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**EXACERBATING THE DIVIDE: WHY THE  
ROBERTS COURT'S RECENT SAME-SEX  
JURISPRUDENCE IS AN IMPROVIDENT  
USE OF THE COURT'S JUDICIAL REVIEW  
POWERS**

Akram Faizer

## ESSAY

### EXACERBATING THE DIVIDE: WHY THE ROBERTS COURT'S RECENT SAME-SEX JURISPRUDENCE IS AN IMPROVIDENT USE OF THE COURT'S JUDICIAL REVIEW POWERS

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#### I. INTRODUCTION

In *United States v. Windsor*<sup>1</sup> and *Hollingsworth v. Perry*,<sup>2</sup> the Roberts Court issued two decisions in the area of same-sex marriage that clearly favored pro-lesbian, gay, bi-sexual, or transgendered (LGBT) plaintiffs, who challenged the constitutionality of Section 3 of the federal Defense of Marriage Act (DOMA) and California's Proposition 8 ballot initiative, respectively.<sup>3</sup> Both decisions were hailed in the liberal media as major advances for LGBT rights, while the reaction from conservatives was altogether muted, if not supportive. For example, Adam Liptak of the *New York Times* lauded the decision as "a pair of major victories for the gay rights movement," while the

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1. *United States v. Windsor*, 133 S. Ct. 2675 (2013); *United States v. Windsor* (*Windsor I*), 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (Dec. 7, 2012).

2. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as 1 U.S.C. § 7).

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

conservative public intellectual and *Washington Post* columnist, George F. Will, said “quite literally, the opposition to gay marriage is dying out.”<sup>4</sup> Although the immediate judicial outcome of the Court’s decisions in *Windsor* and *Hollingsworth* favored LGBT rights, the Court’s decisions should not solely be evaluated according to their apparent desirability. Instead, these decisions should also be evaluated according to their institutional legitimacy, their jurisprudence soundness, and finally, the manner in which these decisions will affect and interact with both U.S. government and society. When evaluated in this manner, the Court’s decisions are a problematic use of judicial review because they risk precipitating a backlash against LGBT rights and further limiting access to courts in a country with pronounced socio-economic cleavages. In short, the decisions exacerbate, rather than bridge, the nation’s divides.

## II. WINDSOR’S TENUOUS LOGIC WILL REQUIRE A PROBLEMATIC REVERSAL OF MARRIAGE LAWS NATIONWIDE

In *Windsor*, the Roberts Court issued a decision on the constitutionality of a DOMA provision that ostensibly has no direct effect on states that limit marriage to opposite-sex couples. However, the decision’s tenuous logic will most likely mandate same-sex marriage nationwide.

*Windsor* involved a constitutional challenge to DOMA’s Section 3, which denied federal marriage and survivor benefits to married same-sex couples because it defined marriage as solely between opposite-sex couples.<sup>5</sup> The plaintiff Edith Windsor, a New York resident whose same sex marriage was legal under New York law, brought suit seeking a refund of \$363,053 in federal estate taxes paid by her deceased spouse’s estate because DOMA denied marital estate tax exemptions to surviving same sex spouses.<sup>6</sup> The U.S. Attorney General, Eric Holder, sided with the plaintiff and advised the lower court that the United States believed the law to be unconstitutional and would not defend the law in court.<sup>7</sup> The law was accordingly defended by the House of Representatives’ Bipartisan Legal Advisory Group (BLAG).<sup>8</sup> Windsor’s summary

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4. Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES, June 26, 2013, available at [http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all&_r=0); George Will, *Quite Literally, The Opposition to Gay Marriage is Dying*, ABCNEWS.COM (Dec. 9, 2012), <http://abcnews.go.com/blogs/politics/2012/12/george-will-quite-literally-the-opposition-to-gay-marriage-is-dying>.

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

6. *Id.*

7. *Id.* at 2683–84.

