# A "[NON]ESSENTIAL LIMIT ON OUR POWER": STANDING DOCTRINE AND JUDICIAL RESTRAINT IN *HOLLINGSWORTH V. PERRY*, 133 S. CT. 2652 (2013)

Article III, Section 2 of the United States Constitution grants federal courts broad jurisdiction to consider "Cases" and "Controversies."[1] The Supreme Court has established that there is no "Case" or "Controversy"—and thus no federal court jurisdiction—if a plaintiff has not suffered an "injury in fact" that is likely to be "redressed by a favorable decision."[2] This doctrine, known as standing, plays a vital role in ensuring that the judiciary acts within its granted powers.[3] Despite the doctrine's importance, scholars have long deplored its inconsistent application by the Supreme Court,[4] and the Court itself has admitted that "the concept of 'Art. III standing' has not been defined with complete consistency . . . by this Court . . . ."[5]

Last term, in *Hollingsworth v. Perry*,[6] the Supreme Court found that ballot initiative proponents who intervened to defend their initiative—Proposition 8—against a constitutional challenge had no standing to appeal in federal court because they had not "suffered a concrete and particularized injury" and they were not authorized to represent California's interests.[7] Citing judicial restraint as the rationale behind limitations on standing, the Court

---

1. U.S. CONST. art. III, § 2.

2. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted).

3. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation." (internal citation omitted)).

4. *See, e.g.*, Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68 (1984) ("In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical."); Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1863 (1996) ("It is difficult to conceive of a constitutional doctrine more riddled with confusion, more unanimously savaged by commentator and court, more important and yet more neglected than the access doctrines which encompass standing jurisprudence.").

5. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982).

6. 133 S. Ct. 2652 (2013).

7. *Id.* at 2659, 2667.

vacated the decision of the Ninth Circuit and remanded with instructions to dismiss the case for a lack of standing.[8]

On its face, the judicial restraint argument made by the Court was persuasive. The Court emphasized the public nature of the debate over same-sex marriage and how the standing doctrine prevented the Court from legislating by entering that debate.[9] Upon closer inspection, however, the *Hollingsworth* decision did not promote judicial restraint in the least. Instead, the Court's inaction amounted to an abdication of its constitutionally granted power to decide "Cases" and "Controversies."

## I. THE FACTS

In 2008, in *In re Marriage Cases*,[10] the California Supreme Court held that the California Constitution allowed same-sex couples to marry.[11] Less than six months later, California voters passed the ballot initiative known as "Proposition 8" that amended the Constitution of the State of California to confine marriage to heterosexual couples.[12]

Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo—two same-sex couples wanting to marry—brought suit against the State of California in a federal district court.[13] The plaintiffs argued that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution by forbidding marriage between two people of the same sex.[14] When the Attorney General of California conceded the case, the district court allowed the official ballot initiative proponents to intervene.[15] The district court ruled for the plaintiffs and enjoined state officials from enforcing Proposition 8.[16]

After the State of California chose not to appeal, the ballot initiative proponents attempted to appeal to the Ninth Circuit

8. *Id.* at 2667–68.
9. *Id.* at 2659.
10. 183 P.3d 384 (Cal. 2010).
11. *Id.* at 453.
12. *Hollingsworth*, 133 S. Ct. at 2659.
13. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).
14. *Hollingsworth*, 133 S. Ct. at 2660.
15. *Perry*, 704 F. Supp. 2d at 928.
16. *Id.* at 1004.

Court of Appeals.[17] The Ninth Circuit certified a question to the California Supreme Court, asking whether the intervenors had the authority to argue on behalf of the state's interest in a law when its officials declined to do so.[18] The California Supreme Court answered that the intervenors could "assert the *people's*, and hence the *state's*, interest in defending the validity of the initiative measure."[19] After receiving this answer, the Ninth Circuit concluded that the intervenors had standing to appeal the case. The Ninth Circuit proceeded to consider the merits of the case and affirmed the district court's holding.[20] The intervenors then petitioned the United States Supreme Court.[21]

## II. THE MAJORITY OPINION

The Supreme Court vacated and remanded with instructions to dismiss.[22] Writing for the majority, Chief Justice Roberts found that the intervenors, who had petitioned the Court, lacked a concrete and particularized injury and thus lacked standing to appeal.[23] Further, the Court found that although the State of California had an interest in defending Proposition 8, the State had not properly authorized the ballot initiative proponents to represent its interest in a federal court.[24]

---

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

18. *See id.* ("'Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.'" (quoting Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (2011))).

