statutorily specified number of voters can petition to propose statutes or constitutional amendments to be placed on the ballot for acceptance or rejection by voters. Oakley, supra, at 1; see also Philip L. Dubois & Floyd Feeney, Lawmaking by Initiative: Issues, Options and Comparisons 27 (1998) (discussing variations among initiatives). A popular referendum is the process by which a statutorily specified number of voters can petition to refer a legislative action to the voters for potential repeal. Magleby, Direct Legislation, supra, at 1. Like with initiatives, referendums may take many forms, including citizen petition ("whereby the people may petition for a referendum on legislation which has been considered by the legislature"); legislative referral ("whereby the legislature may voluntarily submit laws to the voters for their approval"); or constitutional requirement ("whereby the state constitution may require that certain questions be submitted to the voters"). Council of State Gov'ts, The Book of the States 314 (2013).

126. Starting in the late eighteenth century, many states used popular referendums to adopt their new state constitutions. See Dubois & Feeney, supra note 125, at 9 (discussing usage by Massachusetts in 1778 and 1780, New Hampshire in 1779 and 1783, Iowa in 1845, Texas in 1845, Wisconsin in 1846, and California in 1856). Prior to 1801, most state constitutions were not submitted for approval by popular referendum, while by 1900, nearly all had been. Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 41 (1989). Starting in 1818, states began requiring referendums for approval of state constitutional amendments (a requirement that now exists in every state except Delaware), and shortly thereafter they began subjecting pieces of ordinary legislation to popular referendum. See Dubois & Feeney, supra note 125, at 9 (noting introduction of referendum requirement for constitutional amendments by Connecticut in 1818, and chronicling early use of referendums by Massachusetts, Maryland, Rhode Island, and Texas for important statewide issues like establishment of primary school systems, incorporation of new towns, location of state capitals, and raising public debts). Now, twenty-four states allow for a popular referendum, and every state except Delaware allows for a legislative referendum. Council of State Gov'ts, supra note 125, at 323 tbl.6.14; Initiative & Referendum Inst., I&R Factsheet No. 1, at 2, available at http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/Handout%20-%20What%20is%20IR.pdf (on file with the *Columbia Law Review*) (last visited Aug. 21, 2014).

The first state to adopt the initiative was South Dakota in 1898. Dubois & Feeney, supra note 125, at 10. By 1918, eighteen other states (Arkansas, Arizona, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Utah, and Washington) had followed suit. Cronin, supra, at 51. Now, twenty-four states allow for some form of initiative to enact either state statutes or state constitutional amendments. Council of State Gov'ts, supra note 125, at 315–16 tbl.6.10; Initiative & Referendum Inst., supra, at 2.

127. Direct democracy was used to enact many entrepreneurial reforms considered "turning points in American legal history," including women's suffrage, the establishment of the eight-hour workday, and campaign finance regulations. Lynn A. Baker, Direct Democracy and Discrimination: A Public Choice Perspective, 67 Chi.-Kent L. Rev. 707, 708 (1991).

128. See Dubois & Feeney, supra note 125, at 8 (discussing historical usage of direct democracy to create Mayflower Compact and govern early New England villages). The most influential precedent for the adoption of direct-democracy procedures in the United

Progressive Era in the late nineteenth century in response to concerns that existing representative-democracy mechanisms were failing to enact needed entrepreneurial policies.[129] Although the public viewed early advocates as radicals and incumbent legislators dismissed the advocates entirely, support for direct democracy grew from the women's suffrage movement, prohibitionists, and eventually mainstream Democrats.[130] Direct democracy has since experienced two historical waves of popularity—the first from 1910 to 1920[131] and the second beginning in the 1970s and continuing to the present[132]—both tied to public frustration with representative government.

During both waves of popularity, direct democracy has been touted as a method of counteracting the chronic undersupply of entrepreneurial statutes resulting from the influence of interest groups on representative government.[133] In the Progressive Era debates that spurred adoption

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States was their use by Swiss cantons between 1831 and 1890, although many trace the initiative's roots further back to ancient Greece. Magleby, Direct Legislation, supra note 125, at 31; see also Cronin, supra note 126, at 48 (describing impact of journalist J.W. Sullivan's 1893 account of direct democracy as observed in Switzerland).

129. Miller, supra note 124, at 23 ("During the 1890s . . . [m]any believed that the government had been captured by powerful economic interests and, worse, that the constitutional design prevented majorities from breaking the corrupt axis of economic and political power. In their frustration, many Americans joined new political movements . . . [supportive of] direct democracy . . . .").

130. Cronin, supra note 126, at 50–54.

131. See Harel Arnon, A Theory of Direct Legislation 12 (2008) (discussing two historical waves of initiative use). Between 1900 and 1910, only fifty-six initiatives appeared on state ballots, while from 1910 to 1920, 293 appeared. Id. After 1920, the popularity of direct democracy decreased, and only about twenty to thirty initiatives appeared on ballots each general election year until the early 1970s. Dubois & Feeney, supra note 125, at 11.

132. "By all accounts, in the 1970s, the initiative process staged a dramatic revival. A quick glance at the nationwide figures reveals steep decade-over-decade increases in voter-approved statewide initiatives starting in the 1970s." Miller, supra note 124, at 46. During direct democracy's second wave of popularity, more than 170 initiatives appeared on ballots in the 1970s, over 240 in the 1980s, and nearly 400 in the 1990s. See Arnon, supra note 131, at 12. This wave has continued to the present, with more than 400 initiatives appearing on state ballots since 2010. See 2010 Ballot Measures, Ballotpedia, http://ballotpedia.org/wiki/index.php/2010_ballot_measures (on file with the *Columbia Law Review*) (last visited Aug. 4, 2014) (listing 184 measures appearing in 2010); 2011 Ballot Measures, Ballotpedia, http://ballotpedia.org/wiki/index.php/2011_ballot_measures (on file with the *Columbia Law Review*) (last visited Aug. 4, 2014) (listing thirty-four measures appearing in 2011); 2012 Ballot Measures, Ballotpedia, http://ballotpedia.org/wiki/index.php/2012_ballot_measures (on file with the *Columbia Law Review*) (last visited Aug. 4, 2014) (listing 188 measures appearing in 2012).

