

More Than One Way to Structure a Government: *Arizona State Legislature, ASARCO, and Hollingsworth* as a Failed Trilogy

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The United States Constitution provides that rules for the election of congressional representatives for each state shall be set by the “Legislature thereof.” Last Term, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,¹ a Supreme Court majority joined by Justice Anthony Kennedy permitted Arizona to bypass its formal legislature and adopt congressional district lines drawn by an independent commission pursuant to an authorization from the people of the state. Commentary on Justice Kennedy’s vote suggested that practical policy considerations moved him to approve this reassignment of legislative power. But placing *Arizona State Legislature* in its proper context suggests that a deep principle was at work: while the federal Constitution carefully assigns federal legislative, judicial, and executive powers to specific institutions, it leaves the states free to allocate such powers differently. Justice Kennedy’s opinion for the Court in *ASARCO, Inc. v. Kadish*² allowed a state to have its judicial branch make decisions more typical of an executive agency, and to have private proponents defend those decisions to the Supreme Court. The outlier in this trilogy was *Hollingsworth v. Perry*.³ There, over Justice Kennedy’s vigorous dissent, the Court prevented a state from granting executive power to private proponents, and declined to hear their substantive arguments. Analyzing the cases together reveals striking parallels and provides a new perspective on *Hollingsworth*’s anomalous holding.

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1. 135 S. Ct. 2652 (2015).
2. 490 U.S. 605 (1989).
3. 133 S. Ct. 2652 (2013).

I. THE LEGISLATURE: *ARIZONA STATE LEGISLATURE V. ARIZONA
INDEPENDENT REDISTRICTING COMMISSION*

Article I of the United States Constitution creates and empowers the national legislature. Compared with the provisions that empower the executive and judiciary, Article I offers a lengthy and detailed account of its branch's powers and responsibilities. But the very precision of Article I undermines the sense that its provisions are driven by pure reason and natural law.⁴ Its provisions are based on judgments that a different sovereign could reasonably have made in a different way.⁵

An alternative lawmaking process was addressed in *Arizona State Legislature*. The Elections Clause of the United States Constitution provides that the “times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state *by the Legislature thereof*; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.”⁶

In 2000, Arizona voters adopted Proposition 106, which transferred the authority to draw congressional districts from the Arizona State Legislature to a new Arizona Independent Redistricting Commission.⁷ After the Independent Redistricting Commission certified a congressional map, the Arizona State Legislature claimed that Proposition 106 violated the Elections Clause.⁸

The Supreme Court rejected the Arizona State Legislature's challenge on the merits.⁹ In a majority opinion joined by Justice Kennedy, Justice Ginsburg¹⁰ distinguished between constitutional clauses that use the term “Legislature” to refer to a state's lawmaking apparatus and clauses that use

4. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (arguing that broad ideas about the scope of “legislative,” “executive,” or “judicial” power disrespect the more specific compromises built into the Constitution).

5. This point would not have been lost on the framers of Article I. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 138 (2006) (noting that framers drew on the experiences of differently structured legislatures in Massachusetts and Pennsylvania).

6. U.S. CONST. art. I, § 4 (emphasis added).

7. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2661 (2015).

8. *Id.* at 2662.

9. The majority concluded that the Arizona State Legislature had standing to bring its suit. *Id.* at 2663–66. Justices Scalia and Thomas disagreed. *Id.* at 2694 (Scalia, J., dissenting); *id.* at 2699 (Thomas, J., dissenting).

10. Justice Ginsburg was joined by Justices Kennedy, Breyer, Sotomayor, and Kagan.

the term “Legislature” to identify the entity that is to perform a different function, such as electing Senators (as Article I, Section 3 specified prior to adoption of the Seventeenth Amendment).¹¹ Clauses in the former category, like the Elections Clause, did not limit the lawmaking processes that could be adopted by the states themselves.¹² The framers of the Constitution may not have anticipated an initiative process that allowed the people to make laws,¹³ or that allowed them to delegate that power directly to an independent commission,¹⁴ but nothing in the Constitution forbade this type of experimentation.

