

Further Standing Lessons

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The Article III standing doctrine—with its three requirements of injury in fact, causation, and redressability¹—is often criticized as a restriction that prevents liberal, but not conservative, plaintiffs from proceeding in the federal courts.² Standing doctrine has, however, increasingly been an issue in many cases involving conservative litigants: as I have already discussed in the *Indiana Law Journal*, the standing doctrine has posed significant problems for conservative plaintiffs challenging the landmark federal health-care law, the Patient Protection and Affordable Care Act (PPACA); to conservative plaintiffs challenging the Obama Administration’s expansion of funding for stem-cell research; and to conservative appellants defending the federal Defense of Marriage Act and California’s constitutional ban on marriage between same-sex couples.³ We now have Supreme Court decisions in the health-care and marriage equality cases, and the standing analyses—or lack thereof in the health-care case—create problems for standing doctrine more generally.

I had initially concluded that the health-care case presented fairly ordinary standing issues that the Court would address using ordinary standing analysis.⁴ In the end, and surprisingly, the Court avoided the issue altogether: in June 2012, the Court held most of the PPACA constitutional⁵ without even using the word “standing.”⁶

I had also concluded that the gay-marriage cases were likely to founder on the standing issue, even though that outcome was not desirable.⁷ But in July 2013, the Supreme Court found standing for the defenders of the Defense of Marriage Act,

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1. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

2. See Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 *IND. L.J.* 551, 558–562 (2012). As I stated in that article, I use the word “liberal” despite its political disfavor. *Id.* at 552 n.5.

3. *Id. passim*. When I refer to the federal and California cases together, I will call them the marriage equality cases.

4. Elliott, *supra* note 2, at 582.

5. *Nat’l Fed’n of Indep. Bus. v. Sibelius*, 132 S. Ct. 2566 (2012).

6. *See infra* Part I.A.

7. Elliott, *supra* note 2, at 573–74. I did note the possibility that the conservative bloc of the Supreme Court could find standing despite the weight of doctrine against that conclusion, but, as I discuss below, the marriage equality cases produced much stranger alignments among the Justices.

striking down section 5 of the statute as unconstitutional.⁸ The Court found standing lacking, however, for the defenders of California's ban on same-sex marriage, vacating the Ninth Circuit's opinion and (because there had never been any question that the *plaintiffs* had standing to bring the initial suit) leaving in place the district court's expansive ruling striking down the ban.⁹

All three cases, unfortunately, give support to the common belief that standing is merely a means of manipulation: courts will find standing lacking when they wish to avoid the merits of cases and ignore standing when they wish to reach the merits.¹⁰ Indeed, the standing analysis in *Perry* is so flawed that it can only be seen as manipulation. I discuss the unfortunate consequences of this conclusion below.¹¹

All three cases also highlight the problematic nature of standing's role in enforcing the separation of powers. Despite the Court's repeated insistence that standing "is built on a single basic idea—the idea of separation of powers,"¹² I have shown elsewhere that standing serves this role poorly.¹³ As I demonstrate below, both the health-care case and the marriage equality cases raise important separation-of-powers issues and reinforce my conclusion that standing serves separation-of-powers goals poorly.¹⁴

In sum, the health-care case and the marriage equality cases are bad news for standing doctrine. If the Court continues to use standing as it does in these cases, it will undermine its institutional status and reinforce the dangerous belief that Supreme Court Justices are politicians who simply happen to be appointed for life.

I. STANDING (*SUB ROSA*) IN THE HEALTH-CARE CASE

The health-care cases in the lower courts may have raised "standing issues [that we]re garden variety,"¹⁵ but the issues were present and indeed had led to dismissal in some cases—even at the appellate level—for lack of standing.¹⁶ Yet the Supreme Court reached the constitutionality of the PPACA without raising the standing issue at all. After showing that the PPACA opinions are void of any meaningful discussion of standing, I will discuss the implications of that void.

8. *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding that a controversy existed between Edith Windsor and the United States over her victories in the courts below, despite the Obama Administration's agreement with Windsor that DOMA was unconstitutional).

9. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (holding that the appellants lacked standing to pursue the appeal).

10. *E.g.*, Laurence H. Tribe, *American Constitutional Law* § 3–18, at 131 n.10 (2d ed. 1988) (noting that sometimes the Court will ignore proper standing inquiry "in its ... zeal to reach the merits"). However, in a related article, I have come to the conclusion that, at least in the Roberts Court, avoiding standing to reach the merits is actually rare. *See* Heather Elliott, *Does The Supreme Court Avoid Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL OF RIGHTS J. — (forthcoming 2014).

11. *See infra* Part II.A and C.

12. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

13. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

14. *See infra* Parts I.B and II.C.

15. Elliott, *supra* note 2, at 588.

16. *Id.* at 575–76 & n.161.

A. A Void

PPACA became law in early 2010,¹⁷ and dozens lawsuits challenging its requirements—especially the “individual mandate”¹⁸—were filed against the Obama Administration (“Government”).¹⁹ Standing arose as an issue in most of those cases.²⁰ The Supreme Court ultimately granted certiorari in a case arising from the Eleventh Circuit—a case in which the Government had already conceded one plaintiff’s standing.²¹ The Government also did not raise any significant standing objections in the Supreme Court, even supporting a motion to substitute parties late in the game to remedy potential standing problems.²² By the time the case rose to the appellate level, the Government had apparently decided it preferred a decision on the merits to dismissal based on lack of jurisdiction.²³

The Court was willing to follow the Government’s lead. Chief Justice Roberts, writing for a splintered majority in *NFIB*,²⁴ never mentions the standing of the PPACA challengers.²⁵ A text search of the opinion finds no occurrence of the word

17. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029 (2010).

18. *Id.* § 1501. The so-called individual mandate is the provision of PPACA that requires most Americans—with exceptions for those below certain income levels—to purchase health insurance or face a penalty.

19. Elliott, *supra* note 2, at 575 n.159.

20. Elliott, *supra* note 2, at 575–78.

21. Brief for Appellants at 6 n.1, *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), 2011 WL 1461593 (“Defendants do not dispute that plaintiff Brown’s challenge to the minimum coverage provision is justiciable.” (citation omitted)). Of course, the Government’s concession is not binding on the Court, which is obliged to consider standing problems *sua sponte*. See *infra* note 26 and accompanying text.