133. See Thad Kousser & Mathew D. McCubbins, Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy, 78 S. Cal. L. Rev. 949, 949 (2005) ("The initiative process was created originally to enable citizens to enact public policy directly and, in so doing, to overturn the dominion of interest groups . . . . In recent years, initiatives have been thought to . . . provide the people with a means to pressure the legislature into adopting more public-regarding policies." (footnote omitted)); see also supra Part I.B (discussing public choice theory's explanation for systemic undersupply of entrepreneurial statutes in representative democracies).

of the initiative, "[t]he most common claim was that the initiative was a way around monied influence on elected representatives."[134] At the time, citizens perceived state governments to be controlled by special interests—namely "railroads, bankers, land speculators, and robber barons."[135] Reformers attempted to reduce this influence by allowing the public to enact or repeal laws directly, because the public was theoretically less vulnerable to special-interest capture.[136]

Modern direct-democracy supporters still cite the influence of special interests as a major motivation, arguing that "[d]emand for more democracy occurs when there is growing distrust of legislative bodies and when there is a growing suspicion that privileged interests exert far greater influences on the typical politician than does the common voter."[137] As one public choice scholar summarized:

> Public choice literature suggests that special interests exert significant influence in the legislative process, and that "decisions made by legislators may be far more susceptible to interest group pressure than plebiscitary ones." For all its warts, perhaps the best argument for the initiative process may be that it provides an external check on the power of insiders who dominate the legislative and regulatory processes.[138]

Thus, citizens have used direct democracy to enact entrepreneurial policies that may otherwise be blocked by special interests, including campaign finance reform initiatives,[139] antitobacco laws,[140] and environmental protection statutes.[141]

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134. Richard B. Collins & Dale Oesterle, Structuring the Ballot Initiative: Procedures that Do and Don't Work, 66 U. Colo. L. Rev. 47, 56 (1995).

135. P.K. Jameson & Marsha Hosack, Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives, 23 Fla. St. U. L. Rev. 417, 421 (1995) (internal quotation marks omitted).

136. See Sherman J. Clark, Commentary, A Populist Critique of Direct Democracy, 112 Harv. L. Rev. 434, 457 (1998) ("Legal scholars have . . . noted the way in which legislative processes allow minorities to engage in coalition building through logrolling and thus secure outcomes on particular high-priority issues."); see also Clayton P. Gillette, Is Direct Democracy Anti-Democratic?, 34 Willamette L. Rev. 609, 624 (1998) ("[L]egislators are far more vulnerable to interest group capture than . . . the electorate.").

137. Cronin, supra note 126, at 10; see Clayton P. Gillette, Plebiscites, Participation, and Collective Action in Local Government Law, 86 Mich. L. Rev. 930, 981 (1988) [hereinafter Gillette, Plebiscites] ("Unlike the electorate (diffuse and relatively disinterested in the benefits that an interest group has to offer), the legislature constitutes a body small in number, easily reachable, and (according to capture theory) seriously interested in the (electoral) benefits that an interest group can offer.").

138. Nicole Stelle Garnett, Trouble Preserving Paradise?, 87 Cornell L. Rev. 158, 181–82 (2001) (citations omitted) (quoting Gillette, Plebiscites, supra note 137, at 981).

139. Examples of directly enacted campaign finance reforms abound. In 2012, voters in Montana approved I-166, an "advisory initiative" declaring that corporations do not possess First Amendment rights, in an attempt to limit the effect of the Supreme Court's decision in Citizens United v. FEC, 130 S. Ct. 876 (2010). See Mont. Code Ann. §§ 13-35-501 to -504 (West 2013); see also Neil K. Sawhney, Legislative Note, Advisory Initiatives as a

The use of direct democracy to enact entrepreneurial statutes is also at the heart of most normative criticisms of the process. Opponents often argue that direct legislation eliminates the value of deliberation inherent in republican governance[142] and can be a dangerous tool used to impose burdens on minority groups. Opponents also assert that direct-legislation campaigns are marred by "[a]ppeals to prejudice,"[143] resulting in a "whimsical and emotional" process[144] that creates laws more likely to unfairly harm minority groups than ordinary legislation.[145] Historical examples include the use of direct democracy to restrict expansion of low-rent housing projects,[146] deny equal protection to sexual minorities,[147]

Cure for the Ills of Direct Democracy? A Case Study of Montana Initiative 166, 24 Stan. L. & Pol'y Rev. 589, 591–92 (2013) (suggesting advisory initiatives allow citizens to pressure legislatures to adopt their preferred policies). In 1996 and 2002, voters in Colorado twice enacted stricter campaign finance regulations, both of which triggered constitutional challenges. See Colo. Const. art. XXVIII, §§ 1–17, partially invalidated by Dallman v. Ritter, 225 P.3d 610 (Colo. 2010) (en banc); see also Sampson v. Buescher, 625 F.3d 1247, 1261 (10th Cir. 2010) (declaring some restrictions unconstitutional as applied).