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

20. *Hollingsworth,* 133 S. Ct. at 2660 ("'All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interests in remedying that harm.'" (quoting Perry v. Brown, 671 F.3d 1052, 1072 (2012))).

21. *Id.* at 2661.

22. *Id.* at 2668.

23. *Id.* at 2661, 2664 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

24. *Id.* at 2666–68.

### *A. Ballot Initiative Proponents Lacked Standing to Appeal as Individuals*

The Court considered two arguments by the petitioners in regard to standing. First, the petitioners argued they had individual standing to defend the law.[25] For litigants to have individual standing they must prove three elements: (1) That they suffered a concrete and particularized injury, which is (2) "fairly traceable to the challenged conduct," and (3) "is likely to be redressed by a favorable judicial decision."[26] Appellants, like plaintiffs at the trial stage, are required to prove these elements with respect to an injury arising from the trial court judgment.[27] The issue of individual standing turned on whether the district court's judgment had inflicted a concrete and particularized injury on the petitioners.

The Court found that petitioners had not suffered such an injury, because the district court's decision did not order the ballot initiative proponents to do or refrain from doing anything.[28] On appeal, the proponents did not seek a remedy to a particularized injury, but a generalized one, because they sought a remedy for the invalidation of a democratically enacted statute.[29] The Court had historically refused to grant standing to litigants claiming a generalized grievance,[30] citing either constitutional or prudential considerations.[31] The *Hollingsworth* decision aligned with this

25. *See id.* at 2662.

26. *Id.* at 2661 (citing *Lujan*, 504 U.S. at 560–61).

27. *Id.* (citing Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013)) ("Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an 'actual controversy' persist throughout all stages of litigation.").

28. *Id.* at 2662.

29. *Id.*

30. *Id.*

31. Craig A. Stern, *Another Sign from* Hein*: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1213 (2008). Professor Stern gives Elk Grove United Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004) and Devlin v. Scardelletti, 536 U.S. 1, 6–7 (2002) as examples of decisions treating the generalized grievance test as prudential, and Lance v. Coffman, 549 U.S. 437 (2007) and DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345–46 (2006) as cases finding that the generalized grievance test was constitutionally required.

precedent, implying that to grant standing would be to allow "concerned bystanders" to bring claims into federal court.[32]

### *B. Ballot Initiative Proponents Were Not Authorized to Represent the State of California's Interests in Court*

The Court also found that the petitioners did not have standing to represent the State of California.[33] The petitioners argued that even if they had not suffered a particularized injury, the State of California had suffered such an injury, and they had been authorized to act as agents for California's interest in the matter.[34] The vital issue for the Court to resolve was the content of the test that determines whether an individual is authorized to represent a state's interest.

On the issue of standing as agents of the state, both the majority and dissent relied upon *Karcher v. May*[35] and *Arizonans for Official English v. Arizona*.[36] In *Karcher*, two New Jersey legislators sought to defend a law that had passed while they were in office.[37] The Court found, however, that the legislators lost standing after leaving office—initially, they had "participated in [the] lawsuit in their official capacities as presiding officers of the New Jersey Legislature," but after leaving office, "they lack[ed] authority to pursue this appeal on behalf of the legislature."[38] The *Hollingsworth* majority argued that the *Karcher* decision had turned on federal standing law[39] and not on whether New Jersey law authorized the former legislators to defend state interests.[40] Although the *Karcher* decision did not specifically use the word "agent," the *Hollingsworth* majority argued

---

32. *Hollingsworth*, 133 S. Ct. at 2663 (quoting Diamond v. Charles, 476 U.S. 54, 62 (1986)).

33. *Id.* at 2666–68.

34. *Id.* at 2663–64.

35. 484 U.S. 72 (1987).

36. 520 U.S. 43 (1997).

37. *Karcher*, 484 U.S. at 74–77.