8. *Id.*

judgment motion was granted by the U.S. District Court for the Southern District of New York and affirmed by the U.S. Court of Appeals for the Second Circuit.<sup>9</sup> On December 7, 2012, the U.S. Supreme Court granted the U.S. Justice Department's petition for a writ of certiorari.<sup>10</sup> Oral argument was heard on March 27, 2013.<sup>11</sup>

Justice Kennedy's majority opinion affirmed the lower courts and concluded that DOMA's Section 3 was unconstitutional because it denied federal benefits to same-sex couples who were married and living in states where gay marriage was legal.<sup>12</sup> The Court in effect concluded that in providing federal marriage benefits, the federal government must "piggy back" on a state's marriage definition.<sup>13</sup>

This holding would be coherent if it were based on the U.S. Constitution's Tenth Amendment, which confirms that states have residual police powers in our federalist system of government and that "the several States," not the federal government, have the authority to define marriage.<sup>14</sup> The Court, however, did not do so, potentially because the liberal justices who joined Justice Kennedy's decision are, for historical reasons, loath to jurisprudentially expand the Tenth Amendment's scope.<sup>15</sup> The Court instead concluded that DOMA's Section 3 was unconstitutional because it violated the Fifth Amendment's Due Process Clause, which requires, among other things, that the federal government grant all Americans the equal protection of the law.<sup>16</sup> Justice Kennedy writes:

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those

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9. *Windsor I*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (Dec. 7, 2012).

10. *Windsor*, 133 S. Ct. at 696.

11. *Windsor I*, 699 F.3d at 169.

12. *See Windsor*, 133 S. Ct. 2675.

13. *Id.* at 2681.

14. U.S. CONST. amend. X. The Tenth Amendment provides, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

15. *Id.*

16. *Windsor*, 133 S. Ct. at 2695–96.

whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. *This opinion and its holding are confined to those lawful marriages.*<sup>17</sup>

This rationale is contradictory. How is the federal government's duty to recognize same-sex marriages limited only to couples who were both married and are currently living in states that have legalized same-sex marriage? Would the equal protection rationale not require the federal government to recognize same-sex marriages entered into in states where same-sex marriage is legal that have since relocated to states where it is illegal? What about same-sex couples that want to marry in states where same-sex marriage is illegal?

*Washington Post* columnist and public intellectual Charles Krauthammer, noting this contradiction, writes:

Why should equal protection apply only in states that recognize gay marriage? Why doesn't it apply equally — indeed, even perhaps more forcefully — to gays who want to marry in states that refuse to marry them? If discriminating (regarding federal benefits) between a gay couple and a straight couple is prohibited in New York where gay marriage is legal, *by what logic is discrimination permitted in Texas, where a gay couple is prevented from marrying in the first place?*<sup>18</sup>

While the Court's holding might make sense if it were based on the Tenth Amendment, its reliance on equal protection strengthens the argument of those like Justice Scalia, who, in dissent, sets forth the decision as an illogical judicial diktat.<sup>19</sup>

It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court's holding is its sense

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17. *Id.* (emphasis added).

18. Charles Krauthammer, *Nationalized Gay Marriage, Now Inevitable*, WASH. POST, June 27, 2013, [http://www.washingtonpost.com/2013-06-27/opinions/40233030\\_1\\_gay-marriage-state-abortion-law-doma](http://www.washingtonpost.com/2013-06-27/opinions/40233030_1_gay-marriage-state-abortion-law-doma) (emphasis added).

19. *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

of what it can get away with.<sup>20</sup>

Justice Scalia argues that the decision's logic means nothing less than the eventual reversal of all laws limiting marriage to opposite-sex couples.<sup>21</sup> Indeed, he states the Court would have been more honest if it had explicitly done so. He writes:

Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.<sup>22</sup>

The *Windsor* majority invalidated DOMA's Section 3 in an apparent nod towards federalist principles. The problem is that the Court did so by way of the Fifth Amendment's Due Process Clause and therefore made the decision jurisprudentially unsound and underinclusive. Justice Scalia is indeed correct that the *Windsor* holding is destabilized by a volatile equal protection rationale that could undermine the legality of state marriage laws nationwide.