140. Prohibitions on smoking in public places and increases in cigarette taxes are both entrepreneurial policies because they impose costs in a particularized manner on smokers and tobacco companies, while distributing public-health benefits in a generalized manner. See supra note 56 and accompanying text (discussing antitobacco measures as entrepreneurial and often subject to fierce interest-group opposition).

141. Environmental laws are quintessential examples of statutes with concentrated costs and generalized benefits, and private groups have frequently encountered standing problems when they seek to defend or enforce such policies. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (denying standing to environmental activists for lack of sufficiently imminent injury). Citizen groups can establish standing to enforce environmental laws in certain situations. For example, they "adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

142. See Kurt G. Kastorf, Comment, Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule, 54 Emory L.J. 1633, 1649 (2005) ("Strategies change in direct democracy. Cooperation is more difficult, making coalition and rider logrolling rare."). Unlike representative lawmaking, direct democracy contains no repeat players and entails "one-shot, winner-take-all transactions" based on anonymous majoritarian voting. Id.

143. Derrick A. Bell, Jr., The Referendum: Democracy's Barrier to Racial Equality, 54 Wash. L. Rev. 1, 19 (1978).

144. Joseph F. Zimmerman, The Initiative: Citizen Law-Making 9 (1999).

145. See Kastorf, supra note 142, at 1649–52 ("Direct democracy is often hostile to minority interests."). But see Baker, supra note 127, at 715 ("[W]hether a rationally self-interested . . . minority . . . interest group[] ought in general to prefer representative to direct law-making processes is a difficult empirical question and cannot be resolved on the strength of a priori reasoning." (emphasis omitted)).

146. See Bell, supra note 143, at 2–5 (discussing pejoratively James v. Valtierra, 402 U.S. 137 (1971), which held California Constitution Article 34—requiring local referendum before development of any future federally financed low-rent housing project—did not violate equal protection); see also Reitman v. Mulkey, 387 U.S. 369, 370–81 (1967) (invalidating California initiative nullifying antidiscriminatory housing laws).

prohibit the use of affirmative action in college admissions,[148] and ban unpopular forms of free speech.[149] The concern about the influence of prejudice is more salient with direct legislation than ordinary legislation because courts have found it difficult to assess the motivations of voters in determining whether laws enacted through direct democracy are intentionally discriminatory.[150] Thus, even opponents of direct democracy recognize its role in enacting entrepreneurial statutes, some of which impose concentrated costs on minority groups in exchange for intangible, generalized benefits.

Direct democracy is also frequently used to enact "good-government statutes"—entrepreneurial policies that are especially susceptible to the attorney general veto because they impose political costs *directly* on elected officials.[151] As one scholar noted, direct democracy has been used to enact "matters that professional legislators would have preferred to keep to themselves," including campaign finance regulations, legislative redistricting, and lobbying reforms.[152] Because entrepreneurial statutes imposing political costs on elected officials are even more susceptible to the attorney general veto, their frequent enactment via direct democracy may partially explain why direct legislation has been the focus of the veto's use.[153]

2. *Direct Legislation's Unique Barriers to Enactment and Defense.* — In addition to being a frequent vehicle for the enactment of entrepreneurial policies, direct democracy is subject to unique barriers that are inapplicable to traditional legislation and make it more susceptible to the attorney general veto. First, direct legislation is often subject to formal

147. See, e.g., Romer v. Evans, 517 U.S. 620, 623–26 (1996) (striking down Colorado's "Amendment 2," which prohibited state and local governments from entitling any person with "homosexual, lesbian or bisexual orientation" to "claim any minority status" or make any "claim of discrimination").

148. See Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1638 (2014) (upholding Michigan's "Proposal 2," which prohibited state from employing "race-defined and race-based preferences" in college admissions).

149. See, e.g., Spokane Arcades, Inc. v. Ray, 449 F. Supp. 1145, 1151–58 (E.D. Wash. 1978) (striking down "Initiative 335," Washington's moral-nuisance statute banning pornographic theaters and bookstores), aff'd sub nom. Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980), aff'd, 454 U.S. 1022 (1981).

150. See Arthur v. City of Toledo, 782 F.2d 565, 574 (6th Cir. 1986) ("[A]bsent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context.").

151. See supra Part II.A.3 (discussing role of politics in attorney-general-veto calculus and its potentially disproportionate impact on good-government statutes).

152. See Richard Briffault, Distrust of Democracy, 63 Tex. L. Rev. 1347, 1369 (1985) (reviewing Magleby, Direct Legislation, supra note 125) (discussing measures enacted via direct legislation in California, Florida, and Washington).

153. See supra Part II.A.3 (discussing special susceptibility of entrepreneurial statutes imposing political costs on elected officials).

preballot review by the state attorney general, which gives the official wielding the veto power an early opportunity to assess the constitutionality of the measure or potentially block proposals to which she is politically opposed. Second, a common alternative defense mechanism—employed in the *Karcher* example discussed above—is for state legislators to intervene if the attorney general finds a law to be invalid. However, because legislators play no role in the enactment of direct legislation, they may not have a sufficient interest in the law's enforceability to establish standing. Furthermore, legislators are just as likely as (if not more likely than) attorneys general to decline to defend entrepreneurial policies that impose political costs on elected officials for purely political purposes.

Many states require an executive official to review direct legislation before it goes on the ballot.[154] Some reviews are purely to ensure the proposal meets the proper form, while others are more substantive. For example, in September 2013, Massachusetts Attorney General Martha Coakley refused to certify Initiative Petition Number 13-09 (to prohibit casino gambling), arguing it would be an unconstitutional taking of casino owners' private property without compensation.[155] Her decision was later unanimously overturned by the Massachusetts Supreme Judicial Court.[156] Such actions, along with other requirements, like the ability of the attorney general to craft each proposal's title and summary, are early opportunities for elected officials to control the process of direct legislation.[157]

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154. See Council of State Gov'ts, supra note 125, at 321–38 (summarizing preballot procedures for initiatives, referendums, and recalls, including roles of various state officials).

