# The Gay Marriage Cases and Federal Jurisdiction: On Why The Domestic Relations Exception to Federal Jurisdiction is Archaic and Should be Overruled

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**Abstract:**
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# The Gay Marriage Cases and Federal Jurisdiction: On Why The Domestic Relations Exception to Federal Jurisdiction is Archaic and Should be Overruled

**By Steven G. Calabresi[1] & Genna Sinel[2]**

*This working paper considers whether there is a right to same sex marriage under the U.S. Constitution and whether cases that challenge state laws that ban same sex marriage are cases in laws and equity for purposes of the federal question statutes grant of jurisdiction to the Article III federal courts. The essay assumes that there is a right to same sex marriage, but it concludes that the Article III courts did not have jurisdiction to decide* United States v. Windsor, 570 U.S. ___ (2013) *or* Hollingsworth v. Perry, 570 U.S. ___ (2013). *We then ask whether gay marriage suits are barred from federal jurisdiction under the domestic relations exception to federal jurisdiction. We conclude that the Article III federal courts do in fact have jurisdiction to hear pure marital status cases because the domestic relations exception to federal court jurisdiction is an archaic historical remnant, which the Supreme Court ought to do away with. We call on the Supreme Court to eliminate the domestic relations exception to federal jurisdiction.*



"The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the United States."

*In re Burrus*, 136 U.S. 586, 593-94 (1890)

"[W]hile rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts. … In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights ***. When hard questions of domestic relations are sure to affect the outcome, the prudent

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[1] Clayton J. and Henry R. Barber Professor of Law, Northwestern University and Visiting Professor of Political Science, Brown University 2010-2018.We We would like to thank Gary Lawson, Michael McConnell, Robert Pushaw, Marty Redish, and Kate Shaw for their helpful suggestions and comments on this essay. We especially want to thank my co-author on another article and on a Comparative Constitutional Law casebook for his comments, which were especially helpful. All opinions expressed herein are only our own personal opinions and should not be attributed to the persons We thank or to anyone else.

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course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law."

*Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 12-13, 17 (2004)

The U.S. Supreme Court recently struck down the federal Defense of Marriage Act in *United States v. Windsor*[3] and it allowed a lower court ruling to go into effect legalizing gay marriage in California in *Hollingsworth v. Perry*.[4] In addition, the U.S. Circuit Courts of Appeals for the Fourth and Tenth Circuit have held state bans on gay marriage to be unconstitutional, while the U.S. Court of Appeals for the Sixth Circuit has upheld state bans on same sex marriage. The issue is widely expected to be heard soon by the Supreme Court, possibly during the current term of the Court. All of these cases raise important questions of as to gay rights and as to federal jurisdiction. In *United States v. Windsor*, President Obama agreed with the Second Circuit ruling below that the federal government had acted unconstitutionally in defining marriage as being only the union of one man and one woman. Chief Justice Roberts and Justices Scalia and Thomas dissented on the grounds that neither the President nor the Bipartisan Legal Advisory Group of the U.S. House of Representatives had standing to appeal a Second Circuit ruling with which they agreed. In *Hollingsworth v. Perry*, Chief Justice Robert's majority opinion held that several proponents of a California proposition banning gay marriage lacked standing to appeal a lower court order holding that ban unconstitutional, given that the Attorney General and Governor of California agreed that the proposition in question was unconstitutional. I agree with Chief Justice Roberts' majority opinion



[3] 570 U.S. ___ (2013).
[4] 570 U.S. ___ (2013).

in *Hollingsworth v. Perry* and with Justice Scalia's dissent in *United States v. Windsor*. Private busybodies lack standing to defend statutes in federal court that federal or state executive officials refuse to defend on the grounds that they are unconstitutional.[5]