Chief Justice Roberts,¹⁵ Justice Scalia,¹⁶ and Justice Thomas¹⁷ each filed a dissent. Echoing his majority opinion in *Hollingsworth*, Chief Justice Roberts acknowledged the state’s distinctive governmental structure, but insisted that the issue was ultimately controlled by federal law categories.¹⁸ Chief Justice Roberts found the term “Legislature” to be an unambiguous reference to a state’s representative legislative body,¹⁹ citing other uses of the term in the Constitution and the history of Elections Clause jurisprudence.²⁰ The Chief Justice closed this analysis by suggesting that Arizona’s approach was not successful as a policy matter.²¹ Justice Thomas struck a similarly results-oriented note, observing that the measure it had approved in this instance was democracy-reducing, because it transferred power from a democratic legislature to an appointed body.²²

Analysis of the outcome centered on the practical calculus, with at least one commentator suggesting that Justice Kennedy’s position had been a

11. *Id.* at 2666–67 (majority opinion).

12. *Id.* at 2667–68, 2672–73.

13. *Id.* at 2659–60, 2672.

14. *Id.* at 2671.

15. The Chief Justice’s dissent was joined by Justices Scalia, Thomas, and Alito.

16. Justice Scalia was joined by Justice Thomas. Justice Scalia’s dissent focused on the Arizona State Legislature’s Article III standing. *Ariz. State Legislature*, 135 S. Ct. at 2694–97.

17. Justice Thomas was joined by Justice Scalia.

18. *Ariz. State Legislature*, 135 S. Ct. at 2679 (Roberts, C.J., dissenting).

19. *Id.* at 2679–80.

20. *Id.* at 2680–87.

21. *Id.* at 2689–92.

22. *Id.* at 2697–99 (Thomas, J., dissenting).

surprise that was likely informed by California's experiences with redistricting.²³ But Justice Kennedy's opinions in *ASARCO* and *Hollingsworth* reveal a fundamental principle: respect for state authority to divide and structure power along different lines from the federal government.

II. THE JUDICIARY: *ASARCO, INC. v. KADISH*

Article III, Section 2 of the Constitution limits federal judicial power to "Cases" and "Controversies." As a result, federal courts only act in the context of an actual dispute between parties with "standing," or an adequate interest in the outcome. This prevents federal courts from exercising power broadly or on their own initiative, as the political branches do.²⁴ While state courts are designed similarly, they do not match in every particular.

A group of taxpayers and public school teachers brought suit in Arizona state court asserting that mineral leases on public school lands were invalid because they were issued under a state law that conflicted with a federal statute.²⁵ *ASARCO* and other entities that had received leases under the challenged law intervened as defendants.²⁶ After the Arizona Supreme Court held for the plaintiffs, *ASARCO* appealed to the United States Supreme Court.²⁷

Justice Kennedy, writing for four justices on this point, concluded that if the plaintiffs had filed their case in federal court, where Article III's limits apply, the plaintiffs' case "would have been dismissed at the outset" for lack of standing.²⁸

But, now writing for a majority,²⁹ Justice Kennedy concluded that this did not prevent the Supreme Court from analyzing the federal law issues at

23. Richard L. Hasen, *Mindlessly Literal Reading Loses Again*, SLATE (June 29, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/06/arizona-supreme-court-decision-redistricting-ruling-undermines-bush-v-gore.html, [<http://perma.cc/7ZAE-D3QJ>].

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

25. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 610 (1989).

26. *Id.*

27. *Id.*

28. *Id.* at 617. This section of Justice Kennedy's opinion was joined by Chief Justice Rehnquist and Justices Stevens and Scalia. Justice O'Connor took no part in the consideration or decision of the case, leaving the Court deadlocked on this issue.

29. *Id.* at 617–24. This section of Justice Kennedy's opinion was joined by Justices Brennan, White, Marshall, Blackmun, and Stevens.

stake. “When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for review.”³⁰ The Arizona Supreme Court’s action had injured ASARCO by invalidating the state law granting ASARCO valuable mineral leases; as a result, it was appropriate for the Supreme Court to entertain ASARCO’s appeal.³¹ The Supreme Court went on to consider the merits of the dispute.³²

Chief Justice Rehnquist concurred in part and dissented in part.³³ Chief Justice Rehnquist focused on the asymmetry in the majority’s rule, noting that there would be no case or controversy if the plaintiffs had lost in the state courts.³⁴ Though “the state-court judgment adverse to petitioners” could be thought of as “a form of ‘injury’ which supplies Article III standing,” the problem had always been the lack of injury to the plaintiff-respondents, not the defendant-petitioners.³⁵

Justice Kennedy’s approach is best understood as a recognition that Arizona’s court system effectively combines two bodies: a traditional court with jurisdiction limited to cases or controversies and an administrative agency that can receive complaints from citizens and act against regulated entities.