22. Brief for Petitioners (Minimum Coverage Provision) at 16 n.5, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), 2012 WL 37168 (“The federal government has supported a motion in this Court to add as parties two NFIB members whose standing allegations are materially identical to those made by Brown before the filing of her bankruptcy petition.” (citation omitted)). As I note below, the Government did make a standing argument with respect to one aspect of the remedies sought by the plaintiffs. See *infra* Part I.B.2.

23. Lyle Denniston, *Argument preview: Health care, Part I — The power to decide?*, SCOTUSBLOG (Mar. 20, 2012, 12:06 AM), <http://www.scotusblog.com/2012/03/argument-preview-health-care-part-i-the-power-to-decide/> (“One issue unites both the challengers and defenders of the new Affordable Care Act: they would like to have the Supreme Court decide, before summer, the constitutionality of the new Act’s mandate requiring virtually all Americans to obtain health insurance by 2014, or pay a penalty with their tax returns until they do.”).

24. The PPACA case produced one of the split decisions that should be familiar to any student of recent Constitutional law, with Chief Justice Roberts obtaining a majority vote for only Parts I, II, and III–C of his opinion; he received only two votes other than his own for Part IV, and no justices joined him in Parts III–A, III–B, and III–D. Two Justices joined Justice Ginsburg’s concurrence and dissent only partially, another fully. Four Justices dissented. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

25. *Id.* The Chief Justice does address one threshold jurisdictional matter: whether the

“standing” at all in the Chief Justice’s opinion; that opinion also never uses the words “Article III” or “justiciable” in any form. A text search of Justice Ginsburg’s concurrence produces the same result.

This void is surprising, even given the Government’s concessions regarding standing. A federal court, whatever its level, is obliged to raise *sua sponte* any standing problem it perceives,²⁶ and a huge number of the cases below raised standing concerns,²⁷ as did several of the *amici*.²⁸ This wide attention to the issue of standing should have led the Court to mention the issue, even if simply to say “standing is obvious here.” Moreover, even if the Court had originally chosen the *NFIB* case from among the PPACA challenges because it appeared to have no standing problems, events in the real world overtook: the named plaintiff went bankrupt, and a new plaintiff had to be substituted while the case was pending before the Court.²⁹ Yet the word “standing” does not even appear in the Chief’s opinion or in Justice Ginsburg’s opinion.

The dissenting opinion, signed by Justices Scalia, Kennedy, Thomas and Alito, does use the word “standing” in its Article III justiciability sense three times,³⁰ but the dissenters do not actually contend that any standing problem would have prevented the Court from hearing the case. Indeed, at one point, the dissenters acknowledge that standing might well be lacking for adjudication of certain portions of the case, but that those problems should be ignored:

It would take years, perhaps decades, for each of its provisions to be adjudicated separately—and for some of them (those simply expending federal funds) no one may have separate standing. The Federal

Anti-Injunction Act bans the suit. *Id.* at 2582–83.

26. *E.g.*, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (“On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested.” (citation omitted)). *Cf.* *Muskrat v. U.S.*, 219 U.S. 346 (1911) (finding case nonjusticiable despite desire of parties, including the United States, to concede issues of jurisdiction and reach the merits of the case).

27. Elliott, *supra* note 2, at 575–78.

28. Brief for Amici Curiae Tax Law Professors Supporting Vacatur (Anti-Injunction Act) at *30 n.3, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), 2012 WL 195304; Brief for Amici Curiae Mortimer Caplin and Sheldon Cohen Urging Vacatur on the Anti-Injunction Act Issue in Support of Neither Side at 10–11, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), 2012 WL 135049; Brief for Court-Appointed Amicus Curiae Supporting Vacatur (Anti-Injunction Act) at 52–56, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), 2012 WL 72455.

29. Brief for Petitioners (Minimum Coverage Provision) at 16 n.5, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), 2012 WL 37168 (“The federal government has supported a motion in this Court to add as parties two NFIB members whose standing allegations are materially identical to those made by Brown before the filing of her bankruptcy petition.”).

30. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2653, 2669, 2671 (2012) (dissenting opinion of Justices Scalia, Kennedy, Thomas and Alito).

Government, the States, and private parties ought to know at once whether the entire legislation fails.³¹

Just like the Government, the Justices apparently wanted to reach the merits of the case regardless of any standing hurdles. Thus, in the PPACA opinions, standing is the dog that did not bark.³²

B. Why Such A Void?

Can we deduce anything from the standing-shaped hole in the PPACA cases? I can see at least two lessons that this void teaches.

1. Lesson One: Courts *Do* Ignore Standing to Reach the Merits

First, the PPACA case gives support to the conventional view that standing is just a tool for manipulation: courts will ignore standing problems when they wish to reach the merits.³³ That the Court reached the merits is probably a good thing. After all, courts around the country had reached conflicting opinions on the constitutionality of the PPACA.³⁴ Had the Supreme Court decided, like some appellate courts, to decline the case on standing grounds, great uncertainty would have beleaguered implementation of the PPACA for years.³⁵ As the *New York Times* editorialized in March, “putting off judgment on the spurious constitutional objections from the law’s opponents would delay putting those arguments to rest—and likely make it more difficult for the government to provide health coverage to millions of Americans who do not have it now.”³⁶ Thus standing should not have proved an obstacle in deciding this important case.

Just because of cases like this one, I have argued that current standing doctrine is too restrictive and that standing should always be a prudential doctrine that gives the federal courts more flexibility.³⁷ But the PPACA opinion does not actually change the existing doctrine of standing to explicitly recognize a more prudential

31. *Id.* at 2671 (dissenting opinion of Justices Scalia, Kennedy, Thomas and Alito).

32. ARTHUR CONAN DOYLE, *THE MEMOIRS OF SHERLOCK HOLMES* (1894), available at <http://www.gutenberg.org/files/834/834-h/834-h.htm> (“[Police inspector:] ‘Is there any point to which you would wish to draw my attention?’ [Holmes:] ‘To the curious incident of the dog in the night-time.’ [Inspector:] ‘The dog did nothing in the night-time.’ [Holmes:] ‘That was the curious incident.’”).

33. *E.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758 (1999). *But see generally* Elliott, *supra* note 10 (concluding that the *NFIB* case is actually one of very few cases in the Roberts Court giving support to the common belief that the Court ignores standing to reach the merits).

34. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (constitutional); *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (unconstitutional); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (constitutional).

35. If no one had standing now, review would have waited until at least 2014, when the penalty provisions of the PPACA are to go into effect. 26 U.S.C. § 5000A(b)(1) (2013).

