AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era—Judicial Power and Constitutional Authority

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Hollingsworth v. Perry, ___ U.S. ___ (2013)

Kristin Perry and Sandra Stier, a same-sex couple, were denied a marriage license by a county clerk in Alameda County, California. This denial was authorized by Proposition 8, a state constitutional amendment that Californians ratified by initiative in 2008. Proposition 8 declared, "Only marriage between a man and a woman is valid or recognized in California." Perry filed a lawsuit against the governor of California claiming that Proposition 8 violated the federal Constitution. When California officials refused to defend the constitutionality of Proposition 8, the federal district court allowed Dennis Hollingsworth and other persons responsible for the initiative campaign to defend the state constitutional ban on same-sex marriage. The federal district court agreed with Perry's substantive claims, ruling that Proposition 8 violated the fundamental right to marry. California officials did not appeal the order, but Hollingsworth did. The Court of Appeals for the Ninth Circuit first ruled that the official proponents of initiatives had standing to defend those initiatives in court and then in Perry v. Brown *(2012) sustained the lower court ruling that Proposition 8 was unconstitutional. Hollingsworth appealed to the Supreme Court of the United States.*

The Supreme Court by a 5–4 vote ruled that Hollingsworth had no standing to appeal the order of the federal district court. Chief Justice Roberts' majority opinion held that the proponents of Proposition 8 were not state officials and, hence, lacked the constitutional stakes necessary to appeal the district court result. As a consequence, the ruling of the district court became the law of the case (and California began sanctioning same-sex marriages almost immediately). Did the chief justice doubt that Hollingsworth and others were capable of adequately defending the constitutionality of Proposition 8? Why did he nevertheless insist that they lacked standing to appeal the district court's adverse decision? Why did Justice Kennedy disagree? Is he right that one consequence of Hollingsworth *is that no good way exists for defending many initiatives in court? Consider the rather unusual voting divisions in* Hollingsworth. *Did this case turn on attitudes toward the initiative process? Were the justices simply looking for a convenient way to avoid a ruling on same-sex marriage? What might that ruling have been?*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. This requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision. . . . "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." The doctrine of standing . . . ."serves to prevent the judicial process from being used to usurp the powers of the political branches." . . .

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. That

means that standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." . . .

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We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising 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—does not state an Article III case or controversy."

Petitioners argue that the California Constitution and its election laws give them a "'unique,' 'special,' and 'distinct' role in the initiative process—one 'involving both authority and responsibilities that differ from other supporters of the measure.'" True enough—but only when it comes to the process of enacting the law. Upon submitting the proposed initiative to the attorney general, petitioners became the official "proponents" of Proposition 8. . . . But once Proposition 8 was approved by the voters, the measure became "a duly enacted constitutional amendment or statute." Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. They therefore have no "personal stake" in defending its enforcement that is distinguishable from the general interest of every citizen of California.

Article III standing "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" No matter how deeply committed petitioners may be to upholding Proposition 8 or how "zealous [their] advocacy," that is not a "particularized" interest sufficient to create a case or controversy under Article III.

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Petitioners contend that . . . because the California Supreme Court has determined that they are "authorized under California law to appear and assert the state's interest" in the validity of Proposition 8. . . . As petitioners put it, they "need no more show a personal injury, separate from the State's indisputable interest in the validity of its law, than would California's Attorney General or did the legislative leaders held to have standing in *Karcher v. May* (1987)."

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. . . . No one doubts that a State has a cognizable interest "in the continued enforceability" of its laws that is harmed by a judicial decision declaring a state law unconstitutional. To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court. . . . Petitioners here hold no office and have always participated in this litigation solely as private parties.

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Petitioners argue that, by virtue of the California Supreme Court's decision, they *are* authorized to act "'as agents of the people' of California." But that Court never described petitioners as "agents of the people," or of anyone else. Nor did the Ninth Circuit. The Ninth Circuit asked—and the California Supreme Court answered—only whether petitioners had "the authority to assert the State's interest in the initiative's validity." All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This "does not mean that the proponents become de facto public officials"; the authority they enjoy is "simply the authority to participate as parties in a court action and to assert legal arguments in defense of the state's interest in the validity of the initiative measure." That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under our precedents.