In reaching this conclusion, I do not mean to suggest that I think federal or state bans on gay marriage are constitutional or that they are wise as a matter of policy. To the contrary, I think that gay people do have a constitutional right to marry under the Fourteenth Amendment,[6] and I also think that gay marriage is desirable for policy reasons. State bans on gay marriage violate constitutional equal protection principles, and they are a bad idea as a matter of policy. As a constitutional matter, bans on gay marriage are at a bare minimum subject to skeptical scrutiny under *United States v. Virginia*[7] because they discriminate on the basis of sex. Men are allowed only to marry a woman and not another man, and women are allowed only to marry a man and not another woman. This sex discrimination as to whom one can marry is not in my opinion supported by "an exceedingly persuasive justification" that overcomes the skeptical scrutiny mandated by *United States v. Virginia*.[8] There is no empirical evidence that the



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[5] For debate regarding the reach of the standing doctrine, see: William A. Fletcher points out in *The Structure of Standing*, 98 Yale L.J 221 (1988); Antonin Scalia asserts in *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U. L. Rev. 881(1983).

[6] See my paper, which is up now on SSRN entitled "Originalism and Same Sex Marriage."

[7] 518 U.S. 515 (1996).

[8] We have argued that laws that discriminate on the basis of sex should be subject to strict scrutiny. Steven G. Calabresi & Julia Rickert, Originalism and Sex Discrimination, 90 **Texas Law Review** 1 (2011). We have also defended *Loving v.*

legalization of same sex marriage would undermine heterosexual marriage or would be harmful to children contrary to the assertions of those who support state bans on gay marriage.[9] There are many reasons to think, as I do, that gay marriage is preferable on policy grounds to gay promiscuity just as heterosexual marriage is obviously preferable to heterosexual promiscuity. I thus do not agree with the four conservative justices on the U.S. Supreme Court on the merits of the gay marriage issue but agree instead with Justice Anthony M. Kennedy.

I do think, however, that the federal jurisdictional problems with cases challenging the constitutionality of bans on gay marriage in federal court are much more complex and daunting than even the conservative justices on the U.S. Supreme Court acknowledged in the *Windsor* and *Hollingsworth* cases, although in the end I think those problems can be overcome. There is a serious question under current caselaw as to whether the federal courts have either federal question jurisdiction or diversity jurisdiction to decide <u>any</u> pure gay marriage cases. The reason for this is because there is a longstanding domestic relations exception to federal jurisdiction that goes back to the Founding of the Republic such that pure marriage law cases simply cannot be heard in federal court. I conclude that the domestic relations exception to federal jurisdiction ought to be read as not applying to marital status



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*Virginia* on originalist grounds. Steven G. Calabresi & Andrea Matthews, <u>Originalism and Loving v. Virginia</u>, 2012 **Brigham Young University Law Review** 1393-1476.

[9] See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (sodomy laws are unconstitutional because they are an unreasonable exercise of the police power); Romer v. Evans, 517 U.S. 620 (1996) (Colorado initiative forcing gay people to amend the State Constitution to pass gay civil rights ordinances is an unreasonable exercise of the police power.) See also Lochner v. New York, 198 U.S. 45 (1905) (sixty hour maximum work week for bakers is an unreasonable exercise of the police power).

cases. I would confine the exception as Professor Jim Pfander argues to purely religious matters like excommunication that were heard by the Ecclesiastical Courts in England in 1787.

The issue of the scope of the domestic relations exception to federal jurisdiction arises because a State law that criminalized gay marriage, like the Virginia State criminal anti-miscegenation law that was struck down in *Loving v. Virginia*, would be a case in law or equity that would fall within the federal question grant of jurisdiction. Criminal cases are and always have been understood as being cases in law or equity both in England and in the United States. A case, however, that challenges the constitutionality under the federal Constitution of a State law that does nothing more than to define the status of marriage as the union of one man and one woman could be argued not to be a "Case in Law or Equity" as those words are used in the federal Constitution or in the current federal question statute or in the diversity jurisdiction statute.