By way of example, *Windsor* did not adjudicate the constitutionality of DOMA's Section 2, which provides that no jurisdiction need recognize a same-sex marriage entered into in another state that has legalized these marriages.<sup>23</sup> However, section 2's constitutionality is rendered untenable by *Windsor*. On July 22, 2013, the United States District Court for the Southern District of Ohio used the Court's equal protection rationale in *Windsor* to enjoin application of a provision in Ohio's marriage law that refuses to recognize same-sex marriages entered into in states that permit these marriages.<sup>24</sup> Should this decision be affirmed by the Sixth Circuit Court of Appeals, same-sex marriage will, by way of the federal courts, be constitutionally mandated in the conservative states that comprise the Sixth Circuit because of the U.S. Constitution's Supremacy Clause.<sup>25</sup> Since the *Windsor* decision as

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20. *Id.*

21. *Id.* at 2710.

22. *Id.* at 2711.

23. *Id.*

24. See *Obergefell v. Kasich*, No. 1:13-cv-501, slip op. at 2013 WL 3814262 (S.D. Ohio July 22, 2013).

25. U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, Thing in the Constitution or Laws

promulgated, federal district courts in Ohio, Virginia, Utah, Oklahoma, Texas, Kentucky, and Tennessee have all cited *Windsor*'s equal protection rationale to invalidate or adumbrate the invalidation of these states' opposite-sex only marriage laws.<sup>26</sup>

Is this a good result? Not necessarily. As set forth above, George F. Will has said, opposition to same-sex marriage, is, for demographic reasons, literally "dying out."<sup>27</sup> The former *New York Times* blogger, Nate Silver, has used the trajectory of public opinion polls to estimate that voters in 44 states will be in support of gay marriage by the year 2020.<sup>28</sup> The risk is the reasoning used in the Court's decision to invalidate DOMA's Section 3 will lead to a judicially-mandated result that prompts a harmful backlash against same-sex couples and LGBT rights.<sup>29</sup> Justice Ginsberg, leader of the Court's liberal block of justices, made this argument with respect to abortion rights when she said the Court prematurely politicized the issue by nationalizing a woman's individual right to abort her pregnancy in *Roe v. Wade*,<sup>30</sup> notwithstanding the fact that states had begun to liberalize their abortion laws.<sup>31</sup> The Court's inconsistent use of equal protection jurisprudence to invalidate DOMA's Section 3 will hopefully not redound to the detriment of those whose rights the decision seeks to advance.<sup>32</sup>

The Court's *Windsor* decision was lauded because it resulted in the invalidation of a key provision of an altogether execrable piece of federal legislation.<sup>33</sup> Had the Court invalidated DOMA's Section 3 on

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of any State to the Contrary notwithstanding.

*Id.*

26. *Ogerbefell v. WYMYSLO*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Bostic v. Rainey*, 2014 WL 561978 (E.D. Va. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *De Leon v. Perry*, 2014 WL 715741 (W.D. Tex. 2014); *Bourke v. Beshear*, 2014 WL 556729 (W.D. Ky. 2014); *Tanco v. Haslam*, 2014 WL 997525 (M.D. Tenn. 2014). Similarly, state courts have invalidated state opposite-sex only marriage laws in New Jersey and New Mexico. *Garden State Equal. v. Dow* (N.J. Sup. Ct. 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013).

27. Rebecca Shapiro, *George Will: "Quite Literally, The Opposition to Gay Marriage is Dying"* (VIDEO), HUFFINGTON POST (Dec. 9, 2012, 12:07 PM), [http://www.huffingtonpost.com/2012/12/09/george-will-opposition-gay-marriage-dying\\_n\\_2267475.html?](http://www.huffingtonpost.com/2012/12/09/george-will-opposition-gay-marriage-dying_n_2267475.html?)

28. Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What it Means*, N.Y. TIMES (Mar. 26, 2013, 10:10 AM), <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/>.

29. *See Windsor*, 133 S. Ct. at 2675.

30. *Roe v. Wade*, 410 U.S. 113 (1973).

31. Lincoln Caplan, *Ginsburg's Roe v. Wade Blind Spot*, NYTIMES.COM (May 13, 2013, 2:58 PM), <http://takingnote.blogs.nytimes.com/2013/05/13/ginsburgs-roe-v-wade-blindspot>.

32. *Windsor*, 133 S. Ct. at 2705–06 (Scalia, J., dissenting).

33. *Id.* at 2695.