36. *Getting to the Merits*, N.Y. TIMES, Mar. 27, 2012, at A26, available at <http://www.nytimes.com/2012/03/27/opinion/getting-to-the-merits.html?ref=editorials>.

37. *See* Elliott, *supra* note 2, at 596–97; Elliott, *supra* note 13, at 517.

version of standing. The *NFIB* majority does not discuss the issue at all, and cases in which the Court fails to discuss a jurisdictional issue, even when it clearly takes jurisdiction, have no precedential value.³⁸ Moreover, as I argued in *Standing Lessons*, these cases did not present any great opportunity for a revolution in standing doctrine. The Court granted certiorari in the most boring of the PPACA cases, at least from the standing point of view, and it is unsurprising that the Court did not produce a standing blockbuster.

Unfortunately, because the Court has not adopted a prudential view of the standing doctrine (and is unlikely ever to do so), the Court's failure to address standing in *NFIB* is problematic. When case after case emphasizes the fundamental relation between standing and the Court's constitutional role,³⁹ when case after case go into the nitty-gritty details of the plaintiff's standing,⁴⁰ and when standing has been flagged as an issue below, by amici, and by a change of party before the Supreme Court itself, a void like the one here speaks loudly and requires one to ask the question, "why no standing analysis?" The best answer is that the Court wanted too badly to reach the merits to risk discovering that standing was an obstacle after all.

The Justices do themselves no favors when they reinforce the view that the Court is a political body that votes on policy, rather than a panel of judges doing their best to review the law and the facts of a case to determine whether the judgment below was correct. The more it looks like standing is just a tool the Justices use to manipulate their jurisdiction, the more the Court seems like a political body than a judicial body, and the more the Court risks losing the respect required for its proper functioning within the American political system. Fortunately, as I have argued elsewhere, the Roberts Court has only rarely ignored obvious standing problems in order to reach the merits.⁴¹

2. Lesson Two: Separation-of-Powers Conflicts Continue to Inhere in Standing Doctrine

Second, one particular argument over standing in the PPACA case – which occurred in the briefs but which was rendered irrelevant when the Court upheld the constitutionality of the individual mandate – reveals a common tension in standing doctrine that will undoubtedly continue to influence future standing decisions. That is the tension between using standing as a tool to determine whether the plaintiff is a proper party,⁴² and using standing to maintain proper separation of powers

38. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (“[D]rive-by jurisdictional rulings of this sort . . . have no precedential effect”); *Lewis v. Casey*, 518 U.S. 343, 352, n. 2 (1996) (“[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect”).

39. See, e.g., *Steel Co.*, 523 U.S. at 94-95, 102; *Allen v. Wright*, 468 U.S. 737, 750-51 (1984).

40. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007); *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167 (2000).

41. See generally Elliott, *supra* note 10.

42. *Duke Power Co. v. Carolina Env'tl. Study Grp, Inc.*, 438 U.S. 59, 80 (1978) (emphasizing the role of standing doctrine in “assur[ing] that the most effective advocate of

between the three branches of government.⁴³ Those different uses of standing can conflict with one another.

The Government, in its Brief on Severability, suggested that none of the parties had standing to seek severance of the statute, should the individual mandate be found unconstitutional. While the Government conceded that certain parties had standing to challenge the individual mandate,⁴⁴ countless provisions of the PPACA injured no one who was a party to the case. According to the Government, then, if the Court found the individual mandate unconstitutional, it would lack jurisdiction to decide whether to sever the mandate from the rest of the statute.⁴⁵ Instead, the Government argued, the rest of the statute would have to survive because the Court would lack the jurisdiction to do anything else.

This argument picks up a standard refrain in standing doctrine: standing to seek one remedy does not give the party standing to seek any other remedies.⁴⁶ Instead, standing must be shown for each remedy sought.⁴⁷

The PPACA challengers, however, argued that “severability is a remedial inquiry meant to effectuate Congress’ intent, not to redress a distinct injury to a plaintiff.”⁴⁸ Thus, were the Court to invalidate the individual mandate, it could quite properly – and, the plaintiffs contended, would *have* to – move on to deciding whether the PPACA could survive without the mandate, even if no one had been injured by the other provisions of the statute. Only by considering severability could Congress’s interests be addressed.

Who is right? Does each form of relief sought require a plaintiff with standing to seek that relief? Or are some forms of relief directed at other ends, such as preserving congressional prerogatives, so that standing is irrelevant to those forms of relief? The Court did not need to resolve this tension, because it found the mandate constitutional.⁴⁹ Moreover, the right answer seems to be that given by H. Bartow Farr III, the court-appointed counsel on severability, who pointed out that

the rights at issue is present to champion them”).

43. According to the Court, standing “is built on a single basic idea—the idea of separation of powers.” *Allen*, 468 U.S. at 752.

44. *See supra* notes 22-23 and accompanying text.

45. Brief for Respondents (Severability), Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), 2012 WL 273133.

46. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (holding that, even though plaintiff Lyons had standing to seek damages for harm he suffered from a dangerous chokehold applied by the L.A. police, he lacked standing to seek to enjoin that practice because he failed to show a sufficient likelihood that he himself would again be subjected to a chokehold).

47. *Id.*; *see also, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.” (citing *Lyons*)); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (“[S]tanding is not dispensed in gross.”).

48. Reply Brief for Private Petitioners on Severability, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), 2012 WL 864595.

49. The Court did strike down a Medicaid provision also challenged in the same proceeding, but severability was actually not at issue there either, because the Medicaid Act specifically provides that the invalidity of one provision does not mean invalidity of any other Medicaid provisions. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607, 2630 (2012) (both the majority opinion and Ginsburg’s opinion citing 42 U. S. C. §1303).

severability is not really a separate remedy requiring separate standing: “When the Court considers whether other, independently valid provisions of a statute should remain in force, it is not deciding a new ‘claim’ for relief, or a request for a ‘different form’ of relief, both of which would require the plaintiffs to establish standing anew.”⁵⁰ Instead, the severability analysis is *part of* granting the remedy of enjoining the operation of an unconstitutional statute.

But the argument reveals a long-standing tension in the doctrine of standing. Is it a doctrine meant to guarantee that the plaintiff is the right person to bring the lawsuit? And, if so, are there constraints on what a court can do when a plaintiff’s standing is limited, no matter what the costs to other values, such as separation-of-powers principles? Or is standing more about (or, more accurately, always also about) separation of powers, in which case separation-of-powers concerns can (at least in certain circumstances) overcome certain defects in an individual’s standing?