The reason for this is that the phrase "Cases in Law and Equity", in 1787, was a legal term of art that encompassed only those cases which could have been brought at that time in England before the Courts of Law (the Court of King's Bench or the Court of Common Pleas) or before the Courts of Equity (the Court of Exchequer or the Court of Chancery). Matrimonial causes, in 1787, could only be heard in England in the Ecclesiastical Courts of the Church of England, and it was not until the passage of the Matrimonial Causes Act of 1857 that the ordinary courts in England were empowered to hear matrimonial causes and divorce cases. Prior to 1857, marriage in England was a religious sacrament and not a contract and that

was also the case in the United States when Article III was enacted. It is thus not surprising that the gay marriage issue in the United States, today, divides Americans primarily on religious lines, and the original Constitution banned federal establishments of religion primarily to allow the States to have different established churches according to their own preferences.

By the time the Fourteenth Amendment was adopted, in 1868, marriage had come to be thought of as being not only a sacrament but also as being a contract, as Andrea Matthews and I argued in *Originalism and Loving v. Virginia*. But arguably by 1868, Article III had been the Supreme Law of the Land for seventy-nine years, and under Article III matrimonial causes were by definition not "Cases in Law and Equity." The Fourteenth Amendment created new rights, but it did not add to the Article III jurisdiction of the federal courts. And under Article III, pure matrimonial causes (or domestic relations cases as our courts have labeled them) could only be adjudicated in the United States in the thirty-seven State Supreme Courts and in the inferior State courts. It could thus be argued that there is a Fourteenth Amendment argument that bans on gay marriage are unconstitutional, but it is an argument that only the State courts have jurisdiction to address each State deciding for itself what the Fourteenth Amendment means within its own borders.



As I shall explain further below I do think the federal Defense of Marriage Act was unconstitutional because Congress did not have the enumerated power to adopt a federal marriage statute. Under American federalism, the law of marriage and divorce is in "pith and substance" a question of State law and not one of federal

law.[10] It is thus not at all surprising to encounter an argument that the very same Constitution, which leaves the definition of marriage to the States would also not give the Article III federal courts jurisdiction to hear matrimonial causes or domestic relations cases. Under "Our Federalism" one could claim that each of the fifty State Supreme Courts must decide for themselves what the Fourteenth Amendment means within the borders of their respective States. We end up concluding instead that the so-called domestic relations exception to federal jurisdiction should be overruled by the Supreme Court

In this essay, we will argue that Chief Justice Roberts and Justice Scalia were right on the federal jurisdictional issue in *United States v. Windsor* and *Hollingsworth v. Perry*. In Part I, I will argue that litigants cannot appeal decisions with which they agree and that private busybodies in the House of Representatives lack standing to appeal a ruling legalizing gay marriage under federal law. In Part, II I will expand on that argument and will explain why private busybodies in California lack standing to defend the constitutionality of a state adopted initiative, which the executive branch of the California State government will not defend. Finally, in Part III, I will discuss the much broader federal jurisdictional problem with lawsuits like the ones in *Windsor* and *Perry* that I have alluded to in this introduction. The lawsuit in *Perry*, in particular, and in the recent Utah District Court case could be argued not to be cases in law or equity that arise that the Article III federal courts have jurisdiction to hear



[10] The Canadian Supreme Court and prior to 1949, the Judicial Committee of the Privy Council sitting in London, England, have long decided Canadian federalism cases by asking whether a statute is "in pith and substance" a matter of Canadian federal law or a matter of Canadian provincial law. We think this doctrine is a very useful one, and We would urge the U.S. Supreme Court to apply the "pith and substance" test in U.S. federalism cases.

under federal law. After considering this argument at some length, I reject it and conclude that Article III's grant of equity jurisdiction inherently has some evolutive meaning and can always expand to cover deficiencies in law. Today, the federal courts jurisdiction over cases in equity arising under federal law is best understood as encompassing marital status lawsuits like the various same sex marriage cases decided on the merits by the various federal courts of appeals. We conclude by calling on the Supreme Court to eliminate all of the lingering features of the domestic relations exception to federal jurisdiction.