155. See Letter from Peter Sacks, State Solicitor, Mass., to John F. Ribeiro (Sept. 4, 2013), available at http://www.mass.gov/ago/docs/government/2013-petitions/13-09-letter.pdf (on file with the *Columbia Law Review*); see also Office of the Attorney Gen., Commonwealth of Mass., Initiative Petition Information Sheet (2013), available at http://www.mass.gov/ago/docs/government/2013-petitions/13-09.pdf (on file with the *Columbia Law Review*) (submitting text of Petition No. 13-09). The supporters of the initiative received an injunction and were permitted to begin collecting signatures. See Michael Norton, Dog-Racing Opponents Back Push Against Casinos, Sentinel & Enterprise News (Nov. 1, 2013, 6:35 AM), http://www.sentinelandenterprise.com/news/ci_24432509/dog-racing-opponents-back-push-against-casinos (on file with the *Columbia Law Review*) ("Attorney General Martha Coakley in September declined to certify as ballot eligible the proposal to prohibit casinos, but the question's supporters got an injunction from the Supreme Judicial Court and papers from Secretary of State William Galvin's office to begin collecting signatures for the 2014 ballot.").

156. See Abdow v. Attorney Gen., 468 Mass. 478, 484–86, 510 (2014) (discussing procedural history of initiative and unanimously rejecting Massachusetts Attorney General's argument).

157. In many states, the attorney general must prepare the title or summary of the proposed initiative, which is required to be shown during the signature-gathering process and usually appears on the ballot itself. See Council on State Gov'ts, supra note 125, at 321–30 (summarizing title- and summary-preparation procedures).

Direct legislation may be even more vulnerable than regular statutes to the attorney general veto because one of the most commonly used alternative defense mechanisms, legislative intervention, may be inapplicable.[158] The Supreme Court has only narrowly recognized the interest of legislators in "maintaining the effectiveness of their votes" for standing purposes, meaning that because legislatures play no role in enacting direct legislation, intervention may be impossible.[159] Furthermore, even if legislative intervention *could* be used to counteract the attorney general veto, legislators can always decline to intervene.[160] As *Karcher* illustrates, politics can influence the intervention decision, and in cases in which the statute is entrepreneurial *and* imposes political costs on elected officials, legislators will have the same political motivations to defeat the measure as the attorney general.[161]

To review, in order for an attorney general veto to occur, an entrepreneurial policy must be challenged in federal court, and the state's official system of statutory defense must break down. The veto's availability thus depends, not on the form of the statute's enactment, but on the statute's substantive allocation of political costs and benefits and on the actions of public officials. A few factors particular to direct legislation, including its regular role in enacting entrepreneurial policies and the unique position of attorneys general in preparing direct legislation for the ballot, help explain why statutes enacted in this manner are some of the first targets of the growing attorney-general-veto trend.

III. NORMATIVE IMPLICATIONS OF THE ATTORNEY GENERAL VETO

While standing doctrine is designed to prevent courts from becoming political battlegrounds, the increasing use of statutory nondefense suggests that it may be accomplishing the opposite. Concerns about the ability of a handful of elected officials to exercise the attorney general veto have led to a variety of different proposals. Part III.A summarizes the normative arguments both for and against the use of the attorney general veto. Part III.B reviews existing proposals to restrict (or normatively

158. Legislative intervention, for example, was the alternative mechanism of defense for the New Jersey moment-of-silence statute at issue in *Karcher*, as well as the more recent New Jersey partial-birth-abortion statute. See Court Nixes NJ Abortion Law, supra note 113 (discussing legislative intervention to defend partial-birth-abortion statute).

159. See Coleman v. Miller, 307 U.S. 433, 438 (1939) (recognizing interest of legislators in preserving effectiveness of votes). But see Hollingsworth v. Perry, 133 S. Ct. 2652, 2664–65 (2013) (characterizing *Karcher* as permitting two legislators "to speak for" New Jersey as its official agents).

160. See Shaw, supra note 5, at 247 ("Of course, [legislative intervention] will only function if the legislature *chooses* to intervene to defend a law the executive has chosen not to defend, which will hinge on the constitutional views of the particular legislators in office.").

161. See supra notes 115–121 and accompanying text (discussing political background of *Karcher*).

improve) the veto's use. Part III.C advocates for pre-enactment review as the most viable method of alleviating normative concerns surrounding the attorney general veto.

A. *Tool of Democracy or Weapon of Graft?*

Normatively, one can view the attorney general veto either as a tool to ensure political decisions are made by the political branches or as a weapon susceptible to potential abuse by elected officials. As discussed above, the decision by officials to decline to defend statutes has both a legal and political element.[162] Some argue that it is appropriate for politics to play a role: If an attorney general chooses to veto a popular entrepreneurial statute, the political process can replace her with another official whose views more closely align with those of the political majority.[163] But this solution may be untimely for the statute subject to the veto, and thus only effective if the threat of political ramifications can exert ex ante control over attorney-general behavior. This effect is unlikely, given that public choice theory predicts that elected officials will systematically underenact entrepreneurial policies in the first place.[164]

In response, many have expressed concerns that the veto could be abused for political purposes.[165] Exercise of the veto deprives the judiciary of one of its most important functions: determining the constitutionality of statutes. Instead, elected officials (potentially a single official) are in charge of deciding whether state statutes are substantively unconstitutional or in violation of federal law, a decision without a mechanism for

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162. See supra Part II.A.3 (discussing role of politics in nondefense decision).