The Court has given varied answers on this point. In opinions written by Justice Scalia, standing is a strict doctrine for the very reason that the requirements of injury in fact, causation, and redressability protect separation of powers.⁵¹ Yet the Court has also been more flexible when an adverse standing decision might diminish the legislative or executive branches. For example, in *Friends of the Earth v. Laidlaw Environmental Services*, the Court found standing based on pollution-permit violations, even though the plaintiffs had not shown that any actual injury that would result from the violations.⁵² Justice Scalia dissented strongly, warning that allowing the suit to proceed had “grave implications for democratic governance.”⁵³ But Justice Ginsburg, writing for the majority, made clear that to hold otherwise would be “to raise the standing hurdle higher than the necessary showing for success on the merits.”⁵⁴ In other words, Congress (through its delegate, the Environmental Protection Agency) had set pollution limits using legislative power *and* had authorized citizens to sue to enforce those permit limits; to require a higher showing from plaintiffs to clear the standing hurdle would be a great intrusion by the courts on legislative authority. As I have written elsewhere, the *Laidlaw* Court “shows intense concern for a profoundly different conception of separation of powers [from that held by Justice Scalia]: that the Court cannot transform standing into a backdoor way to limit Congress’s legislative power.”⁵⁵

Certainly Justice Scalia was more willing to be flexible in the *NFIB* case than his previous opinions might have suggested. The dissenters, unlike the majority, did express an opinion on how the Court should treat the severability analysis,

50. Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability) at 20, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), 2012 WL 588458.

51. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing standing test as “irreducible constitutional minimum”).

52. *Laidlaw*, 528 U.S. at 181–85. The Court relied on affidavits from the plaintiffs that they were scared to use the river due to the permit violations, and that their property values had declined due to fears of the contamination. *Id.*

53. *Id.* at 202 (Scalia, J., dissenting).

54. *Id.* at 181.

55. Elliott, *supra* note 13, at 496 (citing *Laidlaw*, 528 U.S. at 187).

despite any defects in standing: “The Federal Government, the States, and private parties ought to know at once whether the entire legislation fails.”⁵⁶

The PPACA case may have involved only “garden variety” standing issues.⁵⁷ But they were issues that were pervasive in the lower courts. It is thus surprising that the majority doesn’t refer to any standing issues at all. Does that avoidance of the issue suggest that the Court was worried that standing problems might well exist and were better off ignored, in favor of reaching the merits of an important national dispute? If so, then the Court might *sub rosa* have accepted a prudential – rather than a strict, inflexible, constitutional requirement – of standing. If so, the Court headed in the right direction.⁵⁸ And, if so, it’s a shame that the Court did not say so outright. By not saying so and thus leaving the standing questions unaddressed, the Court added *NFIB* to the long list of cases that look like political manipulation rather than judicial reasoning.

II. STANDING (IN GREAT DETAIL) IN THE MARRIAGE EQUALITY CASES

In contrast to the health-care case, the marriage-equality cases decided by the Court in summer 2013 both discuss standing extensively, in *Windsor* finding standing and going on to strike down portions of the federal Defense of Marriage Act (DOMA) on the merits,⁵⁹ yet in *Perry* finding no standing to review California’s ban on same-sex marriage.⁶⁰ Given extensive similarities in the procedural posture of both cases, the different standing outcomes are hard to reconcile. The unfortunate explanation for the differing outcomes is political: the Court wanted to get the federal government out of the marriage equality debate and leave it for the States.⁶¹ Thus the Court found standing and reached the merits in the DOMA case, while finding no jurisdiction in the California case. Unfortunately for standing doctrine, these results don’t make sense.

A. *United States v. Windsor*

Edith Windsor and Thea Spyer met in 1963⁶² and would have married, had a marriage between two women been legally permitted.⁶³ They ultimately married in

56. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (dissenting opinion of Justices Scalia, Kennedy, Thomas and Alito).

57. Elliott, *supra* note 2, at 588.

58. Elliott, *supra* note 13, at 510, 517.

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

60. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

61. I speak loosely when I refer to the Court: one group of Justices formed the majority in *Windsor* and a different group did so in *Perry*. The Court always acts through the votes of its members. For sophisticated discussions of how the multi-member nature of the Supreme Court affects its decisions, see MAXWELL STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2002).

62. *Windsor*, 133 S. Ct. at 2683.

63. Aaron Hicklin, *Edie Windsor and Thea Spyer: When Edie Met Thea*, OUT, Jan. 9, 2011, available at <http://www.out.com/entertainment/2011/01/09/edie-windsor-and-thea-spyer-when-edie-met-thea>.

Canada in 2007.⁶⁴ Ms. Spyer died in 2009 and, because the federal Defense of Marriage Act (DOMA) forbade recognition of their marriage, Ms. Windsor was required to pay extra taxes in excess of \$350,000 on Ms. Spyer's estate, taxes a heterosexual couple would not have owed.⁶⁵

Ms. Windsor paid the excess taxes and then sued the United States for a refund, contending that DOMA violated both the Equal Protection and Due Process Clauses of the federal Constitution.⁶⁶ Only a few months later, Attorney General Eric Holder announced that the Obama Administration had concluded that DOMA was unconstitutional; therefore, the United States would not defend the statute in court,⁶⁷ though it would remain a party to facilitate a court ruling on the constitutionality of the law and would continue to enforce the law until it had been declared unconstitutional.⁶⁸

Who, then, would defend DOMA? The Bipartisan Legal Advisory Group (BLAG) of the House of Representatives hired former Solicitor General Paul Clement and sought to intervene, which the district court permitted.⁶⁹ The district court then ruled for Ms. Windsor on summary judgment, holding that DOMA violated rational basis review.⁷⁰

Continuing to agree that DOMA was unconstitutional, the United States nevertheless sought review of the district court's opinion in the Second Circuit and also sought certiorari before judgment from the Supreme Court.⁷¹ The Court of Appeals for the Second Circuit affirmed the district court, but rather than applying rational basis review, the court held that sexuality was a quasi-suspect classification deserving of heightened scrutiny under the Constitution and that DOMA failed to survive under such heightened scrutiny.⁷²

The Supreme Court granted certiorari on December 7, 2012, just two months after the Second Circuit's decision. The Court specifically asked the parties to submit briefing on BLAG's standing to participate and on the effect on the Court's jurisdiction of the United States' agreement with Windsor; four days later, the Court appointed Professor Vicki Jackson of the Harvard Law School to argue against jurisdiction.⁷³

The Court, in an opinion released on June 26, 2013, held that *Windsor* presented a case-or-controversy under Article III.⁷⁴ While the majority (Justice Kennedy joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan) acknowledged that the United States' refusal to defend that law did "introduce a complication,"⁷⁵ an

64. *Windsor*, 133 S. Ct. at 2679.