This analogy dispenses with critiques of *ASARCO* based on its asymmetry.³⁶ In *ASARCO*, the Arizona Supreme Court was acting as a state administrative agency, and the controversy began when that agency acted against ASARCO; while the “agency” admittedly did not appear before the federal court in *ASARCO*, its interests were represented by the proponents who had urged it to act. By contrast, the Arizona Supreme Court’s previous consideration of complaints against ASARCO did not qualify, just as an agency’s consideration of proposals from proponents of action would not

30. *Id.* at 623–24.

31. *Id.* at 618–19.

32. *Id.* at 633.

33. Justice Scalia joined Chief Justice Rehnquist’s opinion.

34. *ASARCO*, 490 U.S. at 634 (Rehnquist, C.J., dissenting).

35. *Id.* at 634–35.

36. Scholarly criticism also focused on the asymmetry and its implications. See William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 281 (1990).

qualify. A decision in ASARCO's favor would not have qualified, just as an agency's decision not to act would not qualify.

In sum, Justice Kennedy affirmed Arizona's right to assign its courts powers normally assigned to agencies: "[T]he state judiciary here chose a different path, *as was their right*, and took no account of federal standing rules"³⁷ And he accepted the state judiciary's decision on its own terms. If the Arizona Supreme Court's decision was forced into the same category as a state agency's decision, the case should have begun in federal district court instead of an appeal to the United States Supreme Court.³⁸ But Justice Kennedy's support for Arizona's structural innovation drove him to accept the Arizona Supreme Court's decision as a judicial decision rendered by the state's highest court,³⁹ just as support for structural innovation drove the *Arizona State Legislature* majority to accept a congressional map drawn by an independent commission as a legitimate use of legislative power.

III. THE EXECUTIVE: *HOLLINGSWORTH V. PERRY*

Article II of the United States Constitution vests "executive power" in the President. A permissive approach to standing that allowed private individuals outside the President's control to assert law enforcement interests would arguably dilute this grant of power.⁴⁰ The Constitution does not forbid different approaches to state executives—at the framing, not all states had a unitary executive, and several states continue to divide executive power by separately electing attorneys general. But in *Hollingsworth v. Perry*, a Supreme Court majority applied federal intuitions to a distinctive state structure. The result was a clear departure from the deference shown in *ASARCO* and *Arizona State Legislature*.

In 2008, the California Supreme Court struck down a ban on gay marriage on the ground that it violated the state constitution.⁴¹ California voters then adopted a ballot initiative called Proposition 8, which amended the

37. *ASARCO*, 490 U.S. at 617 (emphasis added).

38. *Id.* at 620.

39. *Id.* at 622–23.

40. *See* *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009).

41. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

state constitution to forbid official recognition of gay marriage.⁴² Two couples brought suit in federal court against state and local officials, alleging that Proposition 8 violated the Fourteenth Amendment.⁴³ After the challengers prevailed in the district court, the state and local officials declined to appeal.⁴⁴ Instead, an appeal was pursued by Proposition 8's "official proponents," private individuals who had shepherded the measure through the ballot initiative process.⁴⁵

The Ninth Circuit certified a question to the California Supreme Court asking whether the proponents had a particularized interest in the litigation.⁴⁶ In response, the California Supreme Court explained that the proponents were authorized to "assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so."⁴⁷ Relying on this answer, the Ninth Circuit concluded that the proponents had standing, considered the case on the merits, and upheld the district court's decision.⁴⁸ The official proponents appealed to the Supreme Court.⁴⁹

The Supreme Court vacated and remanded. Writing for the Court, Chief Justice Roberts⁵⁰ concluded that the proponents' role in the initiative process did not give them a special interest in the outcome, because the role ended once Proposition 8 was approved by the voters.⁵¹

Chief Justice Roberts then turned to whether the proponents could assert California's interests on the State's behalf.⁵² The Chief Justice concluded that they could not, because they could not be characterized as agents of the California government: they "answer to no one; they decide for themselves, with no review, what arguments to make and how to make them"; "they are not elected at regular intervals—or elected at all"; and they are not bound by special ethical obligations to the people of California.⁵³ Chief Justice

42. *Id.*

43. *Id.* at 2660.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (quoting *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011)).