I.

In *United States v. Windsor*, the Obama Administration sought to appeal a Second Circuit holding that it agreed with to the effect that the Defense of Marriage Act was unconstitutional. The Administration argued that since it was continuing to enforce the Defense of Marriage Act ("DOMA")[11] and since it had been ordered to pay Windsor a tax refund, it had suffered sufficient legal injury to allow it to appeal a legal ruling that it agreed with on the merits. To fully understand the Administration's claim, it is necessary to describe the background and procedural posture of the *Windsor* case.



DOMA was adopted in 1996. Section 3 of the Act amended the Dictionary Act in the U.S. Code to provide for a federal definition of the words "marriage" and "spouse" wherever they appear in the U.S. Code. Under DOMA, the word "marriage" in federal law can mean only a legal union between one man and one woman. Edith Windsor and Thea Spyer were both women who were married in Canada in 2007.

[11] Pub.L. 104-199, 110 Stat. 249, enacted September 21, 1996, 1 U.S.C. Section 7 & 28 U.S.C. Section 1738C.

They lived in New York State, where gay marriage is legal, and the State of New York accepted the legality of their Canadian marriage

Spyer died in February 2009, and she left her whole estate to Windsor, her spouse. Because of DOMA, Windsor did not qualify for the spousal exemption to the federal inheritance tax. Windsor paid $363,053 in federal inheritance taxes, and she sought a refund from the Internal Revenue Service, which denied her request because of DOMA. Windsor then sued the United States in the Southern District of New York contending that DOMA was unconstitutional. The Obama Administration notified the Speaker of the House of Representatives, under 28 U.S.C. Section 530D, that the Justice Department would not defend the constitutionality of Section 3 of DOMA. The President did, however, direct his Administration to continue enforcing DOMA, even while not defending its constitutionality. The stated rationale for this order was that it would facilitate judicial review of the constitutionality of DOMA. The Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives then voted to intervene in this case to defend the constitutionality of Section 3 of DOMA. The District Court allowed BLAG to intervene as an interested party.



It should be noted at the outset that Windsor claimed she had standing to sue in the District Court because she was denied a $363,053 tax refund as a result of Section 3 of DOMA. The general rule in federal court is that taxpayers do not ordinarily have standing to challenge the constitutionality of a tax or of the expenditure of government funds. The Supreme Court laid down this rule in the

1920's in *Frothingham v. Mellon*[12] and in *Massachusetts v. Mellon*.[13] Those two cases reject taxpayer standing where there is no particularized, individual legal injury. They make concrete the fact that the federal courts do not sit to correct generalized grievances and that not all deprivations of constitutional rights can be litigated in the federal courts.

The federal courts have the power to protect rights that were recognized at common law or in the Courts of Exchequer or Chancery, in England, but they are not ombudsmen with a general charter to police and enforce the constitution. The Constitution presumes that generalized grievances suffered by all taxpayers equally will be remedied by the political branches of the government and not by the courts. A court ruling in favor of a single taxpayer like Frothingham who had challenged the constitutionality of a federal spending program would be an advisory opinion because it would be purely speculative whether such a ruling would result in any change at all in Frothingham's federal tax bill. Whatever injury Frothingham had suffered was not a legal injury that could be redressed by judicial action; nor was such an injury a legal injury when asserted by the State of Massachusetts. States have no legal right under the Constitution to sue in federal court to challenge the constitutionality of federal spending programs.



In Edith Windsor's case, however, Windsor had suffered a particularized, individual legal injury because, unlike similarly situated married, heterosexual spouses, Windsor did have to pay $363,053 in federal inheritance taxes as a result of

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[12] 262 U.S. 447 (1923). But see Massachusetts v. EPA, 549 497 (2007) (upholding State standing to sue over loss of coastal lands due to global warming).
[13] Id.