65. *Id.* at 2679.

66. *Id.* The Tax Injunction Act would have forbidden a pre-payment suit. *See* 26 U.S.C. § 7421(a).

67. *Windsor*, 133 S. Ct. at 2683.

68. *Id.* at 2684.

69. *Id.*

70. *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

71. *Windsor*, 133 S. Ct. at 2684.

72. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

73. *Windsor*, 133 S. Ct. at 2684.

74. *Id.* at 2686.

75. *Id.* at 2685.

Article III case was nevertheless present because the United States was continuing to enforce the law: it was withholding from Ms. Windsor the \$363,000 she sought, and the judgment requiring the United States to pay Ms. Windsor that money gave the U.S. “a stake sufficient to support Article III jurisdiction.”⁷⁶ The Court noted that *INS v. Chadha* had presented a very similar situation, and jurisdiction had been found there.⁷⁷

The Court did admit that the United States’ failure to defend DOMA raised prudential concerns: was the Court getting the kind of adversarial argument that would permit it to issue a judgment?⁷⁸ The Court concluded that “BLAG’s sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing [the] appeal.”⁷⁹ The Court also emphasized the separation-of-powers issues that would arise if the Court could be ousted from jurisdiction simply because the President refused to defend a law: “the Supreme Court’s primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff . . . would become only secondary to the President’s.”⁸⁰ Congress’s power would also be undermined: “it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’ enactment solely on its own initiative and without any determination from the Court.”⁸¹

Having found jurisdiction present, the Court went on to find DOMA unconstitutional.⁸² The merits opinion is quite muddled, appearing to rest at times on a federalism argument (DOMA disrespects the states who have legalized marriage between same-sex couples)⁸³ and at times on a due process argument (DOMA is supported by nothing more than irrational prejudice and thus cannot be justified, since it infringes on the liberty interests of same-sex couples and their children).⁸⁴

Chief Justice Roberts and Justices Scalia, Thomas and Alito dissented on both the jurisdiction and merits issues. Justice Scalia, who has strong views on standing and the role of the Court in our government,⁸⁵ assailed the majority for “aggrandiz[ing]” the power of the court over “the power of our people to govern themselves.”⁸⁶ The majority, he said, “envisions a Supreme Court standing (or

76. *Id.* at 2686.

77. *Id.* at 2686–87 (discussing *INS v. Chadha*, 462 U.S. 919 (1983), where the Executive Branch agreed with the plaintiff that a law permitting one house of Congress to order the INS to deport Mr. Chadha was unconstitutional as a violation of bicameralism and presentment, and the Court nevertheless found jurisdiction because the INS’s continuing enforcement of the law was enough to satisfy Article III).

78. *Id.* at 2687.

79. *Id.* at 2688.

80. *Id.*

81. *Id.*

82. *Id.* at 2696.

83. *Id.* at 2690–93.

84. *Id.* at 2693–96.

85. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

86. *Windsor*, 133 S. Ct. at 2697 (Scalia, J., dissenting).

rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere ‘primary’ in its role.”⁸⁷ Because Ms. Windsor and the United States agreed on the unconstitutionality of DOMA, Justice Scalia argued, this so-called case was instead “a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one . . . (in this Court) [that will have] precedential effect throughout the United States.”⁸⁸ He then dissented at length from the Court’s merits opinion.⁸⁹

Justice Alito also dissented on the merits, but would have held that the Court had jurisdiction because of BLAG’s intervention.⁹⁰ “[I]n the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.”⁹¹

B. *Hollingsworth v. Perry*

Slightly more than half of California voters voted yes on Proposition 8 (“Prop 8”) on November 4, 2008,⁹² thus adding the following to the California Constitution: “Only marriage between a man and a woman is valid or recognized in California.”⁹³ About six months later, two gay couples challenged the new constitutional amendment by suing several California officials in federal court in San Francisco.⁹⁴ The California officials (including then-Governor Arnold Schwarzenegger and then-Attorney-General Jerry Brown) appeared as parties but

87. *Windsor*, 133 S. Ct. at 2698 (Scalia, J., dissenting). Justice Scalia’s rhetoric here is inconsistent with other opinions he has joined. For example, in *City of Boerne v. Flores*, he joined the majority in overturning a congressional enactment that attempted to redefine First Amendment religious rights using its Fourteenth Amendment enforcement powers: “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” 521 U.S. 507, 519 (1997). Many pundits also noted the irony of Justice Scalia’s spirited defense of Congress in *Windsor*, when he had just—the day before—joined the majority striking down portions of the recently re-enacted Voting Rights Act of 1965 in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). See, e.g., Peter M. Shane, *How Full is that Glass? Reflecting on Voting Rights, Employment Discrimination, and Gay Marriage*, THE HUFFINGTON POST (June 26, 2013, 5:41 PM) (“What makes [Justice Scalia’s] bluster [in *Windsor*] so repugnant is that its author had no problem overturning a congressional act intended to preserve individual rights—the Voting Rights Act—that has been repeatedly and vigorously debated, was supported by successive bipartisan majorities in the national legislature, and which deprives not a single human being of life, liberty, or property.”).

88. *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting).

89. *Id.* at 2705–11.

90. *Id.* at 2711 (Alito, J., dissenting).

91. *Id.* at 2714.

92. Cal. Sec’y of State, *Statement of Vote: Nov. 4, 2008 General Election* 7 (2008), available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

93. Cal. Sec’y of State, *Voter Information Guide: Text of Proposed Laws* 128 (2008), available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/textof-proposed-laws.pdf#prop8>.

