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Standing of Intervenor-Defendants in Public Law Litigation

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ARTICLES

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Unless the plaintiff has a personal stake in the outcome, Article III of the United States Constitution requires federal courts to dismiss a plaintiff's claim for lack of standing. That much is clearly established by decades of precedent. Less understood, however, is the degree to which Article III also requires defendants to possess a personal stake. The significance of defendant standing often goes unnoticed in case law and scholarship, because the standing of the defendant in most lawsuits is readily apparent: any defendant against whom the plaintiff seeks a remedy has a personal interest in defending against the plaintiff's claim.

But the issue of standing to defend takes on outsized importance when third parties who are not targeted by the plaintiff's requested remedy seek leave to intervene in order to oppose the plaintiff's claim for relief. In cases featuring intervenor-defendants—often cases that concern important issues of public law—the personal-stake requirement becomes a real and not merely theoretical concern for the defendant. The problem is well illustrated by pending cases that address the constitutionality of California's Proposition 8 and the federal Defense of Marriage Act. In each case, the executive branch officials named as defendants declined to defend the challenged law, prompting a nonparty with a questionable personal stake to seek to intervene to defend against a plaintiff's claim. The prevailing plaintiff-centered model of standing does not lend itself readily to assessing whether such volunteer defendants have an interest sufficient to create a case or controversy.

This Article develops a model of defendant standing based on the functions that standing doctrine is intended to serve, and derived from the

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cases in which the U.S. Supreme Court has considered the personal stake of defendants under Article III. Under this model, absent a traditional injury in fact, intervenor standing to defend in public law litigation is appropriate only where state or federal law confers on the intervenor the authority to represent the government's interest. This Article then illustrates the application of that model in the Proposition 8 and DOMA cases, and concludes that the intervenors in the Proposition 8 litigation do have standing to defend, while the intervenors in the DOMA litigation do not.

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INTRODUCTION

The doctrine of standing is generally understood to limit the ability of plaintiffs to seek relief in federal court. Courts attribute the doctrine to Article III's restriction of federal jurisdiction to "Cases" and "Controversies," and the need to maintain a proper balance of power among the three branches of the federal government. What has gone largely unnoticed in the decades since the Supreme Court began to develop the standing doctrine is the degree to which Article III restricts who may *defend* against a claim in federal court. This aspect of standing doctrine is so under-appreciated that some courts and scholars have even asserted, incorrectly, that Article III's standing restrictions apply only to plaintiffs, while other courts have used aspects of the plaintiff standing doctrine to enforce limits on defendant standing *sub rosa*.[1]

Pending cases addressing the constitutionality of California's Proposition 8,[2] and the federal Defense of Marriage Act[3] (DOMA) illustrate the circumstances in which issues of defendant standing may be contested, and they highlight the inadequacy of our plaintiff-centered model of standing to guide courts to sensible results in such cases. In both the Proposition 8 and DOMA cases, the executive branch officials named as defendants declined to defend the challenged law in whole or in part, prompting a nonparty to seek to intervene to contest the plaintiff's claims.[4] This unusual procedural posture raises the question whether the existence of an Article III case or controversy depends on a showing that the defendant, as well as the plaintiff, has a personal stake in the outcome of the litigation. If, as many observers expect, the Proposition 8 and DOMA cases reach the Supreme Court, the highly significant merits questions that those cases raise may turn

1. *See infra* Part II.B.

2. *See* Perry v. Brown, --- F.3d ----, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

3. DOMA has been challenged in a number of pending actions in different federal courts. *See, e.g.*, *In re* Levenson, 587 F.3d 925 (9th Cir. 2009); Smelt v. Cnty. of Orange, 447 F.3d 673 (9th Cir. 2006); Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178 (N.D. Cal. 2011); Windsor v. United States, No. 10-civ-8435 (S.D.N.Y. filed Nov. 9, 2010); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *see also infra* Part II.C.

4. In the Proposition 8 litigation, the sponsors of the ballot initiative sought to defend the measure. In several pending DOMA cases, certain members of the United States Congress have sought to intervene to defend the constitutionality of DOMA after Attorney General Eric Holder announced that the Department of Justice would no longer defend section 3 of DOMA in court. *See infra* Part II.C.

on the precise manner in which Article III restricts who may defend a claim in federal court.

Problems of defendant standing have largely escaped notice because they arise infrequently. In most cases, the defendant's personal stake is perfectly clear. When a plaintiff demands relief against a defendant—usually in the form of damages or an injunction—the defendant's exposure to the risk of an adverse judgment suffices to create standing to defend.[5] Contested issues of defendant standing thus arise only in unusual circumstances: (1) in the trial court, when nonparties seek to be heard through intervention, and (2) on appeal, when parties against whom no relief was ordered seek to overturn the trial court's judgment. Because these circumstances occur most commonly in public law cases with significant policy implications, one might expect to find serious studies of defendant standing in the case law and the academic literature. In fact, however, the topic has been all but ignored. Many law review articles have addressed standing to sue, but not one has comprehensively considered the question of how standing doctrine limits who may defend a claim.[6] No less problematically, the courts that have addressed this subject have developed no coherent theory and thus have produced ill-considered and inconsistent outcomes.

This Article seeks to provide much-needed clarity in this neglected field of standing doctrine. I argue that, without articulating a clear theoretical basis for doing so, the Supreme Court has often treated the defendant's personal stake in the litigation as essential to the existence of a case or controversy. But the Court has done so in a confused and haphazard fashion, thus providing insufficient guidance to lower courts and creating an added measure of mischief in cases that concern what I call volunteer defendants—that is, parties not sued by the plaintiff, who seek to intervene as defendants. I respond to these problems by proposing a rubric for analyzing issues of defendant standing in public law cases, and demonstrating its superiority to current doctrine in terms of both theoretical consistency and ease of application.

The Article proceeds in four parts. Part I identifies the core requirements of a "case or controversy" under Article III as developed in the many cases that explore whether the *plaintiff* has standing to maintain an action. Part II argues that Article III's Cases or Controversies Clause limits not only who may bring a claim, but who may defend it. It also explains why standing to defend is rarely litigated, and illustrates the circumstances under which defendant standing issues can arise, by examining two high-profile cases that address the constitutionality of laws that prohibit marriage between individuals of the same sex. Part III discusses the Court's past application of both Article II and Article III standing principles to defendants, critiques the Court's under-theorized approach, and advances a new model for

5. *See infra* Part II.A.

6. For a thoughtful discussion of some of these issues in the context of standing to appeal, see Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813 (2004).

applying justiciability doctrine to defendants. Finally, Part IV applies the proposed test for defendant standing to the pending Proposition 8 and Defense of Marriage Act litigation, and demonstrates that the Proposition 8 intervenors have standing to defend, while the DOMA intervenors do not.

I. CONVENTIONAL STANDING DOCTRINE

This part provides context for the problem of defendant standing by describing how the Cases or Controversies Clause applies in the more usual case to restrict the standing of plaintiffs to assert particular claims for relief.

A. Plaintiff Standing

Standing doctrine is commonly said to be derived from Article III of the U.S. Constitution, which extends federal jurisdiction only to specified categories of "Cases" and "Controversies."[7] The Supreme Court has construed this jurisdictional grant to limit federal jurisdiction to disputes in which a plaintiff demonstrates a sufficient "personal stake" in the outcome.[8] More specifically, standing doctrine, in its most common application, requires the plaintiff to "'show that he personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'"[9]

The Court has also declared that standing does not exist when "the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens."[10] A party's alleged injury that involves nothing more than "harm to his and every citizen's interest in proper application of the Constitution and laws" generally is insufficient to support standing.[11] Thus, when the injury alleged is an injury to the desire

7. U.S. CONST. art. III, § 2, cl. 1.

8. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (stating that "the standing question in its Art. III aspect 'is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf'" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))).

9. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (citations omitted); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984)).

10. *Warth*, 422 U.S. at 499; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).

11. *See Lujan*, 504 U.S. at 573; *see also* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 181, 200–01 (1992) (arguing that the Court in *Lujan* treated the ban on generalized grievances as constitutional in nature, and emphasized "that Article III requires something more than [a request for] relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large"). The extent to which *Lujan* transformed the prohibition on generalized grievances into a constitutional, rather than a prudential, aspect of standing doctrine has been the subject of some disagreement. *Compare* Sunstein, *supra*, *with* David J. Weiner, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 222–24 (2001).

of a citizen or taxpayer to have the government simply follow the law, standing is absent—in part because "the political process, rather than the judicial process, may provide the more appropriate remedy."[12] When an asserted injury "arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* . . . . [S]tanding is not precluded, but it is ordinarily 'substantially more difficult' to establish."[13]

The Court, and some scholars, have also found support for aspects of standing doctrine in Article II of the Constitution.[14] Article II confers the executive power on the President,[15] and provides that the President "shall take Care that the Laws be faithfully executed."[16] Steven Calabresi and Kevin Rhodes, among others, have argued that the President must have control and supervision over all exercises of discretionary executive power.[17] The Court has never gone so far,[18] but it has held that standing

12. FEC v. Akins, 524 U.S. 11, 23 (1998).

13. *Lujan*, 504 U.S. at 562 (citing *Allen*, 468 U.S. at 758).

14. *See, e.g.*, *id.* at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)); *Allen*, 468 U.S. at 761 ("The Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2256 (1999) (arguing that the question of "[w]ho can constitutionally be empowered to represent . . . public interests in court" is a question "of the proper interpretation, not of Article III or Article I, but of Article II."); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1793–96, 1804–08 (1993) (arguing that Article II requires presidential control of law enforcement activities, and bars suits against the federal government by individuals who lack an "individuated interest"); *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1215 (1992).

15. U.S. CONST. art. II, § 1, cl. 1.

16. U.S. CONST. art. II, § 3.

17. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994) ("[A]ll 'executive power' found in the Constitution is only vested in one individual, the President. If anyone else is ever to exercise federal executive power, it must be as a result of the explicit or tacit delegation and approval of the President . . . ."); Calabresi & Rhodes, *supra* note 14, at 1165, 1215 (arguing that "[t]he text and structure of Article II compel the conclusion that the President retains supervisory control over all officers exercising executive power"); *see also* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72–80 (1990); Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 316, 347–54 (1989). This "unitary executive" view of Article II has inspired significant criticism, on both doctrinal and historical grounds. *See, e.g.*, Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 634 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 609–50 (1984) (criticizing the unitary executive

doctrine functions, in part, to protect executive power by limiting the enforcement of federal law by litigants not subject to the control of the President.[19] Tara Grove has recently offered an insightful alternative account of the Article II basis for standing doctrine, arguing that standing protects individual liberty against arbitrary and unchecked exercises of prosecutorial discretion by private actors.[20] Despite their differences, all of the Article II theories of standing share—with one another and with Article III treatments of standing doctrine—a focus on the standing of plaintiffs.[21]

B. Legislative Standing

The Court has developed a specialized set of standing rules to govern cases in which a legislator seeks either to assert or to defend claims addressing either the constitutionality of a law or the legality of executive action. Given the frequency with which legislators seek to intervene in public law cases, the rules governing legislative standing are especially significant in assessing the standing of intervenor-defendants. The

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theory on historical grounds); *id.* at 583–86 (criticizing it on structural and doctrinal grounds); Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131, 137–38 (1993); Sunstein, *supra* note 11, at 211–14.

18. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 690 n.29 (1987) (rejecting the dissent's unitary executive theory as requiring "an extrapolation from general constitutional language which we think is more than the text will bear"); *see also* Calabresi & Rhodes, *supra* note 14, at 1208 (noting that in *Morrison*, "seven Justices rejected Chief Justice Taft's and Justice Scalia's unitary executive construction of Article II").

19. *See, e.g.*, *Lujan*, 504 U.S. at 577 (discussing the role of standing doctrine in protecting executive power from usurpation by Congress and the judiciary); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984).

20. *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PENN. J. CONST. L. 781, 801–03 (2009); *see also* Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2029 (2001) ("Instances of the execution of federal law by those outside the direct control of the President—such as citizens' suit provisions in federal statutes and state implementation of federal regulatory standards—have touched off a vigorous judicial and academic debate."); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1445 (2003) ("Private delegates' exemption from constitutional constraints means that they can wield these government powers in ways that raise serious abuse of power concerns."); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 731 (2004) (discussing qui tam actions, and noting "obvious dangers in a system that permits prosecutorial discretion to reside in each of 250 million autonomous decisionmakers").

21. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 55–57 (1995) (describing limitations on "standing to sue" as a device to protect the Executive Branch from usurpation of power by the judiciary, Congress, and lawyers representing private plaintiffs); Grove, *supra* note 20, at 789 (stating that the focus in Article II standing inquiry "should not be on the Executive Branch, but on the private *plaintiff*") (emphasis added); *see also infra* Part II.B.

foundational cases in this area are *Coleman v. Miller*[22] and *Raines v. Byrd*.[23]

In *Coleman*, a group of Kansas state legislators challenged the state legislature's ratification of the proposed Child Labor Amendment to the United States Constitution.[24] The state Senate had deadlocked on the amendment, and the Lieutenant Governor, as presiding officer, cast a tie-breaking vote in favor of ratification.[25] The claim of the objecting state legislators rested on the argument that the Lieutenant Governor did not have the power to break a tie in relation to proposed federal constitutional amendments.[26] The Court found that the objectors had standing, noting that their "votes against ratification have been overridden and virtually held for naught[,] although if they are right in their contentions their votes would have been sufficient to defeat ratification."[27] The Court held that these allegations established "a plain, direct and adequate interest in maintaining the effectiveness of their votes."[28] Importantly, the Court contrasted this basis for standing with the right of every citizen "'to require that the Government be administered according to law,'" which did not entitle private citizens to sue.[29]

Fifty-eight years later, the Court refined the rule of *Coleman* in *Raines v. Byrd*. In that case, several federal legislators brought an action in which they asked the Court to invalidate the Line Item Veto Act of 1996,[30] claiming that the Act violated the grant of legislative power to Congress by permitting the President effectively to amend spending laws by removing particular appropriations enacted by Congress.[31] The Court, with Chief Justice Rehnquist writing, held that the plaintiffs lacked "a sufficient 'personal stake'" in the dispute, and had neither suffered a concrete personal injury, nor a cognizable institutional injury.[32]

The Court first held that the plaintiffs had not adequately alleged a personal injury. Rather, they had alleged an institutional injury to the power of Congress to craft legislation.[33] "Their claim is that the Act causes a type of institutional injury . . . which necessarily damages all Members of Congress and both Houses of Congress equally."[34] The Court thus distinguished *Raines* from an earlier case, *Powell v. McCormack*, in which

22. 307 U.S. 433 (1939).
23. 521 U.S. 811 (1997).
24. *Coleman*, 307 U.S. at 435–36.
25. *Id.* at 436.
26. *Id.*
27. *Id.* at 438.
28. *Id.*
29. *Id.* at 440 (quoting Fairchild v. Hughes, 258 U.S. 126, 129 (1922)).
30. 2 U.S.C. § 691 (1996).
31. Raines v. Byrd, 521 U.S. 811, 816 (1997). The plaintiffs were eventually proved right on the merits, when the Court invalidated the Act the following year. *See* Clinton v. City of New York, 524 U.S. 417 (1998).
32. *Raines*, 521 U.S. at 830.
33. *Id.* at 825.
34. *Id.* at 821.

standing had been premised on Congressman Adam Clayton Powell's allegation that he had been "singled out for specially unfavorable treatment" by other members of Congress, who had refused to seat him after his election.[35]

Next, the Court held that the *Raines* plaintiffs, unlike the plaintiffs in *Coleman*, could not establish standing based on an institutional injury. *Coleman* stood "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[36] *Raines* was different, the Court held, because the plaintiffs had not alleged "that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated."[37] Thus, under *Raines*, legislative standing would seem to exist only when a specific legislative vote is "completely nullified,"[38] as when a legislative act goes into effect (or does not go into effect) despite the legislator-plaintiff having cast a vote that was "sufficient to defeat (or enact)" the act.[39]

Finally, Justice Souter, in his concurrence, explained the Court's narrow view of legislative standing by reference to foundational separation-of-powers concerns. He suggested that disputes of the sort at issue in *Raines* were better suited to resolution by the political branches, in part because of the risk to the Court's reputation if it were perceived as taking sides in a dispute between the President and Congress.[40] *Raines* thus represents the triumph of a view that Justice Scalia had been articulating for many years: that because legislative standing cases tend to involve "purely intragovernmental dispute[s] . . . concerning the proper workings of [the political branches] under the Constitution,"[41] judicial intervention in such disputes poses unacceptably serious threats to the legitimacy of the Court.[42]

Proponents of a strong view of legislative standing often cite a passage in *INS v. Chadha* in which the Supreme Court stated: "We have long held that

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35. *Id.* (discussing Powell v. McCormack, 395 U.S. 486 (1969)).

36. *Id.* at 823.

37. *Id.* at 824.

38. *Id.* at 823.

39. *Id.*; *see also* Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 258 (2001); Weiner, *supra* note 11, at 206.

40. *Raines*, 521 U.S. at 833 (Souter, J., concurring).

41. Moore v. U.S. House of Reps., 733 F.2d 946, 957 (D.C. Cir. 1984) (Scalia, J., concurring).

42. *Id.* As Justice Scalia observed while still serving on the D.C. Circuit, a legislative suit is not

> between two individuals regarding action taken by them in their private capacities; nor a suit between an individual and an officer of one or another Branch of government regarding the effect of a governmental act or decree upon the individual's private activities. It is a purely intragovernmental dispute . . . concerning the proper workings of the Legislative Branch under the Constitution.

Id.

Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[43] Taken out of context, that statement would appear to permit congressional intervention in any case in which the Attorney General declines to defend the constitutionality of a federal statute. But the Court has interpreted *Chadha* far more narrowly.

In *Chadha*, a federal statutory provision that authorized either house of Congress, by resolution of that house alone, to invalidate a decision by the Immigration and Naturalization Service (INS) to allow a particular deportable alien to remain in the United States was challenged as a violation of the separation of powers doctrine. The INS—represented by the U.S. Attorney General—agreed with the petitioner alien's claim that the legislative veto provision was unconstitutional, and the Ninth Circuit permitted Congress to intervene to defend the challenged statute.[44] The Court permitted the intervention, and struck down the statute as a violation of separation of powers.

Chadha thus involved a peculiar kind of statute—one that granted each house of Congress the power to veto certain decisions of the Executive Branch[45]—and its holding regarding legislative standing has never been extended beyond that narrow context. Indeed, the Court has since rejected efforts to expand *Chadha*'s recognition of legislative standing to permit intervention in any case involving Congress's power vis-à-vis the President. Denying legislative standing in *Raines v. Byrd*, the Court held that the institutional injury to Congress effected by the Line Item Veto Act was "wholly abstract and widely dispersed," and thus could not support a claim of institutional injury.[46] The same might be said of Congress's interest in defending the Defense of Marriage Act. The Court in *Raines* went on to distinguish *Chadha*, noting that—under the broad view of that case urged by the intervenors in *Raines*—*any* federal official would have standing to challenge *any* law that reduced his or her authority relative to another branch.[47] Although "[t]here would be nothing irrational about [such] a system," the Court said, "it is obviously not the regime that has obtained under our Constitution to date."[48] The federal judicial power does not include "some amorphous general supervision of the operations of government."[49]

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43. INS v. Chadha, 462 U.S. 919, 939 (1983).
44. *Id.* at 923–28.
45. *Id.* at 923–25.
46. 521 U.S. 811, 829 (1997); *see also id.* at 826 ("There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step.").
47. *Id.* at 828.
48. *Id.*
49. *Id.* at 829 (quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

Chadha, in short, held only that Congress has a sufficient institutional stake to support a case or controversy where it seeks to defend a power granted to it by a statute. *Chadha* does not hold that Congress may intervene to defend any challenged federal statute, and such a holding would be irreconcilable with *Raines*, not to mention flatly at odds with the exclusive grant of power to the Attorney General in 28 U.S.C. § 516.[50]

C. Legislative Power to Confer Standing

The personal stake necessary to create an Article III case or controversy may be created by legislative action. That is, either federal or state lawmakers may create new rights and, to some extent, confer standing to enforce them. Most obviously, state or federal law can create a "right," the violation of which constitutes an Article III injury.[51] When Congress passed Title VII of the 1964 Civil Rights Act,[52] for example, large numbers of private plaintiffs were thereby granted standing to bring federal suits alleging violations of their newly created statutory rights. Congress also may, by statute, override prudential aspects of standing law, such as the third-party standing doctrine.[53]

This legislative power to create standing is not without limits, however. The Court has often held that Congress may not ignore or override constitutional standing constraints by, for instance, granting a right to sue to someone who lacks a personal, concrete, and particularized injury.[54] "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[55] The Court has reasoned that this limit is an essential bulwark of the separation of powers, stating:

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in

50. *See* 28 U.S.C. § 516 (2006) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

51. *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); FMC Corp. v. Boesky, 852 F.2d 981, 993 (7th Cir. 1998) ("Properly pleaded violations of state-created legal rights, therefore, must suffice to satisfy Article III's injury requirement."); *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1146 (1993); Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 556–67 (1995).

52. *See* Civil Rights Act of 1964, §§ 701–18, 42 U.S.C. §§ 2000e–2000e-17 (2006).

53. *Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

54. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima . . . ."); Nichol, *supra* note 51, at 1146.

55. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).

> our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.[56]

II. THE PROBLEM OF STANDING TO DEFEND

Judicial[57] and scholarly[58] descriptions of standing typically focus on the requirements that Article III imposes on plaintiffs. Although the Supreme Court has also examined the defendant's personal stake in determining whether Article III jurisdiction exists, it has not articulated a coherent theory to guide lower courts. As a result, few lower courts or scholars have considered the other side of the standing coin—the degree to which Article III requires defendants to possess a personal stake in the outcome of the litigation.

This part critiques the common understanding of Article III standing requirements as applicable only or primarily to plaintiffs, and demonstrates that Article III's Cases or Controversies Clause requires that defendants, as well as plaintiffs, possess a personal stake in the outcome of the litigation. It then uses ongoing federal litigation concerning the constitutionality of the federal Defense of Marriage Act and California's Proposition 8 to illustrate that the application of standing requirements to defendants may have significant consequences in public law litigation.

A. The Article III Requirement of Defendant Standing

The widespread acceptance of a largely one-sided view of Article III standing—as limiting who may sue but not who may defend—is surprising because both the text of Article III and the Court's case law interpreting it strongly support the argument that a defendant's personal stake is a necessary component of an Article III case or controversy. First, as a textual matter, the Cases or Controversies Clause seems plainly to require

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56. *Lujan*, 504 U.S. at 576.

57. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011) ("To state a case or controversy under Article III, a plaintiff must establish standing."); *Lujan*, 504 U.S. at 561 (describing standing as "an indispensable part of the plaintiff's case"); *Warth*, 422 U.S. at 498 ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction.").

58. *See, e.g.*, 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 32 (3d ed. 2008) ("Many opinions refer to 'standing' in more general terms as a means of deciding whether the plaintiff has the claim or right asserted."); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.1 (5th ed. 2007); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993) ("One way federal courts ensure that they have a 'real, earnest, and vital controversy' before them is by testing the plaintiff's standing to bring suit."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) ("Standing requires . . . the allegation of some particularized injury to the individual plaintiff.").

interested parties on both sides of the case. A one-sided "case" or "controversy" is an oxymoron. Second, the few cases in which the Court has considered the relevance of a defendant's personal stake to federal jurisdiction confirm that Article III requires defendants to possess a personal stake in the outcome. The failure of lower courts to honor this principle—or even to acknowledge it—is thus perplexing.

1. A "Case" or "Controversy" Requires Interested Adversaries

The terms "case" and "controversy," in their nature, presuppose a dispute with interested parties on both sides;[59] indeed, it makes little sense even to speak of a case or a controversy with only one interested party.[60] In light of this textual reality, it is not surprising that the Court has frequently explained the restrictions imposed by the Cases or Controversies Clause in terms of limiting federal courts to deciding "questions presented in an adversary context,"[61] a phrase that suggests that both sides to a dispute must possess an interest in the outcome. By imposing this requirement, Article III ensures that the federal courts resolve only legal questions that "emerge[] precisely framed and necessary for decision from a clash of adversary argument . . . embracing *conflicting and demanding interests*."[62]

2. The Defendant Standing Requirement Hides in Plain Sight

If the Cases or Controversies Clause requires that defendants, as well as plaintiffs, possess a personal stake in the matter, one might reasonably wonder why defendant standing has received so little attention, and why it is so rarely litigated. The answer is simple: doubts about a defendant's standing arise infrequently, because in the vast majority of cases, the defendant's standing is apparent. Any defendant against whom relief is sought will always have standing to defend, because the exposure to risk of

59. *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) ("Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'" (quoting Diamond v. Charles, 476 U.S. 54, 62 (1986))); Mills v. Green, 159 U.S. 651, 653 (1895) (dismissing where there was "no actual controversy involving real and substantial rights between the parties to the record").

60. *See* United States v. Johnson, 319 U.S. 302 (1943) (dismissing where parties did not appear genuinely adverse); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 134–35 (1873) (dismissing where the parties colluded to bring the case "for the purpose of obtaining the opinion of th[e] court on important constitutional questions without the actual existence of the facts on which such questions can alone arise"); *cf.* Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850) (holding that "any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court").

61. Flast v. Cohen, 392 U.S. 83, 95 (1968); *see also, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) (standing ensures "concrete adverseness").

62. *Flast*, 392 U.S. at 96–97 (emphasis added) (quoting United States v. Freuhauf, 365 U.S. 146, 157 (1961)).

injury from an adverse judgment is a sufficient personal stake to satisfy Article III.[63] This is so because the Court has recognized that the *imminent threat* of injury is sufficient to create an Article III case or controversy.[64]

Because the defendant standing requirement is nearly always satisfied, the issue does not arise in the typical case and is thus easily overlooked. It becomes an issue only in the rare case involving a would-be defendant as to whom the plaintiff has sought no relief. Typically, such would-be defendants are intervenors who seek court permission to join the case as parties to oppose the relief the plaintiff seeks. Not infrequently, then, defendant standing becomes an issue in public law cases when the named defendant (often a state or federal official) refuses to defend all or part of a plaintiff's claim, and a third party seeks to intervene as a defendant—for example, to urge continued application of a purportedly unconstitutional statute.[65]

3. The Court Frequently Requires Defendants to Establish a Personal Stake

In those few cases in which the defendant's standing seems questionable, the Court has frequently based determinations of its own jurisdiction on findings about whether the defendant's personal stake was sufficient to establish an Article III case or controversy. The Court has, for instance, frequently premised a finding of jurisdiction (or the lack thereof) on facts concerning the defendant's stake in the litigation, hinting at a symmetrical understanding of Article III standing—an interpretation of the Cases or Controversies Clause as requiring both plaintiffs and defendants to possess a sufficient personal stake in the outcome. In so doing, the Court has, in effect, recognized that Article III standing requirements apply no less to defendants than to plaintiffs, and has held that they apply both in the trial court and on appeal.[66] In short, "[s]tanding to sue *or defend* is an aspect of the case-or-controversy requirement."[67]

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63. Steinman, *supra* note 6, at 831. Indeed, the right to defend when faced with a possible deprivation is a component of due process. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970). This right to be heard in one's own defense is necessarily a sufficient personal stake to create an Article III case or controversy.