48. *Id.*

49. *Id.* at 2661.

50. Chief Justice Roberts was joined by Justices Scalia, Ginsburg, Breyer, and Kagan.

51. *Hollingsworth*, 133 S. Ct. at 2662–63.

52. *Id.* at 2663.

53. *Id.* at 2666–67.

Roberts recognized that California law had authorized the proponents to proceed in order to protect its initiative process, but he concluded that the issue was ultimately one of federal law.⁵⁴

Justice Kennedy dissented.⁵⁵ He noted that “[u]nder California law, a proponent has the authority to appear in court and assert the State’s interest in defending an enacted initiative when the public officials charged with that duty refuse to do so.”⁵⁶ To Justice Kennedy, these state law points were determinative of the question before the Court. Justice Kennedy urged that the majority’s analogy to the law of agency was inapt⁵⁷ and inconsistent with precedent.⁵⁸ More fundamentally, Justice Kennedy asserted that the majority’s approach would empower California’s governor and attorney general at the expense of the people, who had authorized others to act under California law.⁵⁹ The majority had failed to “grasp or accept” the initiative process, a structure that the people of California had used to exercise “their own inherent sovereign right to govern themselves.”⁶⁰

As with *ASARCO*, Justice Kennedy’s respect for states’ authority to restructure their governments led him to encourage acceptance of state decisions on their own terms. This approach was rooted in respect for California’s right to restructure its government and delegate executive power, even though that delegation weakened the California executive in a manner that would not have been consistent with the federal structural principles regarding the federal executive.

But, of course, Justice Kennedy was writing in dissent, and his position on state structural flexibility was rejected by an unusual coalition of justices from the Court’s left and right wings. It is difficult to avoid the sense that the structural issue was tangled in the merits of *Hollingsworth*, though much turns on the nature of the entanglement.

The state structural flexibility issue may have interacted with the merits on a deep level. *Hollingsworth* put executive discretion in its best possible light, showcasing the idea that executive refusal to support an unjust law

54. *Id.* at 2667.

55. Justice Kennedy’s dissent was joined by Justices Thomas, Alito, and Sotomayor.

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

57. *Id.* at 2670–72.

58. *Id.* at 2672–74.

59. *Id.* at 2671.

60. *Id.* at 2675.

could defend the rights of a minority. Members of the Court have emphasized the importance of executive discretion to the constitutional scheme,⁶¹ and *Hollingsworth* may have been an opportunity to assert that value. Understood in this way, *Hollingsworth* may mark a distinction between legislative and judicial power, which are flexible, and executive power, which is more difficult for the people to exercise directly or delegate to entities outside the state government.

But it is also possible that the interaction occurred at a relatively superficial level. Liberal justices may have seen the issue as an opportunity to exercise the “passive virtues”⁶² and put off consideration of the constitutionality of limitations on gay marriage so that progress in the democratic arena could continue.⁶³ On this account, *Hollingsworth* was just a brief detour on the road to *Obergefell v. Hodges*,⁶⁴ which decisively struck down gay marriage bans just two years later, and *Hollingsworth*’s holding on state structural flexibility is unlikely to endure.

CONCLUSION

The Constitution has relatively little to say about the structure of state governments. Justice Kennedy has been a leading champion of the resulting state authority to employ alternative structures. In *ASARCO*, his opinion for the Court endorsed an alternative approach to structuring a judiciary, and in *Arizona State Legislature*, he joined a majority in endorsing an alternative approach to the legislative process. While his similar views on state executive power failed to attract a majority in *Hollingsworth*, the case may be a temporary setback for state structural flexibility.

61. See *Herrera v. Collins*, 506 U.S. 390, 415–17 (1993) (suggesting that habeas relief is not required for actual innocence claims because of historically rooted state mechanisms for executive clemency); *Morrison v. Olson*, 487 U.S. 654, 727–29 (1988) (Scalia, J., dissenting) (urging that prosecutorial discretion must be vested in an executive politically accountable to the people to avoid oppression).

62. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 111 (2d ed. 1986).

63. Justice Kennedy himself appeared to suggest as much. See *Hollingsworth*, 133 S. Ct. at 2674 (Kennedy, J. dissenting).

64. 135 S. Ct. 2584 (2015).