163. This argument is embraced, most prominently, by Justice Antonin Scalia, who argues that government actions that negatively impact a large, generalized population (like the invalidation of an entrepreneurial policy) can be effectively addressed through the nonjudicial branches and that standing doctrine's cognizable interest requirement can ensure as much:

> One can conceive of such a concrete injury so widely shared that a congressional specification that the statute at issue was meant to preclude precisely that injury would nevertheless not suffice to mark out a subgroup of the body politic requiring judicial protection. For example, allegedly wrongful governmental action that affects "all who breathe." There is surely no reason to believe that an alleged governmental default of such general impact would not receive fair consideration in the normal political process.

Scalia, supra note 10, at 895–96 (footnote omitted).

Perhaps the attorney general veto is simply another structural protection against entrepreneurial statutes that unjustly target political minorities by imposing concentrated costs upon them. As courts have acknowledged, "The equal protection clause is . . . , by its nature, inherently countermajoritarian. As a logical matter, it cannot depend on the will of the majority for its enforcement, for it is the will of the majority against which the equal protection clause is designed to protect." Strauss v. Horton, 207 P.3d 48, 130 (Cal. 2009) (Moreno, J., concurring and dissenting).

164. See supra Part I.B (discussing public choice theory).

165. See supra note 3 and accompanying text (reviewing commentary expressing political-abuse concern).

judicial review.[166] As discussed below, these concerns have motivated many states to establish alternative, official defense mechanisms, in an attempt to prevent the use of the attorney general veto altogether.

B. *Alternative Approaches to Reform*

Proposals to reform the ability of state officials to use the attorney general veto can be grouped into one of four broad categories: mandatory defense, alternative defense, special defense, or pre-enactment defense.[167] Each of these options has its benefits, but the first three also have significant flaws. Mandatory defense requirements eliminate the value of attorney-general expertise, alternative defense mechanisms fail to fully counter the potential for political abuse, and procedures for special defense lack democratic accountability. Pre-enactment adjudication, discussed in more detail in Part III.C, may be the most viable solution, although it also has drawbacks.

1. *Mandatory Defense.* — Eliminating official discretion by mandating defense of all state statutes is not a workable solution to the concerns arising from the attorney general veto.[168] First, such a requirement would eliminate the value of an attorney general's legal expertise.[169] Second, such a requirement would be inefficient, prohibiting officials from conserving limited resources. Third, such a requirement would probably not be an effective means of controlling attorney general behavior. For example, Wisconsin law narrowly restricts the ability of the state attorney general to make an independent determination of a challenged statute's constitutionality,[170] yet in 2009 Wisconsin Attorney General J.B. Van Hollen declined to defend a state statute on constitutional grounds any-

166. The Constitution's Supremacy Clause only mentions state *judges*, not executive or legislative officials. U.S. Const. art. VI, cl. 2. All state officials, however, are bound by oath to uphold the Constitution. Id. art. VI, cl. 3. For a more robust discussion of the interaction between these clauses, see Shaw, supra note 5, at 235–37.

167. For discussion of other potential alternatives, compare David Krinsky, How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals, 57 Case W. Res. L. Rev. 301, 308–25 (2007), which argues that Congress could circumvent standing requirements by authorizing citizen suits in Article I tribunals, with Heather Elliott, Congress's Inability to Solve Standing Problems, 91 B.U. L. Rev. 159, 182–94 (2011), which argues that Congress cannot solve the standing problem via statute. The Dellinger Brief, cited heavily by the Court in *Hollingsworth*, identified five alternative approaches, including mandatory defense and special defense. See Dellinger Brief, supra note 37, at 30–32.

168. See Shaw, supra note 5, at 257–58 (critiquing viability of mandatory defense regimes in Wisconsin, New York, and Maryland).

169. See id. at 218 ("[A] relatively robust nondefense power can carry significant benefits, both by adding additional perspectives to debates about constitutional meaning, and by permitting state executives to leverage their comparative institutional expertise for the benefit of courts, citizens, and even the legislatures whose laws the executive chooses not to defend.").

170. Id. at 257 & n.241 (citing State v. City of Oak Creek, 605 N.W.2d 526, 536 (Wis. 2000)).

way.[171] While mandatory defense might in some cases reduce officials' ability to use the attorney general veto as a political weapon, the cost of sacrificing all discretion outweighs these benefits.

2. *Alternative Defense.* — Rather than require officials to defend every statute, many states attempt to reduce the frequency of the attorney general veto by naming alternative defenders in the event the attorney general declines to defend a statute.[172] The most common candidate is the legislature, with statutes in Alaska, Arizona, Colorado, Nevada, North Carolina, Oklahoma, and Texas explicitly providing that legislators may be permitted to defend the state's generalized interest in the enforceability of state statutes if the attorney general declines to do so.[173] Bills under consideration in Arkansas and Montana would do the same.[174] While this option has the benefit of ensuring advocacy decisions are made by officials with some direct connection to the electorate[175] and is consistent with the role Congress plays in defending federal statutes,[176] it still suffers

171. Id. at 258 & n.248.

172. See, e.g., Ind. Code Ann. § 2-3-8-1 (LexisNexis 2012) ("The House of Representatives and Senate of the Indiana General Assembly are hereby authorized and empowered to employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana."). As discussed supra note 122, in Nebraska, if the Attorney General feels that a statute is unconstitutional, she is required to initiate a suit, which is defended by the Secretary of State, to clarify the statute's constitutionality. See Neb. Rev. Stat. § 84-215 (2008) ("When the Attorney General issues a written opinion that an act of the Legislature is unconstitutional and any state officer . . . , in reliance on such opinion, refuses to implement the act, the Attorney General shall . . . file an action in the appropriate court to determine the validity of the act."); State ex rel. Bruning v. Gale, 817 N.W.2d 768, 771 (Neb. 2012) (deciding case brought under this procedure). In some cases, courts have recognized "the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties." Coleman v. Miller, 307 U.S. 433, 442 (1939).