64. *See, e.g.*, MedImmune, Inc., v. Genentech, Inc., 549 U.S. 118, 126–27 (2007) (clarifying the compatibility of declaratory judgment actions with the Article III case or controversy requirement); Nashville, Chattanooga, & St. Louis Ry. v. Wallace, 288 U.S. 249, 264 (1933) (holding that declaratory judgment proceeding was justiciable "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy").

65. *See infra* Part II.C (discussing examples).

66. Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997); *see also* ASARCO Inc. v. Kadish, 490 U.S. 605, 618–21 (1989) (finding jurisdiction based on defendant's demonstrated personal stake); Diamond v. Charles, 476 U.S. 54, 62 (1986) (denying standing to an intervenor-defendant, but holding that if the original defendant, the State of Illinois, had appealed, "the 'case' or 'controversy' requirement would be met, for a State has *standing to defend* the constitutionality of its statute") (emphasis added).

67. *Arizonans*, 520 U.S. at 64 (emphasis added); *see also* Quinn v. Millsap, 491 U.S. 95, 102–04 (1989) (recognizing defendants' standing to appeal in state court declaratory

At the same time, the Court's treatment of these issues has been inconsistent, due in part to the lack of a clear theoretical framework. In some cases, the Court has enforced something that looks like a defendant-standing requirement, but has done so using the rubrics of causation and redressability—doctrines which are typically associated with plaintiff's standing. In other cases, the Court has skipped over these matters altogether. The Court's own confusion has left the lower courts with no map to follow, thus generating predictably inconsistent results.

In a number of cases, the Court has dismissed the action for lack of Article III jurisdiction because the defendant lacked a sufficient personal stake.[68] In *Diamond v. Charles*,[69] for instance, the Court considered the standing of an intervenor-defendant who sought to appeal the district court's determination that an Illinois law restricting abortion was unconstitutional.[70] The appellant, Eugene Diamond, was a pediatrician in private practice in Illinois, who had successfully intervened in the district court to defend the law alongside the state-official defendants.[71] After the district court invalidated the law, the state declined to appeal. Diamond then sought to appeal alone.[72] The Supreme Court dismissed the appeal for lack of jurisdiction, stating that Diamond lacked the personal stake required by Article III.[73]

In reaching this decision, the Court first held that the state's failure to appeal ended the case or controversy between the original parties, and thus required Diamond to establish standing in his own right to sustain federal jurisdiction under Article III.[74] Next, the Court rejected Diamond's various efforts to establish a personal stake—as a doctor, a citizen, and a father—noting that, on the facts of the case, none of Diamond's proffered bases for standing sufficed to create the requisite legally cognizable interest.[75] Because no defendant with standing had sought review, the Court dismissed the appeal on jurisdictional grounds.

In other cases, the Court has done the opposite, holding federal jurisdiction proper based on its finding that the defendant's stake in the outcome was sufficient to create an Article III case or controversy.[76] In

judgment action); Barrows v. Jackson, 346 U.S. 249, 257 (1953) (addressing the standing of appellee to defend the judgment below).

68. *See, e.g.*, *Diamond*, 476 U.S. at 69.

69. *Id.*

70. *Id.* at 56.

71. *Id.* at 57–58.

72. *Id.* at 61.

73. *Id.* at 69.

74. *Id.* at 68.

75. *Id.* at 68–70.

76. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 288–89 (2000) (finding jurisdiction based on defendant-appellant's personal stake in the case, despite mootness of plaintiff's claim); ASARCO Inc. v. Kadish, 490 U.S. 605, 618 (1989) (on appeal from state supreme court, finding jurisdiction based on defendant-appellant's personal stake in the case although plaintiff lacked standing under federal standards).

ASARCO Inc. v. Kadish,[77] for instance, individual state taxpayers, together with an association of schoolteachers, challenged an Arizona statute governing mineral leases as void under federal law.[78] The Arizona Supreme Court found the statute invalid, and the Supreme Court affirmed.[79] Before reaching the merits, the Court addressed the question of standing, and acknowledged that, under federal standing rules, the plaintiffs would have lacked standing to commence their action in federal court.[80] The Court held, however, that this was not fatal to its appellate jurisdiction. Although the case did not present a "case or controversy" at the outset (on account of the plaintiff's lack of standing) it had been transformed into a "case or controversy" by virtue of the state court judgment against the defendant. Being subjected to such a judgment "constitutes the kind of injury cognizable in this Court on review from the state courts. [Defendants] are faced with 'actual or threatened injury' that is sufficiently 'distinct and palpable' to support *their standing* to invoke the authority of a federal court."[81] Thus, the defendant's injury from the state court judgment was sufficient to support a case or controversy. Although the plaintiff lacked standing under federal justiciability law to complain initially about the defendant's conduct, the Court assessed its own appellate jurisdiction in light of the injury imposed on the *defendants* by the state court adjudication.[82]

The Court offered two key rationales for its holding. First, it emphasized that the functions served by justiciability doctrines—ensuring the presentation of issues in a concrete factual setting, between adverse and properly motivated parties—were met.[83] Second, the Court opined that, because state courts are free to hear cases that do not meet federal justiciability requirements, to hold that there was no case or controversy would effectively render some state court adjudications of federal law unreviewable—a result the Court found unacceptable.[84] The Court might have addressed this problem by simply vacating the state court judgment on jurisdictional grounds. It was unwilling to do so, however, because that

77. 490 U.S. 605 (1989).

78. *Id.* at 610.

79. *Id.* at 610, 633.

80. *Id.* at 612–17. Justice Kennedy's opinion stated that, even assuming that the plaintiffs proved that the statute had cost the state millions of dollars that would otherwise have been directed to schools, it was "pure speculation" whether a judgment in the plaintiffs' favor would result in either lower taxes for the taxpayer plaintiffs or increased school spending and compensation for the teacher's association plaintiffs. *Id.* at 614. On this point, Justice Kennedy's opinion garnered four votes; the other four participating Justices saw no reason to reach this issue. *Id.* at 609; *id.* at 633–34 (Brennan, J., dissenting).

81. *Id.* at 618 (emphasis added) (citations omitted) (quoting Warth v. Seldin, 422 U.S. 490, 500–01 (1975)).

82. *Id.* at 618–20. The Court also recognized the plaintiff's right to defend on appeal the judgment obtained below. *Id.*

83. *Id.* at 619.

84. *Id.* at 620–22.

would effectively have imposed federal standing requirements on state courts.[85]

After *ASARCO*, the Court applied a similar rationale to find defendant standing to appeal, despite the mootness of the plaintiff's claim, where the defendant's own personal stake was deemed sufficient to create a case or controversy. It is black letter law that a case or controversy must exist at all stages of federal judicial review.[86] Thus, when a plaintiff's claim becomes moot while the case is pending on appeal, federal courts ordinarily dismiss the action, and vacate the judgment below for lack of jurisdiction.[87] But that option is not available for state court litigation of federal questions that becomes moot pending appeal to the Supreme Court. Because state courts are free to apply their own versions of mootness and standing doctrines, the Supreme Court will not vacate a state court judgment in a case that was justiciable under state law.[88] Again, the governing principle is that the Supreme Court cannot foist federal jurisdictional rules onto state courts.

The key case is *City of Erie v. Pap's A.M.*[89] There, the Court held that it may exercise appellate jurisdiction in an otherwise moot lawsuit where the plaintiff prevailed below, because the state court judgment creates an injury to the defendant sufficient to create an Article III case or controversy. In *Pap's A.M.*, the plaintiff, an operator of a nude dancing establishment, sued Erie, Pennsylvania seeking an injunction barring the enforcement against exotic dancers of an ordinance that banned public nudity.[90] The state trial court granted the injunction on federal constitutional grounds, and the state supreme court affirmed that decision.[91] While the City's petition for certiorari was pending, the seventy-two-year-old man who owned the plaintiff corporation chose to retire. He thereafter submitted a sworn declaration stating that he had exited the adult entertainment business and retired permanently, had closed the dancing club that was the subject of the litigation, and even sold the real estate on which it was located. He therefore moved to dismiss the case as moot.[92]

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85. *Id.* at 620–21.

86. *See* Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990) (holding that "the case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate"); *see also* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 461 (2007) (arguing that "[i]t is not enough that a dispute was very much alive when the suit was filed," but case or controversy requirements must exist at all stages of federal judicial review (quoting *Lewis*, 494 U.S. at 477)).

87. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case . . . which has become moot . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.").

88. *See, e.g.*, *ASARCO*, 490 U.S. at 620–21 (noting that the Court cannot properly vacate a state court judgment on a question of federal law based on non-justiciability under federal standards); Kan. Gas & Elec. Co. v. State Corp. Comm'n of Kan., 481 U.S. 1044 (1987) (dismissing the case for lack of case or controversy, but leaving the state judgment intact).

89. 529 U.S. 277 (2000).

90. *Id.* at 284.

91. *Id.* at 284–86.

92. *Id.* at 287–89.

The Court denied the motion, found the case not moot, and reversed on the merits. The Court described the mootness issue as a "close" one, but refused to dismiss on justiciability grounds because the City (the defendant below) was suffering harm in the form of the state court's order invalidating its public nudity ordinance.[93] Thus, despite the apparent lack of a personal stake on plaintiff's part, the Court found defendant's injury from the judgment below sufficient in itself to establish federal jurisdiction. Concurring in part, Justice Scalia referred to this part of the Court's rationale as "the neat trick of identifying a 'case or controversy' that has only one interested party."[94]

Most recently, in *McConnell v. FEC*,[95] the Court again recognized the critical role of defendant's personal stake in establishing a case or controversy. In *McConnell*, the plaintiff argued that the intervenor-defendant's appeal should be dismissed because the intervenor-defendant lacked standing. The Court rejected this argument not on the theory that the intervenor-defendants need not have standing, but instead because a different defendant had standing sufficient to establish a federal case or controversy.[96] In other words, the Court identified a case or controversy sufficient to support federal jurisdiction based on its determination that the named defendant, the Federal Election Commission, clearly had standing.[97] Then, having determined that there was a case or controversy based on the personal stake of the original defendant, the Court permitted the intervenor to piggyback on the existing dispute.[98]

In all of these cases, the Court has held that the existence of a case or controversy—and thus the propriety of federal jurisdiction—depends on whether a defendant has a personal stake in the outcome. And yet, because such cases are relatively rare, the lesson has been lost both on courts and on most scholars.

B. The Persistent Misunderstanding of Defendant Standing

Notwithstanding the Court's repeated application of Article III limitations on standing to defend, lower courts have, for the most part, not recognized defendant standing as a distinct component of Article III's Cases or Controversies Clause.[99] This subpart illustrates the plaintiff-centered

93. *Id.* at 288–89. The Court also suggested that despite plaintiff's declaration, Pap's could conceivably resume its nude dancing operations at some point in the future. *Id.* at 288.

94. *Id.* at 307 (Scalia, J., concurring).

95. 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

96. *Id.* at 233.

97. *Id.*

98. *Id.*

99. This may be partly explained by the rarity with which the issue comes up. As discussed in Part II.A.2, *supra*, the issue will rarely come up with respect to named defendants, unless the plaintiff simply names the wrong defendant. But when it does arise in the trial court—most commonly with respect to intervenors—courts struggle due to the absence of a clear and coherent doctrine.

model of standing that prevails in lower federal courts, and demonstrates that courts often conceal their consideration of defendant standing in the guise of plaintiff standing.

When standing questions arise at the trial court level, courts focus their analysis "almost invariably on the plaintiff."[100] If the defendant enters into the standing discussion at all, it is typically only in the context of the "causation" and "redressability" of the plaintiff's injury.[101] Thus, to the extent they recognize the personal stake of the defendant as relevant to Article III jurisdiction, courts typically have sought to force it into the familiar categories of plaintiff standing, rather than recognizing defendant standing as a distinct consideration.[102] Indeed, some courts have even gone so far as to deny that Article III standing limitations apply to defendants at all.[103] Only a very few lower court opinions have recognized the necessity of a defendant's stake in the outcome to the creation of an Article III case or controversy.[104]

Scholars of standing have done little to sort through this confusion. The vast literature on Article III standing doctrine has focused almost uniformly on plaintiff standing.[105] No scholar has mounted a sustained defense of the proposition that Article III requires defendants, as much as plaintiffs, to possess a personal stake in the outcome of the litigation. Indeed, when the term "defendant standing" appears, it is typically used to refer to limits, not

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Courts have been quicker to recognize that Article III may apply directly to the defendant on appeal. The Supreme Court has held that where an intervenor seeks to appeal an adverse judgment that the original defendant has not appealed, "[s]tanding to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'" Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (quoting Diamond v. Charles, 476 U.S. 54, 62 (1986)).

100. 13A WRIGHT, MILLER & COOPER, *supra* note 58, § 3531, at 4.

101. *Id.* at 5–6.

102. *Id.* § 3531.5, at 296; *see also,e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 180 n.64 (1996) (noting that the lack of a proper defendant will lead to dismissal on plaintiff standing grounds, based on lack of redressability); Hall v. LHACO, Inc. 140 F.3d 1190, 1193, 1196–97 (8th Cir. 1998) (denying standing based on a finding that the wrong party had been sued).

103. *See, e.g.*, Colo. *ex rel.* Simpson v. Highland Irrigation Co., 893 P.2d 122, 126–28 (Colo. 1995); *see also* 13A WRIGHT, MILLER & COOPER, *supra* note 58, § 3531, at 5–6. This Article is concerned primarily with civil litigation. The term "standing" may also be used in the criminal context, where courts commonly consider the standing of a defendant to raise certain arguments. *See, e.g.*, Dowtin v. United States, 999 A.2d 903, 908 (D.C. 2010) (holding that a defendant lacked "standing" to challenge an alleged violation of his co-defendant's Fifth Amendment rights). In that context, the question of standing is not concerned with who may defend, but with the scope of arguments that the named defendant may raise.