And petitioners are plainly not agents of the State—"formal" or otherwise. . . . [T]he most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. "An essential element of agency is the principal's right to control the agent's actions." Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to

make and how to make them. Unlike California's attorney general, they are not elected at regular intervals—or elected at all. No provision provides for their removal. As one *amicus* explains, "the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it."

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The dissent eloquently recounts the California Supreme Court's reasons for deciding that state law authorizes petitioners to defend Proposition 8. We do not "disrespect[ ]" or "disparage[ ]" those reasons. Nor do we question California's sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply. But as the dissent acknowledges, standing in federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.

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We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.

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JUSTICE KENNEDY, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE SOTOMAYOR join, dissenting.

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Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court's view of how a State should make its laws or structure its government. The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied. The Court's decision also has implications for the 26 other States that use an initiative or popular referendum system and which, like California, may choose to have initiative proponents stand in for the State when public officials decline to defend an initiative in litigation. . . .

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This Court, in determining the substance of state law, is "bound by a state court's construction of a state statute." . . . Here, in reliance on these statutes and the California Constitution, the State Supreme Court has held that proponents do have authority "under California law to appear and assert the state's interest in the initiative's validity and appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so."

The reasons the Supreme Court of California gave for its holding have special relevance in the context of determining whether proponents have the authority to seek a federal-court remedy for the State's concrete, substantial, and continuing injury. As a class, official proponents are a small, identifiable group. Because many of their decisions must be unanimous, they are necessarily few in number. Their identities are public. Their commitment is substantial. They know and understand the purpose and operation of the proposed law, an important requisite in defending initiatives on complex matters such as taxation and insurance. Having gone to great lengths to convince voters to enact an initiative, they have a stake in the outcome and the necessary commitment to provide zealous advocacy.

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The Court concludes that proponents lack sufficient ties to the state government. It notes that they "are not elected," "answer to no one," and lack "'a fiduciary obligation'" to the State. But what the

Court deems deficiencies in the proponents' connection to the State government, the State Supreme Court saw as essential qualifications to defend the initiative system. The very object of the initiative system is to establish a lawmaking process that does not depend upon state officials. In California, the popular initiative is necessary to implement "the theory that all power of government ultimately resides in the people." . . .

The California Supreme Court has determined that this purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding. Giving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State's governmental structure. . . . As a consequence, California finds it necessary to vest the responsibility and right to defend a voter-approved initiative in the initiative's proponents when the State Executive declines to do so.

. . . . There are reasons, why California might conclude that a conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process. The State may not wish to associate itself with proponents or their views outside of the "extremely narrow and limited" context of this litigation, or to bear the cost of proponents' legal fees. The State may also wish to avoid the odd conflict of having a formal agent of the State (the initiative's proponent) arguing in favor of a law's validity while state officials (*e.g.,* the attorney general) contend in the same proceeding that it should be found invalid. Furthermore, it is not clear who the principal in an agency relationship would be. It would make little sense if it were the Governor or attorney general, for that would frustrate the initiative system's purpose of circumventing elected officials who fail or refuse to effect the public will. . . .

And if the Court's concern is that the proponents are unaccountable, that fear is neither well founded nor sufficient to overcome the contrary judgment of the State Supreme Court. It must be remembered that both elected officials and initiative proponents receive their authority to speak for the State of California directly from the people. The Court apparently believes that elected officials are acceptable "agents" of the State, but they are no more subject to ongoing supervision of their principal—*i.e.,* the people of the State—than are initiative proponents. At most, a Governor or attorney general can be recalled or voted out of office in a subsequent election, but proponents, too, can have their authority terminated or their initiative overridden by a subsequent ballot measure. Finally, proponents and their attorneys, like all other litigants and counsel who appear before a federal court, are subject to duties of candor, decorum, and respect for the tribunal and co-parties alike, all of which guard against the possibility that initiative proponents will somehow fall short of the appropriate standards for federal litigation.

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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. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed. 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.

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In the end, what the Court fails to grasp or accept is the basic premise of the initiative process. And it is this. The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over a century. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign." In California and the 26 other States that permit initiatives

and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice by nullifying, for failure to comply with the Restatement of Agency, a State Supreme Court decision holding that state law authorizes an enacted initiative's proponents to defend the law if and when the State's usual legal advocates decline to do so. The Court's opinion fails to abide by precedent and misapplies basic principles of justiciability. Those errors necessitate this respectful dissent.