Section 3 of DOMA. Windsor thus suffered an injury that was not generally suffered by all taxpayers, that was concrete and particularized, and that could be remedied by a court order in her favor. As a result, Windsor did have standing to challenge Section 3 of DOMA in the District Court, notwithstanding the general rule against taxpayer standing.

The District Court ruled in Windsor's favor and held that Section 3 of DOMA was unconstitutional. The Obama Administration agreed but nonetheless appealed to the Second Circuit apparently hoping to lose in a larger jurisdiction. After the Second Circuit held Section 3 of DOMA unconstitutional, the Obama Administration appealed to the Supreme Court hoping to lose nationwide. This case thus presents the question of whether a litigant can appeal a court judgment that he or she thinks is legally correct when complying with the judgment will cost that litigant money.



The federal courts have jurisdiction to hear only certain categories of "cases" and "controversies". Early in our history, in an episode known as the Correspondence of the Justices,[14] the Supreme Court was asked to give Secretary of State Thomas Jefferson legal advice about various abstract matters pertaining to U.S. foreign relations. The Supreme Court politely declined Jefferson's invitation, saying that it lacked the power to adjudicate issues unless there was a real concrete controversy among legally adverse parties.

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[14] **Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray, The Constitution of the United States** 501-503 (2nd ed. 2013) (discussing and reproducing the Correspondence of the Justices).

In another episode from the 1790's, *Hayburn's Case*,[15] most of the U.S. Supreme Court justices, while riding circuit, held that they lacked the power under Article III to review the amount of revolutionary war veterans' pensions when the judicial decisions in question could be raised or lowered *de novo* following judicial review by an executive branch official. The justices said that they could only hear a case when there was a significant likelihood that a judicial ruling would make a concrete difference in the real world.

Taken together, the Correspondence of the Justices and *Hayburn's Case* make it clear that the federal courts do not have the power to issue advisory opinions. The federal courts are only empowered to hear real and concrete disagreements between adverse litigants where the resolution of those disagreements is substantially likely to make a difference in the real world. This requirement that there be legally adverse parties must exist at all stages of litigation, including on appeal, and not only in the District Court when a case is first brought.



In *Windsor's* case, the United States did not comply with the District Court's order that it pay Windsor a tax refund. It agreed that Windsor was legally entitled to the refund she claimed, but it refused to pay this refund absent a court order that it do so. The majority in *United States v. Windsor* held that this was sufficient to give the United States standing to appeal the District Court's order. As Justice Kennedy said:

> "The judgment in question order the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is a 'real and immediate economic injury.' *Hein*, 551 U.S., at 599 indeed as real and

[15] 2 U.S. 408 (1792). See also **Paulsen et al.**, id., at 495-496 & 500-501 discussing Hayburn's Case.

> immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. ... Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction."

Slip op. at 8.

The flaw in this argument is that the United States does not take the position that it was legally injured by the District Court's order or by the Second Circuit's order. The United States agrees with the courts below that it acted lawlessly by failing to pay Windsor her tax refund. Failure to pay a court judgment that you agree that you owe may create enough adverseness to support appellate jurisdiction to issue a writ of mandamus directing you to pay what you agree you owe, but it does not follow from that that failure to pay a court judgment that you agree that you owe also creates jurisdiction to decide whether you really owed the money that you thought that you had owed. There is a controversy between the United States and Windsor because the Obama Administration is refusing to follow the law. There is not, however, a controversy between the United States and Windsor over what the law entails. The United States and Windsor both agree that the United States is legally obligated to pay Windsor $363,053. Under these circumstances, the United States has not suffered any legal injury as a result of the orders of the federal courts below. Windsor has been injured by the United States' failure to pay what it agrees it owed, but that means only that there is federal judicial power to enforce the District Court's judgment. There is no federal judicial power to review the correctness of the District Court's judgment unless the United States asks the courts

to do that, which it has not done. Accordingly, there is no case or controversy here. *United States v. Windsor* is a feigned case just like the Correspondence of the Justices and *Hayburn's Case*.