104. *See, e.g.*, Natural Res. Def. Council, Inc., v. Jamison, 787 F. Supp. 231, 235 n.1 (D.D.C. 1990) (noting that Article III jurisdiction of federal courts may turn on "questions related to whether the defendant has a sufficient interest to present a justiciable controversy with the plaintiff").

105. Hundreds of law review articles have addressed plaintiff standing; only one that I am aware of has argued that a defendant's personal stake is essential to the existence of a case or controversy. *See* Steinman, *supra* note 6, at 831–34 (discussing the importance of the right to defend and the nature of the personal stake that a party (plaintiff or defendant) must show to establish standing to appeal).

on who may defend, but only on the scope of arguments that a defendant may raise.[106] Some scholars have simply recited the common judicial view that the defendant's personal stake goes only to the issue of the plaintiff's standing, by casting light on causation and redressability.[107]

Quite apart from what the Cases or Controversies Clause may permit, there are compelling policy reasons not to allow just anyone to defend a litigation matter.[108] And federal courts have restricted defendant standing, to a degree. But they frequently have done so by stretching aspects of the plaintiff standing doctrine—namely, causation and redressability[109]—beyond their intended application to do the work of ensuring that defendants have the requisite personal stake in the controversy.

The Court has long held that federal courts lack jurisdiction over cases in which, even though the plaintiff has shown an injury in fact, the named defendant did not cause that injury, or the injury cannot be redressed by a court order.[110] The earliest cases applying these doctrines used them to reject plaintiff standing when the prospect of benefit accruing to the plaintiff from the litigation was too speculative, because it depended on the actions of unrelated third parties not before the court.[111] In *Warth v. Seldin*, for example, the Court dismissed an action against city officials brought by plaintiffs who were seeking the construction of low income housing.[112] It reasoned that causation and redressability were absent because no evidence suggested the readiness of private developers to proceed even if the court

106. The Hart & Wechsler Federal Courts casebook, for instance, contains a thirteen-page section addressing defendant standing that contains no discussion at all of any Article III limits on who may defend a claim. Instead, the authors focus entirely on *jus tertii*, overbreadth, and other doctrines limiting the *scope* of arguments that a particular defendant may raise. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 153–65 (6th ed. 2009).

107. *See, e.g.*, Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 168, 179 (2011); Sunstein, *supra* note 11, at 193–95; Woolhandler & Nelson, *supra* note 20, at 722–23 ("[T]he lack of a proper defendant . . . is normally thought of as a standing issue, currently embodied in the requirements of causation and redressability.").

108. The same policy reasons that the Court has relied on in denying standing based on mere ideological interest apply with equal force to standing to defend. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992) (rejecting standing based on ideological interest); *see also* Greening v. Moran, 953 F.2d 301, 305 (7th Cir. 1992) ("A litigant's desire to vindicate a position does not establish standing.").

109. A plaintiff seeking to establish standing must show not only that she has suffered a legally cognizable injury, but also that it was caused by the defendant's actions, and that it would be remedied by the relief requested. *See* Warth v. Seldin, 422 U.S. 490, 509 (1975).

110. Allen v. Wright, 468 U.S. 737, 757–58 (1984) (denying standing to parents of minority schoolchildren because the line of causation between tax incentives and discriminatory private schools was "attenuated at best"); *Warth*, 422 U.S. at 509 (denying standing where the "asserted injury" was "conjectural" and "the line of causation between [the defendant's] actions and [the] injury [wa]s not apparent from the complaint").

111. *Warth*, 422 U.S. at 504 (denying standing where plaintiffs did not demonstrate that there was a "substantial probability" that preventing defendants' actions would achieve plaintiff's desired outcome); Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973) (denying standing where plaintiff did not show that enforcement of the jail sentence for delinquent father would compel him to pay child support).

112. *Warth*, 422 U.S. at 493.

enjoined unlawful discrimination by the named defendants.[113] In *Warth*, the defendants plainly had a stake in resisting the requested injunction; the denial of standing was based on uncertainty about whether unrelated third parties who could not be bound by the Court's order would change their behavior if the Court enjoined the defendants' alleged discrimination.

In other cases, however, federal courts have used the concepts of causation and redressability to address doubts about the defendant's personal stake in the litigation.[114] Courts have, for instance, denied standing for lack of "causation" when plaintiffs challenging a law or policy sued a public official who may have had no authority to enforce the challenged statute.[115] Cases in this category differ from the early causation and redressability cases in that the plaintiff's ability to obtain effective relief does not depend on the actions of an unrelated third party subsequent to the court's judgment. Rather, the determination that standing is absent in these cases turns primarily on the degree to which the defendant has a stake in the outcome. Such loose application of plaintiff standing doctrine is all too common, and it contributes to criticism of causation and redressability as "arbitrary" and manipulable.[116]

In short, despite occasional indications by the Court that Article III restricts defendant standing by imposing a requirement of personal stake on defendants in federal litigation, courts and scholars have uniformly failed to develop either a theory or a workable doctrine to guide decision making. Courts have instead pushed causation and redressability beyond their

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113. *Id.* at 504–07.

114. *See* 13A WRIGHT, MILLER & COOPER, *supra* note 58, § 3531.6, at 393 (discussing arbitrary lines drawn by redressability doctrine, and noting the "deeper conceptual problems" that may "spring from the subtle opportunity to interchange the concepts of injury and remedy"); *id.* § 3531.5, at 296 (noting the use of causation to dismiss cases of "plaintiffs who simply had sued the wrong defendants").

115. *See id.* § 3531.5, at 364 ("A common variety of the public-official defendant cases involves actions brought by mistake or miscalculation against an official who lacks authority to enforce a challenged statute . . . ."); *see also, e.g.*, Bronson v. Swensen, 500 F.3d 1099, 1110 (10th Cir. 2007) ("[T]he causation element of standing requires the named defendants to possess authority to enforce the complained-of provision."); ACLU v. Florida Bar, 999 F.2d 1486, 1490 (11th Cir. 1993) ("[W]hen a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant . . . .").

116. *See, e.g.*, Elliott, *supra* note 107, at 171 (describing standing as "one of the most amorphous [concepts] in the entire domain of public law" (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)) (alteration in original)); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229–34 (1988); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 301–05 (2002) (arguing that causation and redressability requirements are merely "rhetorical barriers" that in practice do little to define standing requirements); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1775 (1999) (arguing that standing doctrine "is extraordinarily complicated and malleable. In a high proportion of cases, a judge can write an opinion that either grants or denies standing without departing from the norms that define the craft of judging"); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 480 (1996); Sunstein, *supra* note 11, at 195–97; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1420–21 (1988); *see also* 13A WRIGHT, MILLER & COOPER, *supra* note 58, § 3531.3, at 124.

intended parameters to deny standing to plaintiffs where the real issue is the defendant's lack of a personal stake in the outcome. In many cases, the result—dismissal for failure to present an Article III case or controversy—is the same as it would be if the courts explicitly based the decision on defendant standing. But this solution works only haphazardly, and it provides no framework for resolving questions of defendant standing in the critical set of cases in which third parties seek to intervene as defendants.[117] It would be theoretically more sensible, and more conducive to sound decision making, to serve the goals of defendant standing directly, by recognizing that Article III's personal stake requirement applies to defendants as well as plaintiffs. By fashioning the doctrine to fit more closely the purposes it ostensibly promotes, courts could serve those purposes better without exposing themselves to the criticisms that standing doctrine frequently inspires.

C. Illustrating Intervenor-Defendant Standing

If courts have managed to enforce a requirement of defendant standing using other doctrines, such as causation and redressability, one might ask whether the confusion in the current doctrine has had any ill effects. The answer is most clearly seen in a limited set of public law cases in which the original defendant declines to defend a challenged law. In such cases, any number of nonparties—legislators, citizens, or interest groups—may wish to take up the mantle. Such participation may have significant policy repercussions and frequently will raise profound separation of powers concerns, giving added importance to the current doctrinal confusion.[118] Two prominent cases now pending in the federal courts illustrate the problems presented by such intervenors, and provide useful case studies for exploring the application of Article III to defendants.

1. Intervenors and Standing to Defend

Although the vast majority of federal litigation concerns only the parties named in the initial complaint, nonparties occasionally seek to intervene in pending cases, arguing that their interests may be affected by the court's resolution of the matter.[119] Only rarely, however, will such parties be required to establish standing in their own right. Courts have almost always held that the case or controversy that exists between the original parties satisfies Article III's jurisdictional requirement, and that intervenors need not independently establish Article III standing.[120] The rationale for this

117. *See infra* Part III.C.

118. *See infra* Part III.A.

119. *See* FED. R. CIV. P. 24.

120. *See* McConnell v. FEC, 540 U.S. 93, 233 (2003), *overruled in part by* Citizens United v. FEC, 130 S. Ct. 876 (2010) ("The National Right to Life plaintiffs argue that the District Court's grant of intervention to the intervenor-defendants . . . must be reversed because the intervenor-defendants lack Article III standing. It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the

rule is that, where the case or controversy required for federal jurisdiction is present, the intervention of an additional party will not destroy the case or controversy.[121]

The exception to this general rule is that intervenors, whether aligned with plaintiffs or defendants, must independently satisfy Article III standing if they seek to litigate issues beyond those raised by the original parties,[122] or if the case or controversy between the original parties ceases to exist, as it did in *Diamond v. Charles*.[123] Thus, intervenors may piggyback on an

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standing of the intervenor-defendants, whose position here is identical to the FEC's."); 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.").

121. Prior to the Court's decision in *McConnell*, there was a circuit split on the question of whether intervenors were required to independently demonstrate Article III standing. Most circuits had held that an intervenor was not required to show standing in the trial court, but could simply "piggyback" on the case or controversy that existed between the plaintiff and defendant. *See, e.g.*, City of Colo. Springs v. Climax Molybdenum Co., 587 F.3d 1071, 1079 (10th Cir. 2009) (holding that an intervenor "'need not establish [independent] Article III standing *so long as another party with constitutional standing on the same side as the intervenor remains in the case*'" (alteration in original) (quoting San Juan Cnty. v. United States, 503 F.3d 1163, 1172 (10th Cir. 2007))); *Ruiz*, 161 F.3d at 830 (same); *Associated Builders*, 16 F.3d at 690 (same); Yniquez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991) (same); 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."); U.S. Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978) (holding that the existence of a case or controversy between original parties negated the need to impose standing requirements on the intervenor).

Before *McConnell*, three circuits had held that intervenors must show independent Article III standing to participate in a case. *See, e.g.*, Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996); City of Cleveland v. Nuclear Regulatory Comm'n, 17 F.3d 1515, 1517 (D.C. Cir. 1994); United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985). The *McConnell* Court's holding that, where a case or controversy exists between the original parties, intervenors need not independently establish standing, however, calls these decisions into question. Only one circuit has explicitly reaffirmed its rule after *McConnell*, and it did so without citing *McConnell*. *See* ACLU of Minn. v. Tarek Ibn Ziyad Acad., 643 F.3d 1088, 1092 (8th Cir. 2011) ("'In our circuit, a party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24.'" (quoting United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 838 (8th Cir. 2009))).

122. *McConnell*, 540 U.S. at 233 (holding that intervenor-defendant need not establish standing where original defendant had standing, and "[intervenor's] position here is identical to the [original defendant's]"); *Ruiz*, 161 F.3d at 830 (rejecting argument that intervenors must possess standing where "the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so").

123. *See* 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."); *see also, e.g.*, Dillard v. Chilton Cnty. Comm'n, 495 F.3d 1324, 1336 (11th Cir. 2007) ("Having determined that the Intervenors cannot establish Article III standing of their own account, we turn now to the alternative mechanism available to them for doing so: piggybacking upon the standing of

existing case or controversy, and litigate without standing. But if they wish to exceed the scope of the existing case or controversy—either substantively, by raising issues not raised by the original parties[124] or temporally, by pressing onward after their aligned party has chosen not to continue[125]—they must independently establish standing under Article III.

The standing to defend of intervenor-defendants thus becomes a determinative issue in a relatively small number of cases: primarily, those in which the intervenor seeks appellate review of a trial court judgment not appealed by the original defendant, or seeks to assert defenses not raised by a party at the trial level. The next sections illustrate how these complexities can arise, and show that, although rare, such cases may be highly consequential.

2. Intervenor-Defendant Standing to Appeal: The Proposition 8 Litigation

The circumstances in which defendant standing may become dispositive are illustrated by the pending federal litigation challenging California's Proposition 8. On November 4, 2008, California voters approved Ballot Proposition 8, which amended the California constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[126] State court litigation commenced shortly thereafter, followed by litigation in federal court alleging that Proposition 8 violated the plaintiffs' rights under the Fourteenth Amendment to the U.S. Constitution.[127] In the federal litigation, *Perry v. Schwarzenegger*, the plaintiffs prevailed in the district court, which issued an injunction prohibiting enforcement of Proposition 8.[128]

Perry featured an irregular roster of parties. Neither of the named defendants (Governor Arnold Schwarzenegger and Attorney General Jerry

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the original parties. However, doing so requires the existence of an ongoing adversarial case or controversy among existing parties . . . .").

124. *See, e.g.*, *McConnell*, 540 U.S. at 233 (holding that the standing of the intervenor-defendant need not be addressed because its substantive position was identical to that of the FEC, who plainly had standing); *Ruiz*, 161 F.3d at 830 ("Article III does not require intervenors to independently possess standing where . . . the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so.").

125. *Diamond*, 476 U.S. at 68 ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."); Mangual v. Rotger-Sabat, 317 F.3d 45, 61 (1st Cir. 2003) ("It is clear that an intervenor, whether permissive or as of right, must have Article III standing in order to continue litigating if the original parties do not do so.").

126. CAL. CONST. art. 1, § 7.5. The final tally was 52.3 percent for, and 47.7 percent against. *Votes for and Against November 4, 2008 State Ballot Measures*, CAL. SECRETARY ST., http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf (last visited Feb. 23, 2012).

127. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, --- F.3d ----, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012); Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

128. *Perry*, 704 F. Supp. 2d at 995, 1004.

Brown) was willing to defend Proposition 8's constitutionality.[129] The federal district judge permitted some of the original sponsors of the ballot proposition, including five individuals and an organization called ProtectMarriage.com, to intervene as defendants.[130] The district court did not require the intervenors to demonstrate a personal stake in the outcome sufficient to create an Article III "case or controversy." Instead, the court reasoned that, because the named parties possessed such a personal stake, Ninth Circuit precedent established that the trial court possessed jurisdiction over the action, and had the discretion to permit the intervenors to piggyback on the existing case or controversy.[131]

Defendant's standing took center stage only after entry of judgment, when the intervenor-defendants sought to appeal. After the district court entered judgment for plaintiffs, the government-official defendants took no action, but the intervenor-defendants sought appellate review.[132] The Proposition 8 case thus squarely presented a potentially dispositive issue of defendant standing: namely, whether Article III permitted the sponsors of Proposition 8 to appeal after the government officials responsible for that law's enforcement themselves declined to appeal the judgment below. The Ninth Circuit determined that the appellants' standing to appeal depended on the nature of the interest, if any, given to official sponsors of an initiative under California law, and it therefore certified that question of state law to the California Supreme Court.[133] The state court rendered its decision on

129. *See* Stephanie Condon, *Prop. 8 Judges Chide Schwarzenegger, Brown for Not Defending Law*, CBS NEWS (Dec. 6, 2010, 5:22 PM), http://www.cbsnews.com/8301-503544_162-20024769-503544.html (stating that both liberal and conservative Ninth Circuit judges disapproved of the executive's failure to defend Proposition 8); Maura Dolan, *Gov. Won't Defend Proposition 8*, L.A. TIMES, June 18, 2009, at A4 ("California Atty. Gen. Jerry Brown, going farther than Schwarzenegger, said in his legal response to the suit last week that Proposition 8 violates the U.S. Constitution.").

130. Order Granting Motion to Intervene at 3, *Perry*, 704 F. Supp. 2d 921 (No. 09-2292), *available at* https://ecf.cand.uscourts.gov/cand/09cv2292/files/76.pdf. For simplicity, I will refer to the intervenor-defendants collectively as "ProtectMarriage.com" or "intervenor-defendants."

131. *Id.* (stating that intervention at the district court level is governed by Federal Rule of Civil Procedure Rule 24(a), and not the Article III "Case or Controversy" requirement). To the extent that a piggybacking intervenor is barred from raising arguments not raised by its aligned party, the correctness of the district court's intervention decision in *Perry* is open to question. *See supra* Part II.C.1.

132. The Administration's Opposition to Defendant-Intervenors' Motion for Stay Pending Appeal at 3, *Perry*, 704 F. Supp. 2d 921 (No. 09-2292), *available at* https://ecf.cand.uscourts.gov/cand/09cv2292/files/717.pdf (implying that the Governor would not appeal the district court's ruling and arguing that allowing the court's "judgment to take effect serves the public interest"); Attorney General's Opposition to Defendant-Intervenors' Motion for Stay Pending Appeal at 2, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (No. 09-2292), *available at* https://ecf.cand.uscourts.gov/cand/09cv2292/files/716.pdf (stating that the Attorney General would no longer defend the case because "the public interest weighs against [Proposition 8's] continued enforcement").

133. The question certified was:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the

the certified question in November 2011, holding that "when public officials decline to defend a voter-approved initiative or assert the state's interest in the initiative's validity, under California law the official proponents of an initiative measure are authorized to assert *the state's interest* in the validity of the initiative and to appeal a judgment invalidating the measure."[134] On February 7, 2012, as this Article went to press, the Ninth Circuit rendered its decision, finding that, as a matter of federal law, the official sponsors of Proposition 8 possess standing to defend that proposition, including standing to appeal the district court's judgment.[135]

3. Intervenor-Defendant Standing in the Trial Court: The Defense of Marriage Act Litigation

Defendant standing may also be dispositive in a number of pending cases concerning the constitutionality of the Defense of Marriage Act. DOMA became law on September 21, 1996, passing with veto-proof majorities in both houses of Congress.[136] DOMA defines "marriage" for purposes of interpreting any federal law as consisting only of "a legal union between one man and one woman as husband and wife," and defines "spouse" to mean only "a person of the opposite sex who is a husband or a wife."[137] In addition, DOMA provides that states need not recognize marriages performed in another state if they are not between one man and one woman.[138]

DOMA's federal definition of "marriage" and "spouse" have been challenged in numerous cases as violating the Fifth Amendment due process rights of married same-sex couples.[139] Until recently, the federal

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

Perry v. Brown, --- F.3d ----, Nos. 10-16696, 11-16577, 2012 WL 372713, at *6 (9th Cir. Feb. 7, 2012).

134. Perry v. Brown, 265 P.3d 1002, 1015 (Cal. 2011) (emphasis added).

135. *Perry*, --- F.3d ----, 2012 WL 372713, at *7–9 (9th Cir. Feb. 7, 2012). The Ninth Circuit's thoughtful opinion is fully consistent with the approach to defendant standing outlined in this Article. *See infra* Part IV.B.

136. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)). The bill garnered 85 votes in the Senate and 342 in the House. 142 CONG. REC. 22,467; *id.* at 17,094 (1996).

137. 1 U.S.C. § 7.

138. 28 U.S.C. § 1738C.

139. *See, e.g.*, *In re* Levenson, 587 F.3d 925 (9th Cir. 2009); Smelt v. Cnty. of Orange, 447 F.3d 673 (9th Cir. 2006); Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178 (N.D. Cal. 2011); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004). As of this writing, the Bipartisan Legal Advisory Group, an arm of the leadership of the House of Representatives, currently consisting of three Republicans and two Democrats, has successfully sought to intervene in a number of cases challenging section 3 of DOMA. For simplicity, this Article focuses on one of these pending cases, *Windsor v. United States*, No. 10-civ-8435 (S.D.N.Y. filed Nov. 9, 2010), although the others raise similar issues.

government defended the constitutionality of these definitional provisions. On February 23, 2011, however, Attorney General Eric Holder announced a change of policy in a letter to Speaker of the House John Boehner.[140] Holder's letter stated that in circuits that had held that classifications based on sexual orientation were subject to rational basis review, the Administration had defended section 3 of DOMA as meeting that standard. But two recent cases, filed in the Second Circuit, where the standard of review was an open question, had prompted the Administration to "conclude[] that classifications based on sexual orientation warrant heightened scrutiny," and that "Section 3 of DOMA is unconstitutional" under that standard.[141] Accordingly, Holder stated, "the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut."[142] Finally, Holder stated his intention to notify the courts in *Windsor*[143] and *Pedersen*[144] "of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases."[145]

On March 4, 2011, Speaker Boehner announced his intention to convene the Bipartisan Legal Advisory Group (BLAG), a standing body of the House of Representatives,[146] to consider how the House should proceed. On April 18, 2011, he announced that BLAG would pursue the defense of DOMA in place of the Department of Justice, and that BLAG had hired former Solicitor General Paul Clement as lead counsel to defend DOMA.[147] Clement promptly filed briefs in several pending cases, including *Windsor v. United States*, a case pending in the Southern District of New York, seeking permission for BLAG to intervene "for the limited purpose of

140. *See* Letter from Eric H. Holder, Jr., Att'y Gen. of the United States, to John A. Boehner, Speaker of the U.S. House of Reps. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html [hereinafter Holder Letter].

141. *Id.* at 2, 5.

142. *Id.* at 5. Holder further stated that the Executive Branch would continue to enforce DOMA section 3, until it was repealed by Congress or held unconstitutional by "the judicial branch." *Id.*

143. *Windsor*, No. 10-civ-8435.

144. Pedersen v. Office of Personnel Mgmt., 3:10-cv-01750 (D. Conn. filed Nov. 9, 2010).

145. Holder Letter, *supra* note 140, at 6.

146. BLAG is composed of five members of the House leadership: the Speaker, the Majority and Minority Leaders, and the Majority and Minority Whips. *See* Press Release, Office of John Boehner, Statement by Congressman John Boehner (R-West Chester) Regarding the Defense of Marriage Act (Mar. 4, 2011), *available at* http://johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=227399.

147. Letter from John Boehner, Speaker of the House of Representatives, to Nancy Pelosi, House Minority Leader (Apr. 18, 2011), *available at* http://johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=237443; Michael D. Shear, *Law Firm Backs Out of Defending Marriage Act*, N.Y. TIMES CAUCUS (Apr. 25, 2011, 12:28 PM), http://thecaucus.blogs.nytimes.com/2011/04/25/law-firm-backs-out-of-defending-marriage-act-partner-resigns/.

defending the constitutionality of Section III" of DOMA.[148] The parties in *Windsor* did not oppose the motion to intervene, and the court granted it.

Even had the trial court in *Windsor* denied the motion to intervene, BLAG might, of course, have been permitted to participate as amicus curiae. One might wonder, then, what significance party status has. First, status as a party permits substantially more latitude to determine the course of the litigation in the trial court. Parties may conduct discovery, file motions, and examine witnesses, while amici are typically restricted to filing briefs, and even then, only after application to the court.[149] In *Windsor*, for instance, BLAG participated actively in discovery[150] and filed a motion to dismiss the plaintiff's complaint, prompting the Department of Justice attorneys representing the named defendant to oppose that motion, arguing that section 3 of DOMA was unconstitutional.[151] Second, amici have no appeal rights, while intervenor-defendants may, as discussed above, be entitled to appeal even when their aligned parties elect not to.[152]

III. UNDERSTANDING DEFENDANT STANDING

Although there is powerful support in logic, constitutional text, and case law for the notion that Article III requires parties on both sides to possess a personal stake, the doctrine of defendant standing remains under-theorized. Much has been written—by the Court and by scholars—about the nature of the personal stake that plaintiffs must possess, but almost nothing has been written about the personal stake that Article III requires of the defendant. This part addresses that question and derives an approach to defendant standing from the cases in which the Court has applied Article III restrictions to defendants, and from the functions that standing doctrine is designed to serve.

A. The Functions of Defendant Standing

The standing doctrine has been defended on both Article II and Article III grounds.[153] The functions it serves include protecting the Executive Branch against usurpation of its authority by Congress and the judiciary,[154]

148. Memorandum of Points and Authorities in Support of the Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose at 4, *Windsor*, No. 10-civ-8435 (S.D.N.Y. Apr. 18, 2011), 2011 WL 3164126.

149. *See* SUP. CT. R. 37.

150. *See* Plaintiff's Letter Brief in Support of Motion to Compel, at 1–2, *Windsor*, No. 10-civ-8435 (S.D.N.Y. July 18, 2011), *available at* http://www.aclu.org/files/assets/ltr_7_18_2011.pdf (noting that BLAG had insisted on party status, rather than amicus status, and had participated in discovery).

151. *See* Defendant United States' Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment and Intervenor's Motion to Dismiss, at 4–28, *Windsor*, No. 10-civ-8435 (S.D.N.Y. Aug. 19, 2011), *available at* http://www.aclu.org/files/assets/8-19_doj_brief.pdf.

152. *See supra* Part II.C.1–2.

153. *See supra* Part I.A.

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

and promoting sound judicial decision making. Standing serves the former goal by limiting who may enforce the law, and the latter goal in part by requiring that issues are presented to the courts in a concrete factual setting by advocates with sufficient motivation to litigate effectively,[155] and by prohibiting claims brought by concerned bystanders with exclusively ideological aims, rather than individuals whose real-world interests are at stake.[156] Each of these familiar functions counsels in favor of a model of standing that limits not only who may bring a federal action, but also who may defend one.

1. Defendant Standing and the Structure of the Federal Government

The same separation of powers concerns that underlie restrictions on plaintiff standing[157] apply equally to the standing of defendants. Standing is "founded in a concern about the proper—and properly limited—role of the courts in a democratic society,"[158] so that the standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[159] Standing also preserves the Executive Branch's control over the enforcement and defense of federal laws.[160] The Supreme Court has repeatedly held that to permit private parties to vindicate the public interest in enforcement of a law would threaten the separation of powers because it undermines "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[161] Thus, the Court has looked askance at claims of standing founded on nothing more than "vindication of the rule of law."[162] Separation of powers concerns make it difficult to establish standing where a litigant's "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*."[163]

These concerns apply equally in circumstances in which an intervenor seeks to defend a federal law that the President regards as unconstitutional. The most salient feature of the category of cases that we are here concerned with—public law cases featuring volunteer defendants—is that the executive branch declined to defend the laws in question. A case in which

155. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) (stating that the personal stake requirement assures "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

156. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

157. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) (stating that standing is "built on a single basic idea—the idea of separation of powers").

158. Warth v. Seldin, 422 U.S. 490, 498 (1975).

159. Raines v. Byrd, 521 U.S. 811, 819–20 (1997).

160. *See supra* Part I.A.

161. Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3).

162. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106 (1998).

163. *See Lujan*, 504 U.S. at 562.

the President refuses to defend a federal law can readily be seen as an instance of our divided government functioning as intended. The power to pursue the government's interest by defending (or not defending) a law is an important component of the Executive's authority.[164] The Chief Executive's decision *not* to defend a particular statute on the ground that it is inconsistent with the higher law of the Constitution is a straightforward exercise of his duty to take care that the laws be faithfully executed; faced with contradictory laws, he must determine which one takes precedence.[165] To allow a nonparty to assert defenses that the Executive has chosen not to assert, or to appeal when the Executive declines to do so, necessarily shifts that power from the Executive to the courts and Congress, by delegating to the intervenor the Executive's duty to "'take Care that the Laws be faithfully executed.'"[166] Permitting private citizens (or legislators) to litigate in defense of a statute that the Executive has determined to be unconstitutional thus "would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action."[167] The Court, as Justice Scalia wrote in *Lujan*, has "always rejected that vision of [its]

164. *See* Scalia, *supra* note 58, at 897 ("Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in [the federal bureaucracy] or elsewhere . . . [t]he ability to lose or misdirect laws can be said to be one of the prime engines of social change.").