Federalist principles confirmed by the Tenth Amendment, the decision would have consistently and effectively limited its holding only to states that have legalized same-sex marriage. The Court's failure to do so and use of the equal protection rationale to invalidate the law instead will most likely result in the invalidation of all state laws and state constitutional amendments that limit marriage to opposite-sex couples. This result will needlessly further politicize the issue of same-sex marriage and further delegitimize the Court among many conservatives and individuals who espouse a traditional view of marriage. Even from the perspective of an LGBT rights advocate, this is a parlous result because nationwide public opinion is moving strongly toward recognition of same-sex marriage rights. The Court's intervention into the same-sex marriage debate jeopardizes the progress made toward LGBT rights by risking such a backlash. *Windsor*, in short, was an ill-timed and poorly-reasoned application of the Court's judicial review power.

### III. THE COURT'S DECISION IN *HOLLINGSWORTH* WILL IMPROPERLY LIMIT COURT ACCESS FOR MANY AMERICANS

*Hollingsworth v. Perry* involved the constitutionality of California's ballot initiative<sup>34</sup> known as Proposition 8, which in 2008 amended the California Constitution to prohibit same-sex marriages.<sup>35</sup> The ballot initiative passed by a 52%–48% margin and followed a California Supreme Court decision that concluded that California's previous marriage law, which limited marriage to opposite-sex couples, violated the Equal Protection Clause of the California Constitution.<sup>36</sup>

Respondents, two same-sex couples, brought suit in the U.S. District Court for the Northern District of California against the Governor, Attorney General, and other California marriage-enforcing officials challenging the constitutionality of Proposition 8 under the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>37</sup> The named defendants refused to defend the law and the District Court allowed the Petitioners, the proposition's official proponents, to defend the law in federal court.<sup>38</sup> The District Court concluded Proposition 8 violated the

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

35. CAL. CONST. art. I, § 7.5 (defining Proposition 8 as “[o]nly marriage between a man and a woman is valid or recognized in California.”).

36. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); see also *California Results*, L.A. TIMES, <http://www.latimes.com/news/local/la-2008election-california-results,0,3304898.htmlstory> (last visited Oct. 12, 2013).

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

38. *Id.*

U.S. Constitution and the defendants chose not to appeal the decision to the Ninth Circuit Court of Appeals.<sup>39</sup> The Ninth Circuit certified a question to the California Supreme Court as to whether petitioners, as proponents of Proposition 8, had standing under California law to appeal the lower court's decision.<sup>40</sup> After the California Supreme Court concluded that petitioners had standing under California law, the Ninth Circuit concluded that petitioners had standing under Article III of the U.S. Constitution to defend Proposition 8 because California, as an independent sovereign, can determine who defends its laws.<sup>41</sup> The Ninth Circuit writes: "All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm."<sup>42</sup>

With regard to the case's substantive component, the Ninth Circuit, relying on *Romer v. Evans*,<sup>43</sup> affirmed the district court, which concluded the Fourteenth Amendment's Equal Protection Clause required a state to have a legitimate public policy reason to withdraw a right from a group within its population.<sup>44</sup> Because the California Supreme Court's decision of 2008 gave same-sex couples the right to marry in California for a limited time until Proposition 8 went into effect, the lower courts interpreted Proposition 8 as a state constitutional amendment that illegally took a right away from same-sex couples, while not affecting opposite-sex couples.<sup>45</sup> The Ninth Circuit, affirming the district court, writes:

taking away the official designation of "marriage" from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage, did not further any legitimate interest of the State. Proposition 8, in the court's view, violated the Equal Protection Clause because it served no purpose "but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships."<sup>46</sup>

Certiorari was granted by the U.S. Supreme Court and the parties were asked whether Petitioners had standing to appeal the district

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39. *Id.*

40. *Id.* (internal quotation marks omitted) (quoting *Perry v. Brown*, 671 F.3d 1052, 1072 (9th Cir. 2012)).

41. *Id.*

42. *Id.*

43. *Romer v. Evans*, 517 U.S. 620 (1996).

44. *Hollingsworth*, 133 S. Ct. at 2660–61.

45. *Perry*, 671 F.3d at 1096; *Hollingsworth*, 133 S. Ct. at 2661.