173. See Emery P. Dalesio, North Carolina Lawmakers May Defend Laws in Court if Attorney General Won't, SCNow.com, http://www.scnow.com/news/politics/article_55cfe3b8-074d-11e3-8dec-0019bb30f31a.html?mode=jqm (on file with the *Columbia Law Review*) (last updated Aug. 17, 2013) ("Laws authorizing lawmakers to defend their work with outside attorneys are already in force in Alaska, Arizona, Colorado, Nevada, Oklahoma, and Texas.").

174. See Maggie Clark, Attorneys General Prepare to Defend Controversial Laws, Pew Charitable Trusts: Stateline (May 17, 2013), http://www.pewstates.org/projects/stateline/headlines/attorneys-general-prepare-to-defend-controversial-laws-85899476891 (on file with the *Columbia Law Review*) ("Arkansas Sen. Jason Rapert . . . has proposed an additional new law that would give state legislators standing so that they could defend a new state law in court. The same bill was proposed this year in Montana.").

175. See Note, Executive Discretion and the Congressional Defense of Statutes, 92 Yale L.J. 970, 1000 (1983) (arguing, on federal level, congressional defense of otherwise undefended statutes is most appropriate solution for this reason).

176. At the federal level, members of Congress generally lack standing to initiate suits on the constitutionality of laws they pass, but they can defend them. See Raines v. Byrd, 521 U.S. 811, 830 (1997) (holding individual members of Congress did not have sufficient personal stake in dispute and lacked sufficiently concrete injury to establish Article III standing); Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875, 888 (3d Cir.)

from three fatal flaws. First, courts have generally held that individual legislators do not satisfy federal standing requirements, meaning that statutes may still be left undefended.[177] Second, intervening elections can prevent legislators from continuing their role as defendants, as in *Karcher*, again leaving laws undefended.[178] Third, legislative defense is always permissive, not required, and the concern that political pressures could override unbiased legal judgment is not allayed by this scheme.[179] After all, legislators face many of the same political pressures that could lead attorneys general to improperly engage in nondefense.

3. *Special Defense*. — A third type of reform proposal is to establish some form of special defense mechanism. For example, states could appoint special assistant attorneys general or outside counsel to defend specific statutes when the attorney general declines to do so.[180] But this alternative requires the official responsible for declining to defend the statute to exercise the appointment power. It creates difficult questions about the appropriate source and size of the budget available for the litigation. It also places decisions about litigation strategy in the hands of individuals even further removed from popular accountability.

Some reformers have attempted to craft another special defense mechanism—for direct legislation only—by parsing the language of *Hollingsworth*. Most proposals would attempt to establish an agency relationship between private parties (usually the legislation's official sponsors) and the people of the state through the same direct legislation that enacted the policy. One example is the Pension Reform Act of 2014, a

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(holding members of Congress had standing to defend law's constitutionality, but not to seek enforcement), aff'd on reh'g, 809 F.2d 979 (3d Cir. 1986). But see United States v. Windsor, 133 S. Ct. 2675, 2687–88 (2013) (finding standing on prudential grounds for members of Congress to defend suit).

177. See, e.g., Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Ehlmann, 137 F.3d 573, 578 (8th Cir. 1998) (finding legislators lacked sufficiently particularized interest to confer standing); Buquer v. City of Indianapolis, No. 1:11-CV-00708, 2013 WL 1332137, at *3 (S.D. Ind. Mar. 28, 2013) (same); see also Legal Counsel to Defend Constitutionality of an Act, Op. Att'y Gen. No. 488, at 962 (Tenn. Aug. 21, 1981) (opining no statutory authority for legislative intervention exists if Attorney General finds statute unconstitutional). The only exception to this general rule appears to be when legislators seek relief specifically tied to maintenance of the effectiveness of their votes. See Coleman v. Miller, 307 U.S. 433, 438 (1939) (finding legislators had standing to challenge ability of state lieutenant governor to cast deciding vote in favor of proposed constitutional amendment); Alaska Legislative Council v. Babbitt, 181 F.3d 1333, 1337 (D.C. Cir. 1999) ("In narrow circumstances, legislators have a judicially recognized, personal interest in maintaining the 'effectiveness of their votes.'" (quoting *Raines*, 521 U.S. at 821–22)).

178. See Karcher v. May, 484 U.S. 72, 76–77 (1987) (dismissing appeal because legislators "lost their posts as presiding legislative officers"); see also supra text accompanying notes 115–121 (discussing *Karcher*).