94. *Perry v. Schwarzenegger (Perry I)*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

refused to defend the law, and the district court allowed those who had promoted Prop 8 (“the Proponents”) to intervene.⁹⁵ The district court ultimately struck down California’s gay-marriage ban as violating both the Due Process and Equal Protection Clauses of the U.S. Constitution.⁹⁶

No standing problem arose in the district court: the plaintiffs clearly had standing, and the California officials remained as parties, so that the status of the Proponents was not closely scrutinized. But when time came to appeal, the California officials declined to participate.⁹⁷ Under Supreme Court precedent, the Proponents appeared to lack standing to appeal on their own.⁹⁸ The Ninth Circuit concluded that, because Prop 8 arose through the California referendum and initiative process, California law would hold the answer to whether the Proponents were proper parties to pursue the appeal.⁹⁹ It therefore certified to the California Supreme Court the question whether California law gave the Proponents standing to defend Prop 8 on appeal.¹⁰⁰

The California Supreme Court, in response, held that the Proponents were proper parties to represent the State of California in defending Prop 8.¹⁰¹ “We normally expect public officials to defend state statutes when their constitutionality is challenged in federal court, but when those officials decline to do so,” the California constitution and statutes “authorize the official proponents . . . to participate . . . in a judicial proceeding to assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure.”¹⁰² In particular, the court noted, this is necessary because state officials may otherwise unfairly discriminate between laws enacted by the legislature and laws enacted by direct democracy: “the voters . . . may reasonably harbor a legitimate concern that the public officials . . . may not, in the case of an initiative measure, always undertake such a defense with vigor.”¹⁰³ Importantly, the California Supreme Court did not address whether the Proponents had any individual stake in the litigation: the decision was based entirely on California’s initiative system and the Proponents’ role within that system.

After receiving the answer to the certified question, the Ninth Circuit proceeded to find that the Proponents had standing in federal court to defend Prop 8.¹⁰⁴ Because states unquestionably have standing to defend the constitutionality of their

95. *Id.* at 928.

96. *Id.* at 927.

97. *Perry v. Schwarzenegger* (Perry II), 628 F.3d 1191, 1195 (9th Cir. 2011).

98. *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010) (order granting motion to stay) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997)).

99. *Perry II*, 628 F.3d at 1196 (“The parties agree that ‘Proponents’ standing’—and therefore our ability to decide this appeal—“rises or falls” on whether California law affords them the interest or authority described in the previous section.” (quoting Proponents’ Reply Br. at 8)).

100. *Id.* at 1193.

101. *Perry v. Brown* (Perry III), 52 Cal. 4th 1116, 1125–26 (2011).

102. *Id.* at 1152.

103. *Id.* at 1125.

104. *Perry v. Brown* (Perry IV), 671 F.3d 1052, 1070 (9th Cir. 2012).

laws in federal court,¹⁰⁵ and because “it is [the states’] prerogative, as independent sovereigns, to decide for themselves who may assert their interests and under what circumstances, and to bestow that authority accordingly,”¹⁰⁶ the Ninth Circuit held, then “[a]ll a federal court need determine is . . . that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.”¹⁰⁷ California was injured in the Article III sense because its law had been invalidated; California, through its laws as interpreted by the California Supreme Court, had authorized proponents of a ballot initiative to defend that initiative; and so the Proponents were proper defenders of Prop 8 when the California officials had refused to do so.¹⁰⁸ The Ninth Circuit went on to affirm the district court’s decision, although on considerably narrower grounds than provided by the district court.¹⁰⁹

Because the Ninth Circuit’s opinion relied with exceeding thoroughness on *Romer v. Evans*,¹¹⁰ a 1996 opinion written for the Court by Justice Kennedy, it was widely thought that the Ninth Circuit was trying to win Justice Kennedy’s vote in any review by the Supreme Court.¹¹¹ The narrowness of the decision can also be interpreted as an effort to avoid Supreme Court review, an interpretation bolstered by a concurrence written by Judges Reinhardt and Hawkins in denying review en banc:

We held only that under the particular circumstances relating to California’s Proposition 8, that measure was invalid. In line with the rules governing judicial resolution of constitutional issues, we did not resolve the fundamental question that both sides asked us to: whether the Constitution prohibits the states from banning same-sex marriage. That question may be decided in the near future, but if so, it should be in some other case, at some other time.¹¹²

This effort to evade review was ultimately, if circuitously, successful (although any effort to win Justice Kennedy’s vote on the merits was not). The Supreme Court granted certiorari in *Perry* on December 7, 2012, ordering special briefing on the question of the Proponents’ standing.¹¹³

105. *Id.*

106. *Id.* at 1071.

107. *Id.* at 1072.

108. *Id.* at 1075.

109. *Id.* at 1076–96 (noting that “[t]he district court held Proposition 8 unconstitutional [using fairly broad arguments under] the Due Process Clause [and under] the Equal Protection Clause,” further noting that “Plaintiff–Intervenor San Francisco also offer[s] a third argument [under the Equal Protection Clause which provides] the narrowest ground for adjudicating the constitutional questions before us,” and adopting that narrowest ground).

110. 517 U.S. 620 (1996).

111. *See, e.g.*, Lyle Denniston, *Ban on gay marriage struck down* (FINAL UPDATE), SCOTUSBLOG (Feb. 7, 2012, 3:34 PM), available at <http://www.scotusblog.com/2012/02/ban-on-gay-marriage-struck-down/>.

112. *Perry v. Brown* (Perry V), 681 F.3d 1065, 1067 (9th Cir. 2012) (order denying rehearing en banc) (Reinhardt, J. and Hawkins, J., concurring).

113. 133 S.Ct. 786 (2012).

The Court held that the Proponents lacked standing to appeal the opinion below.¹¹⁴ Chief Justice Roberts, joined by Justices Scalia, Ginsburg, Breyer, and Kagan, rejected the case on standing grounds. Any harm the Proponents felt at the invalidation of Prop 8, the Court held, was nothing more than a generalized grievance of the kind long found insufficient to support standing.¹¹⁵ They were not bound by the judgment below: “the District Court had not ordered them to do or refrain from doing anything.”¹¹⁶ While the Proponents were specially involved in getting Prop 8 on the ballot and campaigning for it, once Prop 8 became part of the California Constitution, the Proponents no longer had any special interest in it. They had no more standing to defend Prop 8 than any other citizen would have in seeing the laws vindicated.

Nor could the Proponents obtain standing by claiming to represent the State of California. While, to be sure, California had suffered an injury in having its law invalidated, it had chosen not to appeal. The Proponents were barred by usual rules against “third-party” standing: I cannot bring suit to vindicate my neighbor’s interests—if she wants to sue, she can do it herself.