38. *Id.* at 81.

39. *Hollingsworth*, 133 S. Ct. at 2664–65.

40. *Id*. The majority downplayed the extent to which *Karcher* did consider state law and legislative action. *Id*. *Karcher* found that the former legislators had appeared as representatives of the New Jersey legislature, and placed great emphasis on the fact that following the former legislators' removal from office, the New Jersey legislature refused to defend the law. *See Karcher*, 484 U.S. at 76.

that *Karcher* did not support the proposition that a state could simply nominate a third party as an agent.[41]

The majority also looked to *Arizonans,* which had been dismissed on grounds other than standing but contained dicta on which both the petitioners and respondents relied.[42] The facts in *Arizonans* are analogous to those in *Hollingsworth*: The petitioners were ballot initiative proponents who intervened to defend their proposition after the governor of Arizona refused to appeal an unfavorable judgment.[43] The Ninth Circuit granted standing to the intervenors, reasoning that ballot initiative proponents should have standing just as the legislative body has standing to defend its laws when the executive has refused to do so.[44] The Supreme Court in *Arizonans* stated in dicta that it had "grave doubts" about the Ninth Circuit's standing analysis.[45]

The *Hollingsworth* majority used the language of *Arizonans*, specifically the phrase "agents of the people," to infer the necessity of a principal-agent relationship when determining whether an individual is authorized to represent state interests.[46] This factual analysis scrutinized the precise nature of the purported agency to determine the legality of state authorization.[47] Citing the Restatement (Third) of Agency, which notes that an "essential element of agency is the principal's right to control the agent's actions,"[48] the Court found that the ballot initiative proponents were not agents, because the people of California lacked any control over the ballot proponents.[49] The Court further em-

41. *Hollingsworth,* 133 S. Ct. at 2665–66. As discussed *infra*, *Karcher* is highly distinguishable, because unlike in *Hollingsworth,* New Jersey had not authorized the former legislators to represent state interests. In *Hollingsworth*, the California Supreme Court had held that California election law expressly granted the right to defend a ballot initiative to its proponents. Perry v. Brown, 265 P.3d 1002, 1006 (Cal. 2011).

42. *Hollingsworth*, 133 S. Ct. at 2665–66.

43. Arizonans for Official English v. Arizona, 520 U.S. 43, 55–56 (1997).

44. *Id.* at 57–58.

45. *Id.* at 66.

46. *Hollingsworth,* 133 S. Ct. at 2666 (quoting *Arizonans*, 520 U.S. at 65).

47. *See id.* at 2666–67 ("More to the point, the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest . . . . [P]etitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them.").

48. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (2005).

49. *Id.* at 2666–67.

phasized that the proponents were not elected and were not legally removable, unlike other agents of the state.[50]

Chief Justice Roberts concluded the majority opinion by reciting considerations of judicial restraint and separation of powers as rationales behind the Article III requirements: "Refusing to entertain generalized grievances ensures that . . . courts exercise power that is judicial in nature, and ensures that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society."[51] The conclusion strongly implies that the generalized grievance test is required by Article III and is not a prudential restriction.[52] Ultimately, the majority opinion clearly sets forth two principles for the future: First, the Court will view an intervenor's generalized grievance as constitutionally barred from adjudication in federal courts; and second, the Court will not simply accept appeals by private parties with state authorization without analyzing the nature of the private parties' agency.[53]

## III. THE DISSENTING OPINION

Justice Kennedy wrote the dissenting opinion, joined by Justices Alito, Thomas, and Sotomayor.[54] The dissent did not spend any time addressing whether the proponents suffered a concrete and particularized injury. Rather, it discussed the issue of whether ballot proponents in California were authorized

---

50. *Id.* at 2667. However, it may be said that the people of a state do have control over proponents at the ballot box in the same sense they have control over the executive or legislative branches. Voters can revisit the underlying initiative in the next election.

51. *Id.* (citations omitted) (internal quotation marks).

52. *Id.* (calling the "requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury" an "Article III requirement").