46. *Hollingsworth*, 133 S. Ct. at 2661 (quoting *Perry*, 671 F.3d at 1095–96).

court's decision and order in Respondents' favor.<sup>47</sup>

Chief Justice Roberts' majority decision did not consider any of the case's substantive legal issues.<sup>48</sup> Rather, he seized upon an ostensible textual limitation imposed upon federal courts to hear cases and dismiss them on standing grounds. The U.S. Constitution, Article III, § 2 provides, in relevant part, that the Court's "Judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution . . . [and] Controversies . . . [.]"<sup>49</sup> Interpreting this provision, the Chief Justice writes:

Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." § 2. 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.<sup>50</sup>

Applying this rule to *Hollingsworth*, he writes:

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a "personal and individual way." He must possess a "direct stake in the outcome" of the case. Here, however, petitioners had no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.<sup>51</sup>

The Chief Justice concluded that Petitioners lacked standing under Article III of the U.S. Constitution because they were in no worse position than other citizens who opposed same-sex marriage and therefore had no cognizable injury for standing purposes.<sup>52</sup> With regard to the fact that California specifically allowed Petitioners, as

47. *Id.*

48. *Id.* at 2661-63.

49. U.S. CONST. art. III, § 2, cl. 1.

50. *Hollingsworth*, 133 S. Ct. at 2661 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

51. *Id.* at 2662 (quoting *Lujan*, 504 U.S. at 560 n.1; *Arizonians for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

52. *Id.*

Proposition 8's proponents, to appeal the district court's decision, the Chief Justice writes:

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.<sup>53</sup>

The Chief Justice set forth that because Petitioners neither answered to nor had any ethical or fiduciary obligations to anyone, they could not claim standing as the State of California's agents.<sup>54</sup> He writes: "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."<sup>55</sup> He concludes:

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.<sup>56</sup>

Is this the correct result? Justice Kennedy, whose dissent posits that the Court should have taken consideration of California state law in its standing determination, writes:

Under California law, a proponent has the authority to appear in

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53. *Id.* at 2666 (citations omitted) (quoting *Arizonians*, 520 U.S. at 65; Perry v. Schwartzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011)).

54. *Id.* at 2667.

55. *Id.* at 2668.

56. *Id.*

court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty refuse to do so. The State deems such an appearance essential to the integrity of its initiative process. Yet the Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the State Supreme Court's definition of proponents' powers is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.<sup>57</sup>

According to Justice Kennedy, to focus on agency theory in order to deny petitioners Article III standing is to completely disregard California's voter initiative paradigm that is specifically designed to remedy a situation where elected executive officials, for political reasons, refuse to defend the constitutionality of state ballot initiatives in court.<sup>58</sup> Justice Kennedy writes:

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." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). 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.<sup>59</sup>

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57. *Id.* (Kennedy, J., dissenting).

58. *Id.*

59. *Id.* at 2675 (Kennedy, J., dissenting).

Justice Kennedy's dissent explains that this is especially so in situations such as *Hollingsworth*, where the standing issue was prompted by a federal court's decision to invalidate the law.<sup>60</sup> He writes:

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.

The Court's opinion disrespects and disparages both the political process in California and the well-stated opinion of the California Supreme Court in this case. The California Supreme Court, not this Court, expresses concern for vigorous representation; the California Supreme Court, not this Court, recognizes the necessity to avoid conflicts of interest; the California Supreme Court, not this Court, comprehends the real interest at stake in this litigation and identifies the most proper party to defend that interest. The California Supreme Court's opinion reflects a better understanding of the dynamics and principles of Article III than does this Court's opinion.<sup>61</sup>

It is clear that Petitioners were damaged, for Article III purposes, by the district court's ruling because, unlike other California citizens, they played an altogether unique role in the ballot-initiative process.<sup>62</sup> Justice Kennedy writes:

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

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60. *Id.* at 2674 (Kennedy, J., dissenting).