As Justice Scalia points out in his dissent, the majority errs because it assumes that it is always the province and duty of the judiciary to say what the law is, as was said in *Marbury v. Madison*.[16] *Marbury* does say that, but it does so in the context of the Supreme Court having to decide a *bona fide* case or controversy that was properly before the Court. When there is such a *bona fide* case or controversy before the federal courts then it is indeed the province and duty of the judiciary to say what the law is. But, in *United States v. Windsor* the whole issue before the Supreme Court is whether such a *bona fide* case or controversy was or was not before the Court. One cannot decide *that question* with the *Marbury* dicta because the *Marbury* dicta addresses the powers of the Article III courts when there is a case or controversy properly before them.



As Justice Scalia's dissent points out, the majority in *United States v. Windsor* just assumes that the federal courts must have jurisdiction to adjudicate any question of constitutional meaning. Justice Kennedy thinks it is uniquely the province and duty of the judiciary to say what the Constitution means. But, that is simply not the case, as *Frothingham v. Mellon* and *Massachusetts v. Mellon* make clear. There are many questions of constitutional meaning which are not justiciable and which will thus be finally decided by the political branches of the government. Under American-style judicial review, the U.S. Supreme Court is not empowered

[16] 5 U.S. 137 (1803).

uniquely to enforce or to interpret the Constitution in the way that constitutional courts are so empowered in Germany or in many other foreign nations. There is no judicial review clause or constitutional interpretation clause in Article III of the Constitution. Article III empowers the federal courts to decide only "cases" or "controversies" using the "judicial" power.[17] *United States v. Windsor* did not present a case or controversy about Section 3 of DOMA because the United States agreed with the courts below. You cannot appeal a court judgment that you agree with in the hope that you will lose on appeal.

Justice Alito agreed with Justice Scalia that the Obama Administration lacked standing to appeal *United States v. Windsor*, but he took the position that BLAG had standing to appeal the Second Circuit's judgment because a majority of the House of Representatives had approved of the appeal.[18] Justice Alito thinks that each House of Congress has a judicially cognizable interest in defending the constitutionality in federal court of federal laws, which the President thinks are unconstitutional and, therefore, declines to enforce. Justice Alito seems to share the presumption with Justice Kennedy that the federal courts have the power enjoyed by constitutional



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[17] **U.S. Const. art. 3, section 2.**

[18] What makes this case so interesting is that, in essence, the case is between three parties, two of which are the United States: "The House of Representatives v. Windsor and The Executive Branch." While the President finds DOMA unconstitutional, the House of Representatives disagrees and fights to defend it. However, the power to defend federal legislative acts in court lies outside the power of Congress and for good reason. The principle of the separation of powers is essential to our country, and as the Madison said of it in Federalist No. 47, "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty. To permit Congress to protect its own laws before the Court is to undermine this fundamental component of Constitutional law and denounce the significance of our system of checks and balances.

courts in other countries to interpret and enforce the Constitution in all contexts. This view is quite deeply mistaken.

The federal courts were not set up in the United States to be constitutional ombudsmen, and there is no clause in Article III that can be plausibly read as so empowering the federal courts. Article III gives the federal courts the enumerated power to hear six categories of controversies including controversies to which the United States is a party and controversies among two or more States. Conspicuously missing from this list of six categories of controversies are controversies between either House of Congress and the President as to whether a law is or is not constitutional. Many foreign constitutions provide in some way or another, for the standing of legislators to challenge the constitutionality of a law or of executive branch action, but the U.S. Constitution does not so provide. To the contrary, Article III does give the federal courts jurisdiction over some categories of controversies but not over those of which Justice Alito writes.