165. I bracket for purposes of this discussion the larger question about when, if ever, a President may legitimately decline to defend a duly enacted law. When such decisions are based on policy grounds, they may be deeply problematic. *See* Calabresi & Prakash, *supra* note 17, at 583–84 (stating that Article II's "Take Care" clause "mak[es] . . . clear that the President has no royal prerogative to suspend statutes"); Cass R. Sunstein, *Reviewing Agency Action After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 670 (1985) (arguing that "the 'take Care' clause does not authorize the executive to fail to enforce those laws of which it disapproves"); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2347 (2001) (discussing the "risk that presidential administration might displace the preferences of a prior . . . Congress by interpreting statutes inconsistently with their drafters' objectives").

For our purposes, it is sufficient to note that when the refusal to defend a law is based on the President's good faith opinion that a law is unconstitutional, the legitimacy of the refusal to defend is likely at its greatest, in light of the President's oath to "preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 8; *see also* Grove, *supra* note 20, at 798 n.56 ("Because the Constitution is the *supreme law* that the Executive Branch is charged with faithfully executing, it should perhaps decline to enforce seemingly unconstitutional provisions."). *But see* Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 397 (1987) (considering this possibility, but concluding that the President should enforce the law even in this context).

166. *See Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art II, § 3).

167. *Id.* (citations omitted) (internal quotation marks omitted); *see also* Barnes v. Kline, 759 F.2d 21, 42 (D.C. Cir. 1985) (Bork, J., dissenting) ("By according congressmen standing to sue the President, this court proposes a new and much different answer to the question of the proper role of the federal courts in American constitutional disputation. Changing the constitutional role of the federal courts, moreover, necessarily also alters that of Congress and the President, and seems, on the rationale the majority advances, destined to alter that of the States as well.").

role."[168] The Court has adhered instead to "the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity.'"[169]

In sum, the very same separation of powers policies that support limiting plaintiff standing apply with equal force to defendant standing.[170] Indeed, these separation of powers concerns are at their highest ebb where the would-be defendant is Congress itself, as in the DOMA litigation, because the concern about impinging on the President's authority is magnified when Congress also seeks to aggrandize its own power.[171]

To be sure, these principles apply differently in the Proposition 8 and DOMA cases. Federal separation of powers concerns do not apply in cases challenging state laws, such as the Proposition 8 litigation.[172] States may have their own state law separation of powers reasons for denying standing to intervenor-defendants (or intervenor-plaintiffs),[173] but if a state court resolves those issues in favor of intervenor standing, then federalism dictates a degree of deference to that conclusion by federal courts.[174] Thus, the Article II theories of standing restrict intervenor standing only in cases in which the intervenor seeks to enforce or defend *federal* law. An

168. *Lujan*, 504 U.S. at 577.

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

170. One's assessment of whether judicial intervention is appropriate in these circumstances might, of course, differ depending on whether the would-be intervenor has a plausible claim to the authority to represent the state's interest. Thus, the Executive's prerogative to choose whether or not to defend a law may be merely a default rule, subject to legislative revision. But this line of argument has been roundly rejected by the Court, which has held, time and time again, that Congress cannot grant a right to sue to someone who does not possess a concrete, personal, and particularized injury. *Lujan*, 504 U.S. at 573. "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997). Although *Raines* and *Lujan* concern plaintiff standing, the analysis is the same. If Congress can confer on an individual the Executive's power to represent the state's interest in defending the law, there is no reason in principle why it cannot also confer the state's interest in enforcing the law.

171. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 726–27 (1986) (finding that a statute that vested sole authority in Congress to remove an Executive official violated separation of powers because Congress may not aggrandize itself by exceeding the outer limits of its power); Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam) (finding that the separation of powers doctrine contains "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other"); *see also* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-federal Actors*, 50 RUTGERS L. REV. 331, 347 (1998) (noting that "the anti-aggrandizement principle applies only to how power is allocated among the three branches of the federal government"); *infra* Part IV.A.

172. *See* Lynch, *supra* note 20, at 2028–29 ("[F]ederal separation of powers doctrine does not apply in a rigorous fashion to arrangements between the branches of state government . . . .").

173. *See* Perry v. Brown, 265 P.3d 1002, 1028 (Cal. 2011) (rejecting a separation of powers challenge to intervenor defendant standing under the California state constitution).

174. *See* Perry v. Brown, --- F.3d ----, Nos. 10-16696, 11-16577, 2012 WL 372713, at *8 (9th Cir. Feb. 7, 2012) (holding that states may "decide for themselves who may assert their interests and under what circumstances, and [may] bestow that authority accordingly"); *see also id.* ("Principles of federalism require that federal courts respect such decisions by the states as to who may speak for them . . . .").

intervenor who seeks to enforce or defend state law may do so without raising federal separation of powers concerns.

2. Defendant Standing and Judicial Decision Making

The Article III justifications for standing doctrine—that it improves judicial decision making, and limits the federal courts to their appropriate constitutional role—are also served by applying Article III standing limitations to defendants. Moreover, they apply with full force in both the DOMA and Proposition 8 cases. Article III's injury requirement is ordinarily not satisfied by a litigant's desire that a law be enforced against someone else. In the plaintiff standing context, the Supreme Court has distinguished between cases in which "the plaintiff is himself an object of the action (or foregone action) at issue," so that "there is ordinarily little question" about standing, and cases in which the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," in which it is far more difficult for the plaintiff to establish standing.[175] This principle would seem to apply no less to defendants than to plaintiffs. Requiring that defendants possess a personal stake facilitates better judicial decision making by ensuring that all parties are strongly motivated and thus guarantees vigorous advocacy on both sides. Moreover, the application of a personal stake requirement to both plaintiffs and defendants ensures that there is a close relationship between the plaintiff's legal claim and requested remedy, on the one hand, and the defendant, on the other. This close connection helps ensure that legal issues are presented to the court in a concrete factual setting that will facilitate analysis and decision making.

Similarly, recognizing that defendants must have a personal stake conserves judicial resources by limiting the arguments that may be raised by an intervenor-defendant, and by facilitating the dismissal of cases in which the intervenor-defendant is the only defendant who wishes to litigate at all. In most cases, as noted above, defendant standing is plainly present, and is not litigated. The few cases in which requiring defendant standing would affect the outcome are those in which the defendant intervenors lack a concrete and particularized injury. In those cases, the conventional view of standing as focused on the plaintiff may not permit dismissal of the case, because the plaintiff possesses an adequate personal stake. In contrast, recognizing that Article III's personal stake requirement extends to defendants would permit dismissal, thereby conserving judicial resources.

In sum, bringing defendant standing out into the open would facilitate better decision making by simplifying the doctrine and pushing courts to give explicit consideration to the separation of powers and other policies that the doctrine means to serve. Moreover, in the context of challenges to federal law, it would protect the Executive Branch against usurpation of its power by the other branches.

175. *See Lujan*, 504 U.S. at 561–62 (1992).

B. Assessing the Defendant's Personal Stake

If a necessary condition for an Article III case or controversy is that both parties possess an adequate personal stake in the action, the question becomes: what sort of showing will suffice to establish a defendant's personal stake? I argue that a fairly straightforward rubric for assessing defendant standing can be derived from the various decisions in which the Court has had occasion to assess the Article III standing of defendants, and from the purposes that standing doctrine is intended to serve. In particular, I argue, a defendant may establish standing to defend in three ways. First, a defendant against whom a claim is asserted can establish standing to defend simply by showing that the plaintiff seeks relief against her. A defendant as to whom no claim is asserted—typically an intervenor-defendant—can establish standing to defend either by showing a reasonable apprehension of injury from judicial resolution of the plaintiff's claim, or by establishing a right, conferred by state or federal law, to defend against the plaintiff's claim.

1. Defendants as to Whom a Remedy Is Sought

With respect to the first category, when a remedy—most often damages or an in personam injunction—is actually sought against the defendant, the standing of that particular defendant is easily established.[176] The Court has so held, and properly so, inasmuch as the defendant from whom the plaintiff seeks relief has a due process right to oppose the requested relief,[177] and thus a sufficient personal stake to do so.

Courts are already familiar with this approach to assessing a party's personal stake in the closely related setting of determining standing to initiate a declaratory judgment action. In terms of Article III standing, declaratory judgment plaintiffs are similarly situated to defendants in other actions: both are faced with a legal claim or the threat thereof. And in both contexts, the Court has assessed standing in terms of the threat of injury.[178] If, as the Court has held, the mere threat of litigation seeking relief against a party is sufficient to establish the personal stake required by Article III, then a fortiori, the actual commencement of litigation seeking concrete relief

176. *See supra* Part II.A.2.

177. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

178. The standing of a declaratory judgment plaintiff turns on whether she reasonably anticipates practical and/or legal consequences from the assertion of the threatened claim. *See* Nashville, Chattanooga, & St. Louis Ry. v. Wallace, 288 U.S. 249, 264 (1933) (holding that a declaratory judgment proceeding was justiciable "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy"); *see also* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) (holding that the Declaratory Judgment Act was constitutional, and permitting declaratory judgment in "a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding . . . although the adjudication of the rights of the litigants may not require the award of process or the payment of damages"). Similarly, as discussed above, the standing of a defendant is established by the risk of injury should the court grant relief on plaintiff's claim. *See supra* Part III.B.

against a defendant must give that defendant a sufficient personal stake to satisfy the Cases or Controversies Clause.[179] In light of the similarities between defendants and declaratory relief plaintiffs, it is perplexing that courts have treated them differently for standing purposes, by focusing on the personal stake of a declaratory relief plaintiff, but not consistently taking the same approach in assessing the personal stake of a defendant.

This path to establishing defendant standing applies as well to cases at the appeal stage as to those at the trial stage. When a defendant seeks to attack the judgment below, the general test for standing to appeal is whether the appellant is "aggrieved" by the judgment.[180] A party is aggrieved by the judgment below if it imposes a cognizable injury on that party—by, for instance, requiring the party to pay money or abide by the terms of an injunction.[181] Thus, a defendant may establish the requisite injury for purposes of an appeal simply by showing that he or she is subject to an allegedly incorrect lower court judgment.[182] Indeed, a defendant-appellant aggrieved by the judgment below has standing even more clearly than a defendant at the trial level, because she is actually affected by a judgment, rather than merely threatened by one.

2. Defendants as to Whom No Remedy Is Sought

With respect to defendants against whom no remedy is sought, typically intervenor-defendants, the picture is more complicated. An intervenor-defendant against whom no claim is asserted may seek to establish standing

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179. Some courts have explicitly recognized the close relationship between the standing required of a declaratory relief plaintiff and the personal stake of a defendant. *See, e.g.*, Collin Cnty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods (HAVEN), 915 F.2d 167, 172 (5th Cir. 1990) (holding that the county's declaratory relief action against homeowners' association was non-justiciable where county could not have been made a defendant had homeowners' association sued); Peick v. Pension Benefit Guar. Corp., 724 F.2d 1247, 1258 n.10, 1260 (7th Cir. 1983) (holding that defendant was the proper defendant, in part based on determination that defendant would have had standing to initiate declaratory relief action).

180. ASARCO Inc. v. Kadish, 490 U.S. 605, 623–24 (1989) (finding standing to appeal for defendant-appellant based on injury from judgment below); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980); *see also* Steinman, *supra* note 6, at 840.

181. *Roper*, 445 U.S. at 333 ("A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."); Rinehart v. Saint Luke's S. Hosp., No. 10-2209, 2011 WL 3348234, at *8 (D. Kan. Aug. 3, 2011) ("'A party is aggrieved whose legal right is invaded by an act complained of or whose pecuniary interest is directly affected by the order.'" (quoting Fairfax Drainage Dist. v. City of Kan. City, 374 P.2d 35 (1962))); *see also* BLACK'S LAW DICTIONARY 77 (9th ed. 2009) (defining aggrieved as "having been harmed by an infringement of legal rights").

182. Indeed, the injury inflicted by an allegedly erroneous judgment may be sufficient to anchor federal jurisdiction even where the plaintiff's stake in the outcome did not meet federal justiciability standards. When a plaintiff has secured a judgment, a defendant injured by that judgment will be permitted to appeal, even if the plaintiff has no personal stake in the outcome under federal law. The Court has so held, both in cases where the plaintiff lacked standing from the outset of the litigation, *see ASARCO*, 490 U.S. at 618, 623, and in cases where the plaintiff's claim became arguably moot after entry of judgment, *see* City of Erie v. Pap's A.M., 529 U.S. 277, 288–89 (2000).

by showing a reasonable apprehension of injury from judicial resolution of the plaintiff's claim. In such cases, the showing required for a plaintiff seeking to demonstrate standing again provides an illuminating point of comparison. The linchpin of Article III standing as applied to plaintiffs is that the plaintiff must show that she or he has personally suffered an injury as a result of the defendant's conduct,[183] or that the relevant legislature has validly conferred standing on the plaintiff.[184] In the context of declaratory relief, the injury requirement is satisfied by the plaintiff's reasonable apprehension of being sued by the defendant.[185] Of course, Congress cannot create standing where no injury exists. Thus, valid legislative conferrals of standing will commonly involve either the creation of a right or the delegation to the plaintiff of the authority to represent the state or federal government's own interest.[186]

The appropriate test for assessing the standing of intervenor-defendants follows from these examples. The personal stake of intervenor-defendants may be assessed by looking to whether there is a reasonable risk that the judicial resolution of the plaintiff's claim will injure some legally protectable interest of the defendant. This standard may be satisfied where the court's resolution of the plaintiff's claims may adversely affect the intervenor-defendant, even absent a grant of relief against the defendant directly. For instance, property owners may seek to intervene as defendants in litigation under environmental laws in which the court's resolution of the plaintiff's claim could indirectly limit development of their land.[187] Similarly, in legislative standing cases, legislators may seek to intervene to prevent an "institutional injury," even where there is no request for a remedy against the legislator or the legislature. In such cases, defendant standing is satisfied by the intervenor-defendant's reasonable expectation of harm resulting from judicial resolution of the plaintiff's claims. Conversely, where the intervenor-defendant will *not* be adversely affected by a court order resolving the plaintiff's claims, as in *Diamond v. Charles*, standing to defend has been denied.[188]

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183. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (citations omitted); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984).