61. *Id.*

62. *Id.* at 2669 (Kennedy, J., dissenting).

zealous advocacy.<sup>63</sup>

The Chief Justice's decision was hailed by many on the liberal left side of the political culture because it ensured that same-sex marriage remained constitutionally mandated in California, which is the largest and most economically important state in the United States, as measured by population and economic output, respectively.<sup>64</sup> By dismissing the case on standing grounds, however, the Chief Justice enabled the Court to avoid adjudicating the constitutionality of state marriage laws that limit marriage to opposite-sex couples. Perhaps his motivation in doing so was to avoid having the Court wade into the issue of gay marriage rights when the legality of gay marriage is front and center in the political culture. This rationale, however, would have been satisfied by a holding that certiorari was improvidently granted. Such a holding would have left the Ninth Circuit's decision in place and signaled to both the public and political cultures that the matter should not be reviewed and instead left to the individual states. However, this rationale was already upended by the flimsy logic used in Justice Kennedy's decision in *Windsor*, which will likely result in judicially mandated same-sex marriage nationwide. Moreover, this approach would not have furthered the Chief Justice's standing-limiting jurisprudence. Why might the Chief Justice have chosen to issue a decision that denied Petitioners standing to appeal rather than hold that certiorari was improvidently granted? Perhaps there was not a fifth vote for the latter proposition. More likely, by issuing a decision that substantially limited a litigant's standing to sue in federal court, the Chief Justice furthered his jurisprudentially conservative goals.

Until *Hollingsworth*, the Court's standing-limiting jurisprudence was best enunciated in *Lujan v. Defenders of Wildlife*.<sup>65</sup> *Lujan* was a public interest suit brought by two plaintiffs who objected to a joint regulation promulgated by the Secretaries of the Interior and Commerce. This regulation limited, for agency funding purposes, the geographic scope of the U.S. Endangered Species Act to the territorial United States and the high seas. Plaintiffs' objection to U.S. agency funding for international development projects, which would ostensibly have harmful effects on adjacent wildlife and ecosystems, was dismissed for lack of Article III standing because plaintiffs were unable to allege the following: (1) an actual or imminent concrete and particularized injury;

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63. *Id.*

64. U.S. Department of Commerce, State and County Quickfacts, California, at <http://quickfacts.census.gov/qfd/states/06000.html>; Government Revenue Details, California State and Local Taxes for 2010, [http://www.usgovernmentrevenue.com/California\\_state\\_revenue\\_2010](http://www.usgovernmentrevenue.com/California_state_revenue_2010).

65. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

(2) that is caused by the defendant's actions; and (3) will be redressed by a favorable judicial outcome. Justice Scalia's opinion concluded they lacked standing because they could neither demonstrate any injury caused by the Agency regulation nor redressability should a court rule in their favor.<sup>66</sup>

Justice Scalia focused on the fact that Article III requires federal plaintiffs to demonstrate an injury to an individual right as opposed to a public right that has been legislatively pronounced to apply to all members of the public.<sup>67</sup> The governing law with respect to Article III standing, however, was enunciated in Justice Kennedy's concurring opinion, which concluded that the two public interest plaintiffs might have been able to demonstrate an injury-in-fact if they had already made definite plans to visit the affected international areas.<sup>68</sup> As such, although the *Lujan* case greatly circumscribed a public interest plaintiff's right to sue in federal court, Justice Kennedy's concurring opinion left an open window for public interest plaintiffs by concluding that procedural devices, such as the purchase of an airline ticket to visit a threatened ecosystem, may confer sufficient injury upon a public interest plaintiff for Article III standing purposes.<sup>69</sup>

Needless to say, the Chief Justice's decision in *Hollingsworth* has, going forward, shut this procedural window. Fortuitously for him, this allowed the Court to avoid adjudicating the politically divisive issue of state marriage laws while furthering his jurisprudentially conservative goals. Why would limiting Article III standing be conservative? The prominent author and legal analyst, Jeffrey Toobin, writes that the Chief Justice "had spent decades thinking about how to throw plaintiffs in civil cases out of court—the faster, the better. Civil procedure, so dreary even to most lawyers, was for [current Chief Justice] Roberts the surest route to victory for his political side."<sup>70</sup> The reason imposing procedural roadblocks has a conservative bias is the economics of U.S. civil jurisprudence. Toobin writes:

The real-world implications of these procedural roadblocks were clear. With so many barriers at every stage of the process, plaintiffs' lawyers hesitated before filing new cases, or did not bring them at all. The costs and risks were too high, [Legislative efforts at tort reform, like limits on punitive damages, compounded the difficulties for plaintiffs]. If claims could never

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66. *Id.* at 558–61; 563–78; *see also* 16 U.S.C. § 1531 (2012).