Consider, for example, Article 93 of the German Basic Law, which sets out the jurisdiction of the German Constitutional Court.[19] Article 93 explicitly provides that:

> 1) The Federal Constitutional Court shall rule: ***
>
> 2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one fourth of the Members of the Bundestag; ***
>
> 3. in the event of disagreements concerning the rights and duties of the Federation and the Länder, especially in the execution of federal law by the Länder and in the exercise of federal oversight;

[19] **Basic Law of the Federal Republic of Germany, Article 93.**

> 4. on other disputes involving public law between the Federation and the Länder, between different Länder, or within a Land, unless there is recourse to another court;
>
> 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority; ***

The German Basic Law thus differs from Article III of the U.S. Constitution because it explicitly empowers one fourth of the members of the Bundestag, the lower House of the German parliament, to sue in the Constitutional Court when there is a question about the constitutionality of a federal law. Similarly, under French law, sixty members of either the Senate or the National Assembly have standing to challenge the constitutionality of a proposed law before the French Constitutional Council. Thus, Article 61 of the French Constitution of the Fifth Republic provides explicitly that:



> "Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators."[20]

The French and German constitutions are thus quite explicit in providing legislators with standing to raise constitutional challenges before their respective constitutional courts. But, there is quite simply no analogous clause in Article III of the U.S. Constitution giving the federal courts the power to hear cases brought by members of the House of Representatives or the Senate.

Article III only gives the federal courts jurisdiction over the following six controversies:

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[20] **The Constitution of the Republic of France (1958) Art. 61.**

> "controversies to which the United States shall be a party;--*** controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

Controversies between either the House of Representatives or the Senate and a President who is declining to defend the constitutionality of a federal law quite simply fail to appear on the Article III, Section 2 list. *Expressio unius, exclusio alterius*. The federal courts simply do not have the jurisdiction to hear the kinds of cases that Justice Alito would have them hear when he argues that BLAG has standing. Legislative standing to sue is expressly provided by the German and French Constitutions, but such standing is not provided for by Article III of the U.S. Constitution, even though that Article does provide for standing to hear six other enumerated categories of controversies. Justice Alito's concurrence is thus flatly contradicted by the plain text of Article III, which he fails even to discuss.[21]



The Supreme Court has not generally reviewed cases like those as to which Justice Alito writes. In *Raines v. Byrd*,[22] the Court held that individual members of Congress lacked standing to bring constitutional challenges, and, in *Goldwater v. Carter*,[23] Justice Powell said that a suit brought by a single member of the Senate was not even ripe because there was no controversy between the President and the Senate until the latter by majority action brought suit. Two hundred and twenty-

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[21] For more debate on whether a single house of Congress has standing to alone bring a federal case, see: Grove, Tara Leigh and Devins, Neal, "Congress's (Limited) Power to Represent Itself in Court" (August 21, 2013). Cornell Law Review, Vol. 99, (2014 Forthcoming); William & Mary Law School Research Paper No. 09-253.
[22] 521 U.S. 811 (1997).
[23] 444 U.S. 996 (1979).

four years of almost unbroken constitutional practice make clear what the text of Article III plainly indicates. The federal courts do not have jurisdiction to hear "controversies" between a majority of the House of Representatives and the President over the latter's failure to execute a law. The House of Representatives can impeach the President and it can cut off funding for programs he wants funded, but it cannot sue him over a "controversy" due to his failure to execute a law.

Justice Alito probably believes that BLAG and the House of Representatives have standing to defend DOMA because *United States v. Windsor* is a case, "in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority… ."[24] This argument fails however, because even though the *Windsor* case arises under federal law, it is not a "case in law and equity" as that term is used in the Constitution. Article III makes it clear that "cases affecting ambassadors, other public ministers and consuls" and "cases of admiralty and maritime jurisdiction" are not "cases in law and equity" even though they may arise under federal law.[25] This is why the framers of Article III thought that it was necessary to separately spell out the jurisdiction of the federal courts in cases affecting ambassadors and in admiralty cases.