179. See supra Part II.A.2 (discussing influence of politics on nondefense decision).

180. See Deal, Olens Appoint Water Lawyers, Newnan Times-Herald (Nov. 4, 2013), http://www.times-herald.com/local/20131028WEBGov-Deal_water-lawyers2013-10-28T13-15-44 (on file with the *Columbia Law Review*) (discussing appointment of Georgia special assistant attorneys general).

proposed California initiative that includes a separate clause declaring that, in the event state officials decline to defend the statute in court, the initiative's official proponents shall "act as agents of the people and the State" to do so, subject to certain legal, ethical, and fiduciary requirements.[181] This option seems unlikely to effectively circumvent *Hollingsworth*, for two reasons. First, *Hollingsworth*'s agency analysis suggests that no private parties could effectively represent the state's general enforceability interest, unless they are appointed, controlled, and removable by elected officials.[182] Second, appointing private parties to this role via direct legislation may itself violate other state constitutional provisions, as it effectively establishes new permanent constitutional officers (which ordinarily requires amending the state constitution).[183]

4. *Pre-Enactment Adjudication.* — While the three types of proposals discussed above modify existing defense structures by adding additional potential defendants, pre-enactment adjudication fundamentally alters the defense timeframe. Proposals in this category would require the attorney general to assess a law's validity before enactment and bind her future litigation decisions to this assessment. As discussed in more detail in Part III.C, this novel solution would significantly reduce the ability of the attorney general to block laws for political, rather than legal, purposes. It would preserve the role of the courts as final arbiters of legal questions and would retain the benefit of genuine adversariality that is a hallmark of the judicial system.

C. *Pre-Enactment Adjudication*

State attorneys general play an important role in crafting statutes—both direct legislation and traditional legislation—before their enactment. As discussed in Part II.B.2, attorneys general in many states already engage in pre-enactment review of proposed direct legislation,[184] although there is significant variation among states regarding what level of substantive pre-enactment review is permitted.[185] Massachusetts law specifically provides for pre-enactment review by the Attorney General of whether an initiative broaches any of an enumerated set of "excluded matters," which includes certain individual rights protected by the

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181. See Letter from Chuck Reed et al. to Ashley Johansson, Initiative Coordinator, Office of the Att'y Gen. app. § 9, at 9–10 (Oct. 7, 2013) [hereinafter Pension Reform Act], available at https://oag.ca.gov/system/files/initiatives/pdfs/13-0026%20(13-0026%20(Pension%20Reform)).pdf (on file with the *Columbia Law Review*) (requesting preparation of title and summary for initiative containing this clause).

182. See supra notes 34–39 and accompanying text (discussing *Hollingsworth*'s requirement of "agency relationship" with state).

183. See Pension Reform Act, supra note 181, at 10 (requiring sponsors to take oath of office for California public officers in article XX, section 3 of California Constitution).

184. See supra Part II.B.2 (discussing Massachusetts system).

185. See Dubois & Feeney, supra note 125, at 41 tbl.10 (describing levels of authorized review for twenty-five states).

Massachusetts Constitution (e.g., the right of trial by jury, freedom of the press, freedom of speech).[186] Similarly, Florida requires the Attorney General to seek review by the Florida Supreme Court of proposed ballot initiatives.[187] Most states, however, allow for review only of relatively non-substantive matters—for instance whether the measure is of the proper form and meets signature requirements—and for preparation of titles and summaries.[188]

The pre-enactment-review proposal would build on the Massachusetts model and require state attorneys general to assess the substantive validity of all proposed laws before enactment.[189] A declaration from the attorney general that the proposal would be legally indefensible would prevent it from becoming law absent a contrary judicial determination.[190] This would give the bill's proponents an opportunity to bring suit challenging the attorney general's reasoning. If the attorney general permitted the proposal to continue, she would be required to defend the statute if challenged, and future attorneys general could utilize her initial analysis to guide their litigation strategy.

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186. See Mass. Const. amend. art. XLVIII, Init., Pt. 2, § 2 (enumerating excluded factors); id. § 3 (providing for attorney general review).

187. See Bill Cotterell, Florida's Attorney General Challenges Medical Marijuana Initiative, Chi. Trib. (Oct. 24, 2013), http://articles.chicagotribune.com/2013-10-24/news/sns-rt-us-usa-florida-marijuana-20131024_1_ben-pollara-medical-marijuana-marijuana-initiative (on file with the *Columbia Law Review*) (discussing Attorney General's challenge of proposed marijuana-legalization initiative).

188. See, e.g., Alaska Const. art. XI, §§ 2–5 (allowing Lieutenant Governor to review for form and to prepare summary); Ariz. Const. art. IV, pt. 1, § 1 (allowing Secretary of State to review for proper form); Ark. Const. amend. VII (same).

189. A formalization of this process would almost certainly require states to adopt constitutional amendments clarifying the role of the state attorney general. See supra notes 181, 183 and accompanying text (discussing Pension Reform Act's proposed constitutional amendment). This solution may also present logistical problems, given the amount of legislation that would need to be reviewed. But state attorneys general are often asked privately to weigh in on the validity of legislation before passage, and presumably state attorneys general would approve most pieces of legislation without much discussion. See, e.g., Fla. Stat. Ann. § 16.01(3) (West 2014) (authorizing Florida Attorney General to issue advisory opinions); Miss. Code. Ann. § 7-5-25 (West 2014) (authorizing Mississippi Attorney General to issue advisory opinions); Tex. Gov't Code Ann. § 402.042 (West 2013) (authorizing Texas Attorney General to issue advisory opinions).

190. This solution is similar to one proposal discussed in the amicus brief in *Hollingsworth* that is widely recognized as serving as the basis for the court's holding. See supra note 37 (discussing Dellinger Brief). The brief argues that a "state could require the Attorney General, before an initiative about which she has constitutional doubt takes effect, to initiate a declaratory judgment action in state court to resolve the constitutionality of the initiative, or seek an advisory opinion from the state's highest court." Dellinger Brief, supra note 37, at 31. The solution proposed here—covering both initiatives and traditional statutes—goes somewhat further, as it would require state attorneys general to issue their opinions before the statute's enactment, and then bind them to those positions in the event of future litigation.