67. *Id.* at 577–78.

68. *Id.* at 579 (Kennedy, J., concurring).

69. *Id.*

70. JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 74 (2012).

get to trial because of procedural barriers, there would be fewer cases brought in the first place. This was especially true in civil rights cases—in “public law” cases, in [Harvard Law School Professor Abram] Chayes’s phrase—because these ambitious undertakings had the greatest procedural vulnerabilities. The defense bar understood these economic realities and, with a sympathetic judiciary, pushed to capitalize on its advantages. As a lawyer and judge, Roberts was more skilled at this kind of work than anyone.<sup>71</sup>

In *National Federation of Independent Business v. Sebelius*,<sup>72</sup> the Chief Justice obtained the liberal segment of the political culture’s acquiescence in a decision that greatly narrowed the scope of congressional legislative power under the Commerce Clause. He was able to do so because his decision allowed the Patient Protection and Affordable Care Act to survive judicial review. He similarly obtained this same constituency’s support for a decision that will make it more difficult for individual plaintiffs to access federal courts because his decision resulted in a constitutional-mandate for same-sex marriage in the nation’s most populous state.

This is a problematic result for a country that suffers from a very weak economy in which low labor productivity growth, staggeringly high levels of income and wealth inequality, stagnant middle class and working class wages, low labor force participation rates, and chronically high unemployment have become the new normal.<sup>73</sup> Poorer Americans and visible minorities have historically been able to access the courts by way of trial lawyers who accept representation on a contingency fee basis. Such representation will, most likely, be less forthcoming if courts, based on the Chief Justice’s decision, become more inclined to dismiss cases on technical grounds. The regressive nature of standing-limiting jurisprudence was demonstrated in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,<sup>74</sup> where the Roberts Court dismissed, on standing grounds, the plaintiff’s sex discrimination claim against her employer because the alleged discriminatory pay decisions made by the company were beyond the 180-day limitation period of Title VII of the Civil Rights Act of 1964.<sup>75</sup> Justice Alito’s decision concluded that Ledbetter

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71. *Id.*

72. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

73. CIA World Factbook Website, at <https://www.cia.gov/library/publications/the-world-factbook/>; David Leonhardt & Kevin Quealy, *The American Middle Class is no Longer the World’s Richest*, NYTIMES.COM (Apr. 22, 2014), at [http://www.nytimes.com/2014/04/23/upshot/the-american-middle-class-is-no-longer-the-worlds-richest.html?\\_r=0](http://www.nytimes.com/2014/04/23/upshot/the-american-middle-class-is-no-longer-the-worlds-richest.html?_r=0).

74. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

75. *Id.* at 621–23.

untimely filed suit with the Equal Employment Opportunity Commission (EEOC) even though she never knew of her unequal pay treatment at the time the limitation period had elapsed.<sup>76</sup> Based largely on a dissent by Justice Ginsburg, which was unusually read from the bench, Congress enacted the first piece of legislation signed into law by President Obama, the Lilly Ledbetter Fair Pay Act of 2009, which revised the civil rights law to read that if a present act of discriminatory pay is related to discrimination that took place outside the 180-day limitation period, the prior act can be incorporated into the claim.<sup>77</sup> Needless to say, congressional interventions of this type are highly atypical and implausible in the divided government paradigm that characterizes today's Washington. Toobin writes:

The Ledbetter case reflected the practical impediments to plaintiffs in civil rights cases. She initiated the case in 1998, and the Supreme Court decided it nine years later. As with most plaintiffs, her lawyers worked for a contingency fee, which meant they earned nothing on the case for nearly a decade (or, as it turned out, ever). Not many lawyers are willing to take such risks. Indeed, Ledbetter's case only reached the Supreme Court because after her loss in the Eleventh Circuit, her original lawyers brought the case to the Supreme Court Litigation Clinic at Stanford Law School. There, the teachers and students agreed to represent Ledbetter for free.<sup>78</sup>

Using the standing doctrine and other technicalities to dispose of cases in a manner favorable to corporate interests is clearly in line with the Chief Justice's conservative jurisprudence and politics. Is this in the country's best interest? Conservatives such as the academic historian Niall Ferguson posit that the United States suffers from too much regulation and litigiousness, which hinders U.S. competitiveness.<sup>79</sup> With that said, it is liberals who have lauded the Chief Justice's decision that will make the legal system less accessible to individual Americans and provide federal courts with fewer opportunities to enforce rights and entitlements related to employment and public policy. This is a problematic result for a country that prides itself on being governed by the rule of law.