Moreover, because the Proponents held no official position in state government, they lacked standing to represent California under *Karcher v. May*.¹¹⁷ In *Karcher*, leaders of the New Jersey legislature were authorized to represent the state in court when the state attorney general refused to do so. The leaders brought a lawsuit but were voted out of office while the case was pending. The Supreme Court held that, when they lost their offices, they lost standing to sue on behalf of New Jersey.¹¹⁸

In applying *Karcher* to the Proponents, the Court emphasized that the legislative leaders “were permitted to proceed only because they were state officers, acting in an official capacity [Proponents] hold no office and have always participated in this litigation solely as private parties.”¹¹⁹ The Court similarly rejected Proponents’ standing under *Arizonans for Official English v. Arizona*.¹²⁰ As I discuss in more detail below, the Court essentially ignores the role of state law in the analysis. Presumably the legislative leaders were proper parties in *Karcher* because New Jersey law made them so—and also determined that they could no longer sue on behalf of the state once they were no longer state officials. Similarly, in *Arizonans*, no state law made ballot-initiative supporters the proper parties to defend the ballot initiative in court. Here, by contrast, the California Supreme Court held that California law made the Proponents proper parties, and nothing had happened to change the Proponents’ status under California law.

Finally, the Court held that the Proponents lacked standing because they claimed to be “agents” of California but were not agents under any standard definition of agency.¹²¹ This part of the opinion is the most obviously strained. The Proponents almost certainly referred to agency in their briefs because they thought they had to

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

115. *Id.* at 2662-3.

116. *Id.* at 2662.

117. 484 U.S. 72 (1987).

118. *Id.* at 81.

119. *Hollingsworth*, 133 S. Ct. at 2665.

120. *Id.* at 2665-67.

121. *Id.* at 2666-67.

under *Arizonans*, where the Court itself had sloppily used the term “agent” in rejecting standing for Arizonan ballot-initiative proponents. The concept of agency otherwise plays no important role in the Proponents’ argument. Nevertheless, the Court seized on the word and blew it up into a full argument under the Restatement of Agency.

The Court concluded by emphasizing its respect for the California Supreme Court and the California initiative system. Yet, the Court said, “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.”¹²²

Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, would have adopted the California Supreme Court’s view and allowed the Proponents to defend Prop 8 on appeal. Justice Kennedy started by acknowledging the truth of the Court’s statement: “a proponent’s standing to defend an initiative in federal court is a question of federal law.”¹²³ But, Justice Kennedy wrote, the federal requirements were satisfied by the Proponents. First, California “sustained a concrete injury, sufficient to satisfy the requirements of Article III, when a United States District Court nullified a portion of its State Constitution.”¹²⁴

Second, Justice Kennedy argued, the State Executive does not have the last word in determining whether to litigate to redress that injury; California has an initiative system precisely to allow the People to act despite the preferences of their elected officials, and the California Supreme Court held that the Proponents were proper parties to represent the State in court when the state officials refused to do so.¹²⁵ It is not for the United States Supreme Court to tell California that it must adopt an agency theory in determining who can represent it in court; an agency relationship would be particularly problematic in this case—who would the principal be? The Governor or the Attorney General, both of whom wish to acquiesce in the district court’s judgment?¹²⁶ Moreover, Justice Kennedy pointed out, other similar litigation arrangements have long been recognized as proper under Article III.¹²⁷

Thus Justice Kennedy and three of his fellow Justices would have held that the Proponents are proper appellants and that the Court has jurisdiction.

C. What Can We Learn from the Marriage Equality Cases?

The marriage equality cases, just like the health-care case, show that the Court does in fact use standing to manipulate its jurisdiction, reaching or avoiding the merits as it chooses. Even more than the health-care case, the marriage equality cases reveal the problems inherent in using standing doctrine to try to vindicate separation-of-powers interests: in both *Windsor* and *Perry*, both sides have strong separation-of-powers arguments that the standing doctrine does little to clarify. In

122. *Id.* at 2667.

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

124. *Id.*

125. *Id.* at 2669.

126. *Id.* at 2671.

127. *Id.* at 2672.

the end, the marriage equality cases provide strong support for the arguments I have made elsewhere: standing should be severely reined in or even abandoned, and the Court should shift to a prudential abstention doctrine in determining its jurisdiction.¹²⁸

1. Lesson One Redux

Like the PPACA case, the marriage equality cases support the view of standing-as-manipulation.¹²⁹ The differing outcomes on standing in *Windsor* and *Perry* are best explained by naked politics: the Court wanted to strike down DOMA to get the federal government out of the marriage-equality debate, but wanted to avoid making any decision that would impose marriage equality on the States. Thus standing in *Windsor* but no standing in *Perry*.

It is no accident that the first sentence of *Perry* refers to the “active political debate” over marriage equality. The blogosphere suspected that the Court might duck in *Perry* because of the high level of political activity surrounding marriage equality. (Not long before *Perry* issued, Rhode Island, Delaware, and Minnesota all passed statutes recognizing the right of same-sex couples to marry; ballot initiatives to recognize or to ban marriage between same-sex couples are pending in as many as eleven states as of this writing.)

And at least one Justice had made clear her reluctance to become involved in issues subject to active political debate among the States. Justice Ginsburg gave speeches in 2008 and 2012 emphasizing the negative effect *Roe v. Wade* had had on the Court’s position in American society, because *Roe* short-circuited democratic debate over abortion.¹³⁰ Her 2012 speech was seen as signaling her reluctance to make *Perry* the *Roe* of marriage equality: better for the Court to stay out of the debate and let the States hash it out over the next decade.¹³¹

Ironically, however, the Court’s standing decision in *Perry* has the effect of short-circuiting democratic debate in California, by leaving in place the district court’s decision striking down Prop 8 and leaving the People of California without a means to challenge that decision.¹³² As Justice Kennedy stated in dissent:

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

128. Elliott, *supra* note 13, at 510–514.

129. See, e.g., Pierce, *supra* note 33, at 1758.

130. Adam Liptak, *Shadow of Roe v. Wade Looms Over Ruling on Gay Marriage*, N.Y. TIMES, Mar. 24, 2013, at A1. I note that this view of *Roe* is sharply criticized by some scholars. See, e.g., Linda Greenhouse & Reva B. Siegel, *Backlash to the Future? From Roe to Perry*, 60 UCLA L. REV. DISC. 240 (2013).

131. It should be noted, however, that Ginsburg herself rejects the analogy. See Adam Liptak, *Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 25, 2013, at A1.