Scholars have made arguments both for[191] and against[192] pre-enactment judicial review of proposed statutes, especially in the direct democracy context. First, this proposal would eliminate concerns about standing: An entrepreneurial policy would be defended either by the attorney general (if she determined the law was defensible) or by the policy's sponsors (if the attorney general determined the law was indefensible). In the latter case, sponsors could sue the attorney general directly and assert their particularized interest in the law's ability to exist (which the Court has acknowledged as cognizable, even where sponsors could *not* assert a particularized interest in the law's enforceability once enacted).[193] Then, the judicial branch would play its traditional role of determining the statute's constitutionality. Second, this proposal would respect popular sovereignty for direct legislation, as a state attorney general would be forced to publicly state her position on the constitutionality of each measure prior to its appearance on the ballot in the next election (which frequently coincides with the attorney general election).[194] Lastly, this system would uniformly clarify which state agent is responsible for a statute's defense, eliminating much of the complexity created by different state models.[195]

Critics argue that triggering pre-enactment judicial review forces courts to engage in behavior they otherwise avoid due to ripeness con-

191. See, e.g., Scott L. Kafker & David A. Russcol, The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions, 2012 Mich. St. L. Rev. 1279, 1281 (arguing for greater pre-election review of constitutional amendment initiatives by state courts); Susan L. Turner, Revising the Role of the Florida Supreme Court in Constitutional Initiatives, Fla. B.J., Apr. 1997, at 51, 52 (arguing initiative process could be improved by expanding role of Florida Supreme Court in pre-election review).

192. See, e.g., James D. Gordon III & David B. Magleby, Pre-Election Judicial Review of Initiatives and Referendums, 64 Notre Dame L. Rev. 298, 298 (1989) ("[I]t is generally improper for courts to adjudicate pre-election challenges to a measure's substantive validity."). But see David B. Magleby, Let the Voters Decide? An Assessment of the Initiative and Referendum Process, 66 U. Colo. L. Rev. 13, 46 (1995) ("[C]ourts play a vital role in the direct legislation process.").

193. As *Hollingsworth* made clear, proposal sponsors retain Article III standing to defend their measure up until it is enacted. See Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) (finding ballot-initiative sponsors' "'unique,' 'special,' and 'distinct' role in the initiative process" extends "to the process of enacting the law" and no further (quoting Reply Brief of Petitioners at 5, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144), 2013 WL 1143553, at *5)).

194. See Jeremy Zeitlin, Note, Whose Constitution Is It Anyway? The Executives' Discretion to Defend Initiatives Amending the California Constitution, 39 Hastings Const. L.Q. 327, 352 (2011) (arguing Proposition 8 scenario allowed for democratic accountability through intervening election in which all attorney general and gubernatorial candidates announced intentions to defend or decline to defend Proposition 8 in court).

195. See Joseph Kanefield & Blake W. Rebling, Who Speaks for Arizona: The Respective Roles of the Governor and Attorney General When the State Is Named in a Lawsuit, 53 Ariz. L. Rev. 689, 716 (2011) (arguing legislature should clarify via statute appropriate role of Governor and Attorney General in defense of state statutes).

cerns.[196] Although this avoidance may have efficiency benefits, many have argued in response that "delaying judicial review until after the election distorts the process of review" because judges "are reluctant to overturn measures recently approved by the voters, and therefore strain to find such measures constitutional."[197] Another potential counterargument to pre-enactment review is that—similar to what occurred in *Karcher*—the process could be complicated if the attorney general is replaced sometime after the review and the new attorney general has a different view of the statute's constitutionality. This concern may be overblown because requiring an assessment of a law's defensibility would at least require thoughtful consideration of potential defenses—analysis that could aid even a skeptical attorney general in creating plausible defenses.

Another potentially inflated concern is that this system would expand the power of the attorney general to veto legislation. This system would not enlarge the power of the attorney general, but would merely formalize the veto process, increase transparency, and reduce the likelihood of abuse.[198] All told, while this alternative may encounter resistance from courts uninterested in conducting pre-enactment statutory reviews on ripeness grounds, it would avoid standing problems, bring light to the attorney general's decisionmaking process, and provide an electoral check against potential political abuse of the veto.

CONCLUSION

Concerns about nondefense of popular initiatives after *Hollingsworth* have misidentified the problem: Any entrepreneurial statute, no matter how enacted, could be at risk. Standing doctrine's requirement that private-party defendants of state statutes possess a particularized interest in the statute's enforceability means that entrepreneurial policies—like campaign finance reforms and many environmental statutes—lack a private defense mechanism, while clientele policies—like tax credits for a special-interest group—will be vigorously defended. Thus, when entrepreneurial policies are challenged, state officials can exact an "attorney general veto" through a strategy of nondefense. The attorney general veto raises important unanswered questions about the proper roles for political officials and federal judges in our democracy. Concerns about the increasing use of the attorney general veto as an antidemocratic po-

196. See, e.g., Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 127 (Mass. 1946) ("[N]o court can interfere with the process of legislation, either by the [legislature] or by the people, before it is completed, to prevent the possible enactment of an unconstitutional measure.").

197. Dubois & Feeney, supra note 125, at 43–45.

198. While this system would permit attorneys general to veto clientele policies in addition to their existing ability to veto entrepreneurial ones, interest groups seeking beneficial clientele statutes—either through direct or traditional legislation—would be motivated to quickly bring a suit challenging the veto decision. The ultimate constitutionality of the statute would then be determined by judicial actors.

litical weapon have prompted many proposals for reform. The only solution that retains some of the potential benefits of allowing officials to make the veto decision is to formalize the process. Requiring attorneys general to announce a veto before a statute's enactment allows for ex ante judicial review and preserves political accountability.