53. Justice Scalia's agreement with the second point is surprising. The options for the standing of a state agent include both a bright-line rule ("Does State law authorize the litigant to represent state interests?"), and a factual analysis ("Does the state have a principal-agent relationship with the litigant?"). Favoring the factual standard over the bright-line rule does not comply well with the judicial philosophy Justice Scalia espoused in *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). In that essay, Justice Scalia stated that "[he] believe[s] that the establishment of broadly applicable general principles is an essential component of the judicial process," *id.* at 1185, and that "[t]he common-law, discretion-conferring approach is ill suited . . . to a legal system in which the supreme court can review only an insignificant proportion of the decided cases." *Id.* at 1178.

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

by state law to represent the state's interest.[55] The dissenters believed that the proponents had been authorized, and that the Court should have proceeded past standing analysis to examine the merits of the case.[56]

According to the dissent, the test to determine whether a party has authority to represent the state's interest is simple: Does state law grant this person authority to represent the state's interest?[57] The Supreme Court, the dissent noted, is bound by the interpretations of state courts when deciding the substance of state law.[58] Thus, the Supreme Court is bound by the California Supreme Court's determination that ballot proponents are authorized to represent California in the legal defense of their propositions.[59]

The dissent characterized *Karcher v. May* and *Arizonans for Official English v. Arizona* as standing for the proposition that whether an individual is authorized to represent a state's interest is a question of state law.[60] According to the dissent, the determinative factor in *Karcher* was that state law authorized two legislators to represent New Jersey in court, and once they lost office, they lost their authorization under state law.[61] The dissent further argued that dicta from *Arizonans* strongly implied that if Arizona state law had authorized ballot proponents to represent the state, they would have had standing.[62] The *Arizonans* Court had noted that no Arizona law granted ballot proponents the right to defend the enacted proposition, which cast doubt on the petitioner's standing.[63] The dissent made the inference that, had Arizona authorized ballot initiative proponents to defend the people's interest, a finding of standing would have been more likely.[64]

---

55. *See id.*

56. *Id.*

57. *Id.* at 2669.

58. *Id.* That a state may comprise the substance of its law by either legislation or judicial decision is an important point, since the California Election Code itself does not expressly give proponents the authorization to defend their propositions in court. *See id.* at 2662–63.

59. *Id.* at 2669–70.

60. *Id.* at 2672.

61. *Id.* It is difficult to discern which side of the argument *Karcher* favors, because either possible test ("What does state law say?" or "Does the state have a principal-agent relationship with the litigant?") would have resulted in the same holding in that case.

62. *Id.*

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

64. *Hollingsworth,* 133 S. Ct. at 2672–73.

Even assuming, however, that state law did not govern the question, the dissent argued that proponents still could represent the state's interest because California had essentially the same control over proponents as it did over elected officials.[65] Like the legislative and executive bodies, ballot initiative proponents are accountable by virtue of elections: The proponents' authorization to defend a proposition would end if voters struck down a proposition.[66] This observation countered the Court's Restatement of Agency analysis, in that the principal, the people, had the same control over ballot initiative proponents as they did over elected officials.[67]

Finally, the dissent questioned the majority's stated rationale: Far from ensuring judicial restraint, the dissent felt that the majority's holding would encourage suits against ballot initiatives in district courts.[68] Once a district court decides against an initiative—and the ballot initiative proponent loses standing—the people of the state are without a remedy.[69] Blocking the appeal of such cases does not prevent federal courts from deciding such cases, but it does insulate the far-reaching decisions of solitary district courts from review.[70]

## IV. THE PREVAILING THEORIES OF JUDICIAL RESTRAINT DO NOT SUPPORT THE *HOLLINGSWORTH* COURT'S DECISION

The dissent's position furthered the stated rationale of judicial restraint, whereas the majority's holding undermined it. Precedent on whether a state could authorize a citizen to defend the state's law was unclear prior to *Hollingsworth.*[71] The majority in

---

65. *Id.* at 2671–72.

66. *Id.*

67. *Id.* at 2670–72.

68. *See id.* at 2674 ("There is much irony in the Court's approach to justiciability in this case. A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case. . . . And rather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, here the Court refuses to allow a State's authorized representatives to defend the outcome of a democratic election." (internal citation omitted)).