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76. *Id.* at 621.

77. Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e (2012).

78. TOOBIN, *supra* note 70, at 76.

79. Niall Ferguson, *How America Lost Its Way*, WALL ST. J. (June 7, 2013, 7:02 PM), <http://online.wsj.com/article/SB10001424127887324798904578527552326836118.html>.

#### IV. CONCLUSION

The Roberts Court's recent jurisprudence in the area of gay marriage evidences a self-contradictory libertarian, federalist, and conservative jurisprudence that will most likely be harmful to U.S. society. The *Windsor* and *Hollingsworth* decisions were very popular with liberal pundits because they resulted in the invalidation of DOMA's Section 3 and created a constitutional-mandate for same-sex marriage in the nation's most populous and economically most important state. For example, in the August 2013 issue of *New York Review of Books*, David Cole writes:

Together, these decisions are a consummate act of judicial statesmanship. They extend federal benefits to all same-sex married couples in states that recognize gay marriage, expand the number of states recognizing gay marriage to thirteen, yet leave open for the time being the ultimate issue of state power to limit marriage to the union of a man and woman. The Court took a significant step toward recognition of the equality rights of gays and lesbians. But by not imposing same-sex marriage on the three quarters of the states whose laws still forbid it, the Court has allowed the issue to develop further through the political process—where its trajectory is all but inevitable.<sup>80</sup>

In *Windsor*, however, the Court's failure to base its invalidation of DOMA's Section 3 on Federalist principles alone and instead rely on a self-contradictory application of the equal protection component of the Fifth Amendment's Due Process Clause, will, notwithstanding the fact that the vast majority of U.S. states are currently in the process of legislatively liberalizing their marriage laws, most likely lead to judicially-mandated same sex marriage nationwide. This risks causing a backlash against LGBT rights among traumatized citizens who are prone to be exploited by demagogues in a politically divisive environment that is coping with the effects of two failed wars and a parlous economy.

In *Hollingsworth*, the Chief Justice's decision resulted in a constitutional-mandate for same-sex marriage in the nation's most populous and politically important state. However, his narrow interpretation of Article III standing that led to the case's dismissal will render the U.S. legal system even less accessible to the majority of Americans. This is a problematic result for a country with an atypically

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80. David Cole, *Equality and the Roberts Court: Four Decisions*, N.Y. REV. BOOKS (Aug. 15, 2013), <http://www.nybooks.com/articles/archives/2013/aug/15/equality-and-roberts-court-four-decisions>.

weak social safety net that has historically used the legal process as a means of advancing the rights of marginalized and oppressed groups. Although the Chief Justice's standing-limiting jurisprudence is defensible from a conservative perspective, it is liberals and not conservatives who have lauded his *Hollingsworth* decision.

The Court's jurisprudence should be evaluated not only based on its decisional outcomes, but also the institutional legitimacy of these outcomes, the legal soundness of its jurisprudence, and finally, the manner in which these decisions affect and interact with U.S. government and society. By this measure, although the outcomes of the Court's recent decisions involving same-sex marriage pleased segments of the U.S. political and media culture, the Court's jurisprudence is wanting in the areas of institutional legitimacy, legal soundness, and the manner in which the decisions affect U.S. government and society. Asking the Roberts Court to jurisprudentially remedy a continent-sized super power's problems is certainly asking too much for the one unelected branch of the U.S. government. That said, the Court can certainly be judged according to the Latin medical phrase "primum non nocere," meaning "first, do no harm." The harm is evidenced by the Roberts Court's recent jurisprudence in the area of same sex marriage, which may well exacerbate, rather than bridge, the country's numerous divides.