132. Elliott, *supra* note 2, at 572–73.

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.¹³³

Justice Alito, who would have found jurisdiction in both cases, found *Perry* a much *easier* case than *Windsor* because of California's initiative system. He noted the paradox presented by the Court's decision to find standing in *Windsor* but to deny it in *Perry*: "It is remarkable that the Court has simultaneously decided that the United States, which received all that it had sought below, is a proper petitioner in [*Windsor*] but that the intervenors in *Hollingsworth*, who represent the party that lost in the lower court, are not."¹³⁴

Should the Court have found standing in *Perry*? The case does raise a number of unusual concerns.¹³⁵ In particular, there is a misfit between the Proponents' use of the legislative process against a historically oppressed minority, and their use of the courts to defend that legislation. Under footnote four of *Carolene Products*, the role of the courts is to protect the minority, not to give the majority a forum.¹³⁶ Had the Court based its reluctance to review Prop 8 on such concerns, I might have found its opinion more persuasive. But, of course, standing doctrine does not leave room for such concerns.

A prudential doctrine of standing would allow such concerns to be addressed explicitly.¹³⁷ Instead, the Court tries to shoehorn its concerns about intervening in a hot topical issue into the strictures of the standing doctrine, which is poorly equipped to serve that purpose. As a result, the Court, in trying not to look political, ends up looking political.

2. Lesson Two Redux: Standing is Still a Bad Tool for Vindicating Separation-of-Powers Concerns

The marriage equality cases both presented unusual standing problems. We are usually worried about plaintiff standing (as, for example, in the health-care case): is someone seeking judicial action from the federal courts when they do not actually raise a case or controversy? We do not usually worry about the defendant's

133. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting) (citations omitted).

134. *United States v. Windsor*, 133 S. Ct. 2712 (2013) (Alito, J., dissenting) (citations and internal quotation marks omitted).

135. *Id.*

136. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

137. Elliott, *supra* note 13, at 515–16 (arguing for a prudential abstention doctrine to replace much of current standing doctrine so that courts can "more intelligibl[y] and thus more defensibl[y]" pursue standing's goals).

standing, presumably because defendants risk suffering adverse judgments.¹³⁸ And certainly a defendant facing an adverse judgment would have standing to appeal.¹³⁹ But in *Perry*, the defendants bound by the adverse judgment chose not to appeal, and in *Windsor*, the defendant bound by the adverse judgment agreed with the judgment against it. It might appear that, under conventional standing doctrine, a case or controversy did not exist. This cannot, of course, create or defeat jurisdiction: many defendants are happy with the judgments against them, when the judgments are for piddling amounts, or leave undisturbed things the defendant cares more about. Defendants may even default, so that judgment is entered against them without their participating at all.

At the same time, both *Perry* and *Windsor* involved adversity in a larger sense. Even if the Governor and Attorney General of California declined to appeal the district court's judgment, the People of California arguably suffered an injury (they had, after all, voted by a majority to enact Prop 8 into law). As I argued in my earlier piece in the *Indiana Law Journal*: "To permit ballot initiatives to change the law by direct democratic vote, but to have no mechanism by which those initiatives can be defended in court, makes hollow the promise of direct democracy."¹⁴⁰

Similarly, in *Windsor*, the Obama Administration refused to defend DOMA, but Congress (or at least BLAG) wanted to defend it. Allowing the Executive to acquiesce in the invalidation of federal law, but not allowing Congress to step in defend that law, creates a gap in our legal system. Justice Scalia, in his *Windsor* dissent, contended that Congress had all the tools it needed to defend itself when the Executive refused to defend: it could use appropriations, oversight, and ultimately impeachment to attempt to control the President.¹⁴¹ Yet this ignores the role the district court has already played in striking down DOMA: surely the appropriate supervisor of the district court is ultimately the Supreme Court, and the appropriate review of the district court's opinion is by appellate review, rather than through some tangential slanging match between the Hill and the White House.

The real problem here may be with the Supreme Court's holding in *Diamond v. Charles* that standing must be present at all stages of litigation.¹⁴² I hope to argue elsewhere that, so long as standing is present through the district court's entry of judgment, appellate review is within the judicial power delineated by Article III as part of the higher courts' supervisory powers, regardless of whether standing continues to be present.¹⁴³

Taking a step even further back, both *Windsor* and *Perry* show the hopelessness of trying to use standing doctrine to resolve separation of powers debates. *Everyone* had a good separation of powers argument: Should a lower court's opinion striking down a congressional enactment go unreviewed? Should the Executive get to divest the Supreme Court of jurisdiction by acquiescing in the lower court's opinion?

138. 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3902, at 61 (2d ed. 1991 & Supp. 2011).

139. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989).

140. Elliott, *supra* note 2, at 571.

141. *United States v. Windsor*, 133 S. Ct. 2675, 2702 (2013) (Scalia, J., dissenting).

142. 476 U.S. 54 (1986).

143. Heather Elliott, "Standing to Appeal Should be Governed by Prudential, Not Constitutional, Rules," unpublished manuscript.

Should the Executive get to create jurisdiction in the Supreme Court by refusing to pay Ms. Windsor her money while agreeing she deserved it? Should the Supreme Court get to reach out and grab a big political decision by ignoring the strictures of Article III? Should the Executive Branch of California get to undermine the initiative system by refusing to defend Prop 8 in court? Should a lower federal court get to strike down a state constitutional enactment with no oversight? Should ballot initiative proponents get to step into the shoes of the State with no constraints or supervision?

Only a one or two these questions really have anything to do with injury-in-fact, traceability, or redressability. Instead, these questions are about the appropriate roles of legislatures, executives, and courts, and about the relationship between the federal courts and the states. Both *Windsor* and *Perry* would have been better opinions if they had engaged those issues directly, rather than through the filter of standing doctrine.

CONCLUSION

I suggested in my earlier *Indiana Law Journal* article that “[t]hese new cases ... present opportunities for the Court to alter existing doctrine in ways long argued for by liberals: the courts should be more broadly accessible, and the strange-bedfellows moment presented by these cases might cause the Court to grant that access.”¹⁴⁴ Unfortunately, the Court did not seize this opportunity. Instead, it further confused an already confusing doctrine.

The health-care case arguably made the courts more broadly accessible on an issue of great national importance, but the Court gave no reasoning to support similar access in the future. The marriage equality cases were so transparently political in their application of the standing doctrine that they give ammunition to those who think that the Court sits as a super-legislature. Standing, at least in these opinions, continues to be a “cover” for improper analysis¹⁴⁵ and a “word game played by secret rules.”¹⁴⁶

144. See Elliott, *supra* note 2, at 598.

145. *Allen v. Wright*, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting).

146. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).