184. *See, e.g.*, Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000) (holding that qui tam relators have standing under Article III because the False Claims Act constituted "a partial assignment of the Government's damages claim"); Karcher v. May, 484 U.S. 72, 75, 80 (1987) (noting that state legislators were invested by state law with the authority to assert the state's interest in the constitutionality of a law).

185. *See* Nashville, Chattanooga, & St. Louis Ry. v. Wallace, 288 U.S. 249, 264 (1933); *see also* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937).

186. *See supra* Part I.C; *see also, e.g.*, *Vt. Agency of Natural Res.*, 529 U.S. at 771–78; *Karcher*, 484 U.S. at 75–78, 80.

187. *See, e.g.*, Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274, 1285 (E.D. Cal. 2000) (permitting property owners to intervene as defendants in an Endangered Species Act case brought by environmental group challenging the Secretary of Interior's failure to protect a habitat).

188. *See supra* Part II.A.3.

Finally, defendants may establish the requisite personal stake by showing that the law confers on them a right to defend against the plaintiff's claim. Although such laws are relatively rare, the Court has explicitly recognized that they confer a sufficient personal stake to create a case or controversy. In *Karcher v. May*,[189] for instance, the Court pointed to a specialized provision of New Jersey state law in finding that defendants initially possessed standing to defend, and that they later lost it when they were removed from their positions of legislative leadership.[190] In contrast, the Court in *Arizonans for Official English v. Arizona* expressed skepticism about the intervenor-defendants' standing to defend a law where no state law appeared to confer any such right on the intervenors.[191]

C. Rule 24 and Defendant Standing

One might ask whether Federal Rule of Civil Procedure 24's requirements for intervention obviate the need to recognize that the Article III standing requirement applies to defendants as well as plaintiffs. To be sure, there is some affinity between the two doctrines. Rule 24(a)'s requirement of "an interest relating to the property or transaction"[192] precludes intervention of right by many prospective intervenors who also would be unable to satisfy a requirement of defendant standing. But although the requirements overlap, they are not identical. Rule 24 permits intervention in some cases in which the model of defendant standing articulated above would not be satisfied, and it permits courts to deny intervention even where the intervenor-defendant does possess standing.[193]

First, Rule 24(a)'s interest requirement is not perfectly contiguous with that of Article III's Cases or Controversies Clause. The Rule requires "an interest relating to the property or transaction that is the subject of the action," which the federal courts have not construed to be quite as rigorous as Article III's standing requirements.[194] The Supreme Court has held that intervenors need not independently satisfy Article III standing requirements so long as they do not exceed the scope of the underlying case or controversy.[195] Most circuits have recognized that intervenors may satisfy

189. 84 U.S. 72 (1987).

190. *See infra* Part IV.A.1.

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

192. Rule 24(a) permits intervention as a matter of right to anyone who

> is given an unconditional right to intervene by federal statute[,] or claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a) (permitting intervention of right "on timely motion").

193. The Rule permits the court to deny intervention, notwithstanding the prospective intervenor's interest in the outcome, where "existing parties adequately represent that interest." FED. R. CIV. P. 24(a)(2).

194. *See supra* Part II.C.1.

195. *See* McConnell v. FEC, 540 U.S. 93, 233 (2003), *overruled in part by* Citizens United v. FEC, 130 S. Ct. 876 (2010) (declining to address standing of the intervenor-

Rule 24(a) without demonstrating an interest sufficient to establish Article III standing.[196] And even those circuits that have required intervenors to demonstrate Article III standing have recognized that Article III imposes a different and higher standard than Rule 24(a).[197] Moreover, Rule 24(b), unlike Rule 24(a), imposes no requirement that the intervenor possess an interest at all; it authorizes intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact."[198]

The DOMA litigation nicely illustrates the substantial space between the requirements of Rule 24 and those of Article III standing. Lower courts in numerous circuits have granted BLAG's motions to intervene on the vague ground that federal legislators have an "interest" in the validity of federal laws, without even considering the high bar imposed by federal legislative standing doctrine.[199] This highlights an important formal difference between Rule 24 and Article III standing: Article III standing is a jurisdictional rule that mandates dismissal where standing is lacking. It thus serves to ensure that courts do not act in excess of their jurisdiction. Rule 24 is not regarded as limiting courts' jurisdiction, and it serves a different set of goals. The Rule's leniency allows district court judges to balance the Federal Rules' aims of efficiency, accuracy, and fairness by permitting a litigant who may possess special insight or incentive, or whose interests may not be fully protected by the existing parties, to intervene.[200] This is all to the good when the court's jurisdiction is established by an existing case or controversy, but Rule 24 cannot serve to keep courts within Article III's bounds. For that purpose, a clearer understanding of Article III's application to defendants is required.

IV. APPLYING DEFENDANT STANDING

This part applies the model of standing to defend developed in Part III to the DOMA and Proposition 8 litigation, and argues that BLAG's standing

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defendant where the named defendant had standing and the intervenor-defendant took a position identical to the named defendant).

196. *See, e.g.*, Ruiz v. Estelle, 161 F.3d 814, 830 (5th Cir. 1998) ("Article III does not require intervenors to independently possess standing . . . ."); 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 . . . ."). *See generally supra* Part II.C.1.

197. *See, e.g.*, ACLU of Minn. v. Tarek Ibn Ziyad Acad., 643 F.3d 1088, 1092 (8th Cir. 2011) ("'In our circuit, a party seeking to intervene must establish Article III standing *in addition to the requirements of Rule 24*.'" (emphasis added) (quoting United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 838 (8th Cir. 2009))).

198. FED. R. CIV. P. 24(b) (permitting intervention, on "timely motion" and with the court's permission, to anyone who satisfies the requirement quoted in text, or who "is given a conditional right to intervene by a federal statute").

199. *See, e.g.*, Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178 (N.D. Cal. 2011); Windsor v. United States, No. 10-civ-8435 (S.D.N.Y. filed Nov. 9, 2010); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

200. *See* FED. R. CIV. P. 1 (stating that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

to defend DOMA in the various cases in which it has intervened turns on whether BLAG can establish its personal stake under the Court's legislative standing case law. Similarly, the standing to defend of the intervenors in the Proposition 8 litigation depends on whether California state law confers the state's interest in defending a law enacted by ballot proposition on the official proponents of that ballot initiative. I conclude that intervenor standing to defend is proper in the Proposition 8 case, but not in the DOMA litigation.

A. Intervenor-Defendant Standing in the Trial Court: The Defense of Marriage Act

In the *Windsor* case, BLAG was permitted to intervene to defend the constitutionality of section 3 of DOMA. An assessment of the ability of congressional committees or representatives to intervene in DOMA litigation must take account not only of the doctrine of defendant standing, but also of the peculiarities of legislative standing. This section describes the Court's rule for legislators wishing to intervene to defend a law that the executive will not defend, and applies it to the efforts of the House of Representatives to intervene in DOMA litigation. The question of the intervenors' standing to defend in *Windsor* is twofold: (1) do the intervenors possess a sufficient personal stake in their own right, and (2) if not, has Congress validly conferred on them the authority to represent the federal government's interest?

1. Legislative Standing to Defend

Under the Court's legislative standing case law, legislators wishing to intervene in federal court actions must establish either a personal injury or an injury to the power of Congress to craft legislation.[201] Like the plaintiffs in *Raines*, the intervenors do not contend that they have been "singled out for specially unfavorable treatment" compared to other members of Congress.[202] Rather, their claim can only be that their votes for DOMA have been "completely nullified" by the President's actions.[203] But the Court in *Raines* took a very restrictive view of legislative standing, holding, in pertinent part, that it exists only when a legislative act does not go into effect despite the legislator having cast a vote that was "sufficient to . . . enact" the Act.[204]

That standard is plainly not met here. First, DOMA did go into effect, and it remains the law. Indeed, the President stated that he would continue to enforce section 3 of DOMA until it was overturned.[205] Second, unlike the challenged action in *Raines*, the President's refusal to defend section 3

201. *See supra* Part I.B.
202. *See* Raines v. Byrd, 521 U.S. 811, 821 (1997).
203. *Id.* at 823.
204. *Id.*
205. *See supra* Part II.C.

does not single-handedly dictate the result. The law may or may not be overturned; the court could appoint the intervenors or others as amici to ensure that it hears vigorous arguments on all sides. Moreover, the federal courts have frequently upheld laws despite the President's refusal to defend.[206] Ultimately, under the restrictive standard of *Coleman* and *Raines*, the President's mere refusal to defend the constitutionality of the law inflicts no injury on the intervenors, and cannot amount to "complete nullification" of their votes.

2. Congressional Conferral of Standing to Defend

The Supreme Court has addressed the standing of legislators to intervene as defendants in only one case, *Karcher v. May*.[207] Interestingly, just as in the DOMA and Proposition 8 contexts, state executive officials in *Karcher* had refused to defend a law challenged on federal constitutional grounds.[208] As a result, leaders of the New Jersey state legislature intervened in federal litigation to defend the statute.[209] The Supreme Court held that the legislator-intervenors had Article III standing to defend the law in the trial court, based on its determination that legislative leaders "had authority under state law to represent the State's interests" by defending a state statute that "neither the Attorney General nor the named defendants would defend."[210] Thus, standing at the trial court level had been proper.[211]

The Court, however, went on to find that the legislator-intervenors lacked standing, based on changes in their status that occurred after trial. While the case was pending, the intervenors lost their leadership positions, and their successors moved to withdraw their appearance.[212] The Court rejected the intervenors' request to proceed in their individual capacities, holding that the intervenors no longer had standing to defend the law in the Supreme Court.[213] This determination rested on state law, which, the Court held, granted standing to the legislative leaders in their official capacity. Thus, once the intervenors had lost their leadership positions, the state law right on which their standing was based no longer was theirs to assert.[214]

Karcher thus holds that Article III restricts who may defend a law, both at trial and on appeal, and that standing to defend a state law rests with

206. *See* Nina Totenberg, *U.S. Sends Conflicting Signals on Gay Marriage Law*, NPR (Mar. 1, 2011), http://www.npr.org/2011/03/01/134132526/u-s-defends-doma-despite-dropping-support (enumerating instances when U.S. Presidents have refused to defend laws in court, noting that some such laws were subsequently upheld by the Supreme Court).

207. 484 U.S. 72 (1987).

208. *Id.* at 82; *see also id.* at 75.

209. *Id.* at 82.

210. *Id.* at 75, 82.

211. *Id.* at 80.

212. *Id.* at 76.

213. *Id.* at 77 ("The authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded Karcher and Orechio [the intervenor-defendants] in office.").

214. *Id.*

those officials endowed by state law with the authority to represent the *state's* interest.[215]

In contrast with the state law at issue in *Karcher*, Congress has not, as of this writing, passed a law or adopted a resolution authorizing the leadership of the House of Representatives to represent the federal government's interests in court by defending DOMA, or federal law in general. Quite the contrary: federal law vests the authority to represent the interests of the United States exclusively in the Attorney General, subject only to specified exceptions.[216] Existing law does require the Attorney General to notify the General Counsel of the House of Representatives if he determines that he intends to refrain "from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute."[217] Nothing in the statute, however, purports to authorize the General Counsel to intervene in event of such notice, or confers on the House the authority to represent the interest of the United States in defending any law.

Moreover, even if there were statutory authorization of the sort relied on by the Court in *Karcher v. May*, it is far from clear that such a law would satisfy Article III in circumstances involving intervention by federal legislators. In *Karcher*, the Court deferred to the state of New Jersey's judgments about the appropriate distribution of governmental authority between its executive and legislative branches. In the context of DOMA, however, the Court will be constrained by the U.S. Constitution's scheme of separation of powers, and by the risk to the Court's credibility if it were perceived to be taking sides in a dispute between the other two branches.[218] As the Court noted when it denied legislative standing in *Raines*, "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[219]

In sum, because the intervenor-defendants in *Windsor* seek to raise defenses not raised by the original defendant, they should have been required to establish Article III standing. And under the stringent test for

215. *Id.* at 82 (noting that the legislators were permitted to intervene because state law endowed them with authority to defend state laws if the Executive would not).

216. *See* 28 U.S.C. § 516 (2006) (providing that "the conduct of litigation" involving the United States is reserved to the Attorney General, "[e]xcept as otherwise authorized by law"). The "otherwise authorized by law" exception to § 516 has been read to require a statutory enactment, and not a mere resolution of a single house. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 56 n.8 (D.D.C. 1973) ("[A]ny exception to § 516 must be one 'authorized by law.' Although the question has never been specifically litigated, it seems apparent that 'law' in § 516 would not include a legislative action of the sort represented by S.Res. 262. The term 'law' does not normally encompass within its definition 'resolution,' and all recognized exceptions to § 516, such as 10 U.S.C. § 1037, are statute laws enacted by both Houses."). Thus, the House proceedings by which BLAG was authorized to intervene in the various DOMA cases cannot suffice.

217. 28 U.S.C. § 530D(a)(1)(B)(ii); *see also* 2 U.S.C. § 130f(b) (2006).

218. Raines v. Byrd, 521 U.S. 811, 833 (1997) (Souter, J., concurring).

219. *Id.* at 820 n.3 (majority opinion).

legislative standing established in *Raines* and *Coleman*, it seems unlikely that the Court would find that the intervenor-defendants have standing. Because standing to defend is required in the trial court as well as on appeal, their motion to intervene should have been denied for lack of standing to defend.