69. *Id.* at 2669–71, 2674–75 (noting that because ballot initiatives, by their nature, circumvent the executive and legislative branches, often the political branches do not offer the "zealous advocacy" that is one of the policy goals of standing doctrine).

70. *Id.* at 2674.

71. *See supra* Part II.B.

*Hollingsworth* gave a plausible account of precedent, as did the dissent. The majority failed, however, to give a plausible account of how it exhibited judicial restraint in its holding. Judicial restraint helps protect: (1) the proper governmental function and separation of powers, (2) the consent and legitimacy derived from the original intent of the Constitution, and (3) the predictability created by the careful maintenance of precedent. By not granting standing in *Hollingsworth v. Perry,* the Court avoided making a controversial judgment on the merits of the case but did not further judicial restraint in any sense.

### *A. Separation of Powers Considerations Do Not Justify the Court's Inaction*

Chief Justice Roberts wrote in the introduction to the majority opinion that standing doctrine "ensures that we act *as judges,* and do not engage in policymaking properly left to elected representatives."[72] The conclusion of the case contains similar language: "The Article III requirement [of a particularized injury] serves vital interests going to the role of the Judiciary in our system of separated powers."[73] The implication of this language is that, had the *Hollingsworth* Court decided the merits of the case, they would have been legislating, not adjudicating.

A consideration of *Hollingsworth*'s possible outcomes, however, does not suggest that considering the merits would have involved the Court in a legislative function. Had the Court upheld Proposition 8 as constitutional, it would have upheld a democratically enacted proposition, upheld the California Supreme Court's interpretation of the state's own law, and allowed the same-sex marriage debate to continue on a state-by-state basis. Had the Court found Proposition 8 to be unconstitutional, it would have been functioning as an anti-majoritarian check by protecting the constitutional rights of the minority from the caprices of the voting public of California.

Moreover, the Court overlooked the risks inherent in judicial abdication,[74] which was the upshot of its *Hollingsworth* holding.

---

72. *Hollingsworth,* 133 S. Ct. at 2659.

73. *Id.* at 2667.

74. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 455–78 (1996). Pushaw argues that modern justiciability doctrines, including standing, enable judicial abdication in which the judiciary is actually inferior to other branches and fails to provide an

Judicial abdication presents a structural problem: The three branches envisioned by the Founders are to have co-extensive powers that operate as checks and balances.[75] The separation of powers argument may in fact cut against a strict standing test: Scholars have noted that the generalized grievance test may leave violations of collective rights, or violations of governmental structural requirements, without a remedy.[76]

Additionally, the separation of powers aspect of judicial restraint is irrelevant in an argument over standing to appeal; because appeals arise from cases already within the federal judiciary, "*separation of powers concerns are not part of the equation*."[77] Granting standing to an appellant serves as an important check on a lower court.[78] Following the holding in *Hollingsworth*, federal district courts can invalidate ballot initiatives with decisions that, if the state declines to appeal, cannot be challenged.

### *B. Originalism Does Not Justify the Court's Inaction*

The majority's decision does not rely upon or further judicial restraint in the sense of exercising only the powers granted by the Constitution as originally interpreted. The *Hollingsworth* Court purports to consider original meaning in its holding, stating that "[a]s used in the Constitution, ['Cases' and 'Controversies'] do not include every sort of dispute, but only those 'historically viewed as capable of resolution through the judi-

---

adequate check on the power of the other branches. Pushaw's explanation for the abdication falls on the Frankfurter Court, which tightened the justiciability doctrines to block challenges to New Deal legislation. This trend abated during the Warren Court but then strengthened during the Rehnquist years for the purposes of blocking public interest litigation. *Id.* at 455–67.

75. *Id.* at 428–29 & n.164. *See also* THE FEDERALIST NO. 51, at 321–22 (Madison) (Clinton Rossiter ed., 1961) ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

76. *See, e.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 463–64 (2008) (stating that current doctrine does not serve its stated goals of promoting proper separation of powers); Pushaw, *supra* note 74, at 487–88 (arguing that, under the generalized grievance test, no one would have standing to bring most suits relating to violations of collective rights or governmental structure requirements).

77. 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, 845 (2004) (emphasis added).