B. Intervenor-Defendant Standing to Appeal: Proposition 8

In *Perry v. Schwarzenegger*, the initiative proponent, ProtectMarriage.com, was permitted to intervene as defendant in the trial court without being required to establish standing in its own right.[220] But because ProtectMarriage.com sought to appeal alone after losing in the trial court, the Ninth Circuit raised the question of the defendant's standing to appeal.[221]

ProtectMarriage.com offered three separate theories in its effort to establish standing. The first involved an injury in fact to the organization itself, based on its financial and other expenditures in drafting and supporting Proposition 8. The second was an associational standing theory, alleging that the organization had standing to vindicate the rights of its individual members. The third was akin to a legislative standing theory, and was premised on the claim that state law confers the state of California's interest in defending a law enacted by ballot initiative on the sponsors of the initiative in question, at least where state executive branch officials refuse to defend the law.

1. Organizational Standing to Defend

An organization can demonstrate the personal stake required by Article III in one of two ways: First, it can sue on its own behalf if it can satisfy the same standing test that applies to individuals.[222] Second, it can sue in a representative capacity, asserting the rights of its individual members, under

220. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010); *aff'd sub nom.* Perry v. Brown, --- F.3d ----, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

221. *Perry*, --- F.3d ----, 2012 WL 372713, at *2; *see also* Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997) (holding that "[a]n intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III'" (quoting Diamond v. Charles, 476 U.S. 54, 68 (1986))).

222. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 378–79 (1982) ("In determining whether HOME has standing under the Fair Housing Act, we conduct the same inquiry as in the case of an individual . . . ."); *see also* Abigail Alliance for Better Access v. Von Eschenbach, 469 F.3d 129, 132 (D.C. Cir. 2006) ("'There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.'" (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975))); ACORN v. Fowler, 178 F.3d 350, 356 (5th Cir. 1999) ("An organization has standing to sue on its own behalf if it meets the same standing test that applies to individuals.").

what is called "associational standing."[223] ProtectMarriage.com alleged both theories.

As to the first, ProtectMarriage.com attempted to establish standing in its own right, alleging that its expenditure of money and time in drafting and supporting Proposition 8 gives rise to the risk of an injury in fact sufficient to permit its defense of the law.[224] This argument, however, is difficult to reconcile with the prohibition on standing based on generalized grievances.

In the plaintiff standing context, the Supreme Court has long held that "generalized grievances," such as the broad desire to have the government enforce the law, do not suffice to confer standing on individuals.[225] The Court has repeatedly held that the appropriate means of redress for injuries that are widely shared is through the political branches and not the courts, because the courts' antidemocratic action is legitimate only when necessary to protect constitutional rights of a minority.[226] When the political branches fail to serve the wishes of the majority, the appropriate remedy is at the ballot box, not in the courts.[227] As the Court held in *Diamond v. Charles*, an ideological desire to defend a statute on the part of a member of the general public does not establish an Article III personal stake.[228]

If ever there was a widely shared grievance, it was the grievance held by the majority of California voters who supported Proposition 8 at the ballot box against their elected Governor and Attorney General, who refused to defend Proposition 8 in court. Not only did millions of California voters—52.3 percent of those who cast ballots—support Proposition 8, tens of thousands of them gave money or time in support of its passage.[229] Indeed,

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223. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (recognizing the right of an organization to represent injured members); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958) (recognizing the NAACP's standing to represent its members and challenge a state law forcing it to disclose membership lists); *see also* Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (referring to the doctrine as "associational standing").

224. *See* Brief for Defendant-Intervenors-Appellants at 22, *Perry*, --- F.3d ----, Nos. 10-16696, 11-16577, *available at* http://www.ca9.uscourts.gov/datastore/general/2010/09/22/10-16696_openingbrief.pdf; *see also* Brief for Appellees at 33, *Perry*, --- F.3d ----, Nos. 10-16696, 11-16577, *available at* http://www.ca9.uscourts.gov/datastore/general/2010/10/27/Answering_Brief2.pdf.

225. Lujan v. Defenders of Wildlife, 504 U.S. 555, 575–76 (1992).

226. *See id.* at 576 ("Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.").

227. *See id.* at 576–77; Warth v. Seldin, 422 U.S. 490, 499–500 (1975); *see also* Scalia, *supra* note 58, at 881.

228. Diamond v. Charles, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton* . . . in defending the standards embodied in that code.").

229. The dollar value of 2008 contributions to "Yes on 8" through the National Organization for Marriage and ProtectMarriage.com totaled nearly $42,000,000, while the total number of donations was at least 46,941. *See Campaign Finance: Proposition 008 – Eliminates Right of Same-Sex Couples to Marry. Initiative Constitutional Amendment*, CAL. SECRETARY ST., http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1302602&session=2007 (last visited Feb. 23, 2012).

many individuals donated five and six-figure sums to support Proposition 8.[230] Thus, the stake alleged by ProtectMarriage.com is not "particularized" in the way that Article III requires.[231] Rather, it might fairly be characterized as "only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large."[232] The Court has "consistently held" that such an alleged injury "does not state an Article III case or controversy."[233]

Moreover, recognizing organizational standing for ProtectMarriage.com raises a related problem of judicial administration. If financial and other investments in support of a ballot proposition were sufficient to confer standing to defend the resulting law, then not only ProtectMarriage.com, but many others, including countless individuals, would have standing to defend Proposition 8. If standing is granted on an individual injury theory, it is difficult to identify a principled basis for granting standing to the official sponsor of a ballot proposition, but denying it to the thousands of individuals who made significant financial or other investments in the proposition's passage.

2. Associational Standing to Defend

The second theory of standing that ProtectMarriage.com asserted is an associational standing theory. The Court in *Hunt v. Washington State Apple Advertising Commission*[234] held that an organization seeking standing to litigate on behalf of its members must show three things: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[235]

Although the second and third prongs of the *Hunt* test are likely satisfied,[236] ProtectMarriage.com's associational standing argument is likely to fail the first prong, because it is difficult to envision an individual

230. Matthai Kuruvila, *Mormons Denounced over Prop. 8*, S.F. CHRONICLE, Oct. 27, 2008, at B1; Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1 (discussing five to seven-figure donations to the "Yes on 8" campaign by various Mormon families).

231. *Lujan*, 504 U.S. at 560–61 & n.1.

232. *Id.* at 573–74.

233. *Id.*

234. 432 U.S. 333 (1977).

235. *Id.* at 342–43 (citing Warth v. Seldin, 422 U.S. 490, 511, 515 (1975)).

236. As to the second prong, "[t]he germaneness test is relatively loose," and is satisfied where the interests at issue are "pertinen[t]" to the organization's purpose. Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 286 (D.C. Cir. 1988); *see also* Nathaniel B. Edmonds, *Associational Standing for Organizations with Internal Conflicts of Interest*, 69 U. CHI. L. REV. 351, 360 (2002) (providing additional context as to the germaneness test). The third prong, too, is easily satisfied, so long as the organization's individual members are not seeking compensatory damages. *Warth*, 422 U.S. at 515.

member who could establish standing in light of the prohibition on generalized grievances.[237] When an "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* . . . standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."[238] A member's mere concern with a social issue is not enough to satisfy the standing requirement; there must be an identifiable, concrete injury suffered by at least one member of the organization.[239] No such injury is apparent here.

3. Quasi-legislative Standing to Defend

Finally, in addition to seeking standing in their individual capacities, the initiative sponsors argued that they have authority under state law to represent the interests of the People of the State of California.[240] This argument is based on the People's reserved authority to exercise the legislative power, and casts initiative sponsors as representatives of the people, exercising delegated authority to represent the state's own interest.[241] ProtectMarriage.com argued that the unique nature of the initiative process requires that sponsors be permitted to defend an initiative measure, at least when state officials refuse to do so.[242] "[P]ermitting official proponents to defend initiatives when public officials refuse to do so vindicates the People's initiative power," and thereby ensures "'the people's rightful control over their government.'"[243] A contrary rule, they argued, would frustrate the provisions of the California constitution that created the initiative process, by permitting recalcitrant elected officials to effectively veto duly adopted initiatives.[244]

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237. Standing does not exist when "the asserted harm is a 'generalized grievance' shared in a substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992).

238. *Lujan*, 504 U.S. at 562 (citing Allen v. Wright, 468 U.S. 737, 758 (1984)).

239. *Warth*, 422 U.S. at 515; *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (finding standing where alleged injury was "far more than simply a setback to the organization's abstract social interests").

240. Defendant-Intervenors-Appellants' Opening Brief at 19, Perry v. Brown, --- F.3d ----, Nos. 10-16696, 11-16577 (9th Cir. Feb. 7, 2012), *available at* http://www.ca9.uscourts.gov/datastore/general/2010/09/22/10-16696_openingbrief.pdf. *But see* Brief for Appellees, *supra* note 224, at 29.

241. Defendant-Intervenors-Appellants' Opening Brief, *supra* note 240, at 19.

242. *Id.* at 21–22.

243. Defendant-Intervenors and Appellants' Reply to Amicus Briefs at 4–5, *Perry*, --- F.3d ----, Nos. 10-16696, 11-16577 (certifying questions to No. S189476) (Cal. argued Sept. 6, 2011), 2011 WL 2357942 (quoting Strauss v. Horton, 207 P.3d 48, 84 (Cal. 2009)).

244. *See id.* at 6–8 (arguing that because no public official has veto power over initiatives, "it is doubtful . . . that such officials 'may, consistent with the California Constitution, achieve through a refusal to litigate what [they] may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it if no one else—including the initiative's proponents—is qualified to do so'") (second alteration in original) (internal citation omitted); *see also* CAL. CONST. art. 2, § 1. The U.S. Supreme Court has linked the power to create laws with the power to defend them, which lends some credence to ProtectMarriage.com's argument. *See* Diamond v. Charles, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, only the State has the kind of

Karcher v. May and a later case, factually very similar to the Proposition 8 litigation, provide insight into these arguments. In *Karcher*, as we have seen, the Court accepted New Jersey's representation that state law permitted the legislature to defend the challenged law, and held that such a state-conferred interest was sufficient for Article III standing. In *Arizonans for Official English v. Arizona*,[245] the Court applied a similar analysis in a case addressing the standing of the sponsors of a ballot proposition to defend the measure against a federal constitutional challenge.[246] The Ninth Circuit had held that the sponsors had standing in the same way that the state legislators had standing in *Karcher*.[247]

The Supreme Court in *Arizonans* vacated the opinion of the Court of Appeals, and ultimately dismissed the case on abstention grounds, to permit state courts to determine the nature of any interest that state law conferred on ballot proposition sponsors.[248] Along the way, however, the Court expressed "grave doubts" as to whether the intervenors had Article III standing to appeal.[249] In particular, the Court expressed skepticism about the sponsors' assertion of a "quasi-legislative interest" that would support standing, noting that the sponsors were neither elected by the people nor, as in *Karcher*, appointed by state law "as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State."[250] Thus, the Court suggested that a state law authorizing ballot proposition sponsors to represent the interests of the state would have supported standing, as in *Karcher*, but it found no such state law on the books.[251]

Applying this analysis to the Proposition 8 litigation, it appears that the state law question of whether initiative sponsors are authorized by California law to represent the state's interest in litigation concerning the validity or enforcement of the measures they sponsor ought to dictate the result of the federal standing question. The California Supreme Court held in November 2011 that state law does confer the state's interest in defending an initiative on the sponsors thereof, at least where responsible executive branch officials refuse to defend.[252] This state law rule, under the holding in *Karcher*, confers on ProtectMarriage.com a sufficient stake in the outcome to support Article III jurisdiction.[253]

As this Article went to press, the Ninth Circuit panel in *Perry* handed down its decision, holding that ProtectMarriage.com did have standing to

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'direct stake' identified in *Sierra Club v. Morton* . . . in defending the standards embodied in that code." (quoting Sierra Club v. Morton, 405 U.S. 727, 740 (1972))).

245. 520 U.S. 43 (1997).
246. *Id.* at 64–67.
247. *Id.* at 65–66.
248. *Id.* at 74–76, 80.
249. *Id.* at 66.
250. *Id.* at 65.
251. *See id.* at 65–66.
252. *See* Perry v. Brown, 265 P.3d 1002, 1020–25 (Cal. 2011).
253. *See id.*; *see also* Karcher v. May, 484 U.S. 72 (1987).

appeal the district court's judgment.[254] The panel's decision exemplifies the approach set forth in this Article. The panel asked the right question—whether the intervenors had either a personal stake or the authority to assert the state's own interest—and thoughtfully analyzed the case law before arriving at the correct conclusion.[255] But defendant standing all too frequently escapes notice. Current doctrine provides inadequate, and at times downright misleading, guidance to lower courts, which unsurprisingly results in erroneous decisions, such as the incorrect decisions to permit intervention in *Windsor* and other DOMA cases, and under-theorized decisions, such as the initial intervention ruling by the district court in *Perry*. A clearer understanding of standing—as a symmetrical requirement of personal stake on both sides of the case—would facilitate better decision making by simplifying the doctrine and pushing courts to give explicit consideration to the various policies that the doctrine means to serve.

CONCLUSION

Current doctrine treats standing principally as a limitation on who may sue. But case law, the text of Article III, and the policies underlying the standing requirement all support the notion that, in every case, defendants must also have a personal stake in the outcome. Recognizing that Article III applies to defendants as well as plaintiffs would bring standing doctrine into closer alignment with the results in many standing cases. No less importantly, it would provide better guidance to lower courts regarding the circumstances in which intervenor-defendants may be permitted to litigate in federal court.

254. *See* Perry v. Brown, --- F.3d ----, Nos. 10-16696, 11-16577, 2012 WL 372713, at *7–9 (9th Cir. Feb. 7, 2012).

255. *See id.* at *9–11.