78. *See Hollingsworth*, 133 S. Ct. at 2674 (Kennedy, J., dissenting) ("[T]he Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed.").

cial process.'"[79] However, there is a disconnect between Article III's "Case" or "Controversy" requirement and modern standing doctrine. The strict test for standing laid down by *Lujan v. Defenders of Wildlife* has little connection to the original meaning of the Constitution.[80] Eighteenth-century English courts, along with early American courts, allowed "prerogative writ procedures" or advisory opinions, whereby judges decided cases in which parties had little or no individualized injury.[81] Prior to the 1920s, the Court treated most justiciability doctrines as prudential principles that helped courts keep their dockets manageable.[82] *Hollingsworth*, however, continues the recent trend of raising the threshold for standing under Article III, without attempting to offer historical explanations for what it interprets as a constitutional bar to an appeal.[83]

### *C. Stare Decisis and Predictability Do Not Justify the Court's Inaction*

Judicial restraint is also defined as the careful maintenance of predictable precedent.[84] This approach, favored by Professor Thomas Merrill, values stare decisis and consistency in legal rules as the goals of judicial restraint.[85] Predictability comes not only from court decisions that do not overturn precedent, but also from opinions setting forth bright-line rules.

Under this interpretation, the *Hollingsworth* decision was facially a plausible method to decide the case. On the one hand, the Court's holding entailed a compromise position by not considering the merits of Proposition 8. The Court's application of precedent on the question of individual standing was at least

---

79. *Id.* at 2659 (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

80. *See* Pushaw, *supra* note 74, *Justiciability*, at 477 ("The Court has failed to articulate a persuasive historical rationale for its view of standing. Indeed, it often simply makes unsupported assertions about the Framers' understanding . . . .").

81. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 480–81 (1994).

82. Pushaw, *supra* note 74, at 458. The uncertainty about the location of the generalized grievance test, in particular, shows the ahistorical nature of the Court's interpretation of Article III. *See, e.g.*, Stern, *supra* note 31, at 1213–14 (describing the movement of the generalized grievance test between constitutional and prudential grounds).

83. *See Hollingsworth*, 133 S. Ct. at 2667.

84. Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274–75 (2005).

85. *Id.* at 273–77.

plausible. On the other hand, the decision to use a factual agency analysis to determine the standing of individuals to represent a state's interest introduced an innovation[86] that overturned the practice of some states that have ballot initiatives.[87] Furthermore, the frequency of legal challenges against ballot initiatives in federal courts, compounded by the fact that ballot initiatives by their nature circumvent elected officials, gives state governments a "*de facto* veto" and raises the probability that district courts will come to disparate, unreviewable constitutional determinations.[88]

Judged only on the basis of inconclusive precedent, the Supreme Court could have credibly granted or withheld standing, and the Court invoked judicial restraint to justify its choice of one set of doctrinal interpretations over the other. Yet the *Hollingsworth* decision did not further judicial restraint as defined by separation of powers, originalist interpretation, or stare decisis and predictability.

## V. CONCLUSION

Separation of powers considerations do not justify the holding of *Hollingsworth v. Perry*. In light of the dearth of historical justification for its constitutional interpretation and the ruling's debatable furtherance of predictability, the stated rationale of judicial restraint suggests merely that the Supreme Court is seeking to stay out of the current debate surrounding the legal merits of state same-sex marriage laws. The actual rationale for the Court's inaction may have been an unstated one, such as the desire to avoid controversy or to maintain institutional credibility by charting a "middle" course.

*Joshua Abbotoy*

---

86. *Hollingsworth,* 133 S. Ct. at 2672. (Kennedy, J., dissenting) (stating that "[c]ontrary to the Court's suggestion, this Court's precedents do not indicate that a formal agency relationship is necessary," and "[y]et today the Court demands that the State follow the Restatement of Agency").

87. *Id.* at 2670 (noting that Montana and Alaska have authorized ballot initiative proponents to defend state interests based on reasoning similar to that given by the California Supreme Court in Perry v. Brown, 265 P.3d 1002 (2011)).

88. *Id.* at 2671 (citing KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 106 (2009) for the proposition that "185 of the 455 initiatives approved in Arizona, California, Colorado, Oregon, and Washington between 1900 and 2008 were challenged in court").