Admiralty law is a body of federal law, and admiralty cases thus arise under federal law, but admiralty cases are not according to Article III "cases in law and equity." The reason for this is that, in 1787, admiralty cases in Great Britain were heard by special admiralty courts, without jury trial being available, whereas "cases in law" were heard by the Court of King's Bench, the Court of Common Pleas, or the

[24] **U.S. Const. art. iii, section 2, clause 1.**
[25] See id. Clauses 2 & 3.

Court of Exchequer and "cases in equity" were heard by the Court of Chancery or sometimes by the Court of Exchequer. Neither the law courts in Great Britain nor the Court of Chancery or the Court of Exchequer had jurisdiction in 1787 to hear a lawsuit brought by either House of Parliament against the King on the grounds that the King was failing faithfully to execute an Act of Parliament.

In fact, neither the law courts nor the Court of Chancery had jurisdiction to hear cases of impeachment. The House of Commons had the sole power to initiate impeachments, and the House of Lords had the sole power to try them. The law courts and the Courts of Chancery and of Exchequer could not review such cases, which helps to explain why the U.S. Supreme Court was right in *(Walter) Nixon v. United States* to rule that even though impeachment cases in the U.S. arise under federal law, they raise a political question that the federal courts do not have jurisdiction to resolve.[26] Article III of the Constitution does not give the federal courts jurisdiction to hear cases of impeachment that arise under federal law, and Article I gives the "sole" power to initiate such cases to the House of Representatives[27] and the "sole" power to try them to the Senate.[28]



The federal courts do not have jurisdiction over all cases that arise under federal law but only jurisdiction over "all cases <u>in law and equity</u>" that arise under federal law. A suit by the House of Representatives arguing that the President has failed faithfully to execute the law arises under federal law but it is not a case in <u>law or equity</u>, neither as those terms were understood in 1789, nor as they have been

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[26] 506 U.S. 224 (1993).
[27] **U.S. Const. art. I, section 2.**
[28] **U.S. Const. art. I, section 3.**

understood over the last two hundred and twenty four years of American history. Justice Alito cannot point to a single case in all the time from 1789 down to the present day in which the federal courts have heard cases like the controversy between BLAG and Windsor over which he thinks the federal courts have jurisdiction.

In *Massachusetts v. Melon*, the Supreme Court considered a claim of federal jurisdiction between a State and the federal government where the State of Massachusetts claimed that Congress was spending money unconstitutionally. Such a claim is arguably analogous to the claim that BLAG had standing to appeal in *United States v. Windsor* because the States, like the House of Representatives, are institutional bodies, which, under German constitutional law, have standing to raise constitutional claims. The U.S. Supreme Court, however, held that the States did not have standing under U.S. constitutional law to raise such claims in *Massachusetts v. Mellon*. Justice Alito agreed with this holding in *Massachusetts v. EPA*, a case in which he joined dissents by Chief Justice Roberts and Justice Scalia arguing against State standing. It is hard, to say the least, to square Justice Alito's conclusion that the States lacked standing to sue in *Massachusetts v. EPA* with his conclusion that BLAG had standing to appeal in *United States v. Windsor*.



There is one prior Supreme Court precedent, *INS v. Chadha*, in which the House of Representatives did have standing to challenge an executive branch failure to execute a law insofar as it provided for a one house legislative veto.[29] In *Chadha*, the INS gave Jagdish Chadha a stay of an order of deportation, and the House of

[29] 462 U.S. 919 (1983).

Representatives purported to veto the stay of deportation pursuant to a statute which provided for a one house legislative veto. The Supreme Court found that it had jurisdiction to hear this case, which it decided on the merits by holding all legislative vetoes to be unconstitutional.

The *Chadha* case is easily distinguishable from *United States v. Windsor*. In *Chadha*, each house of Congress had a statutory right to veto executive branch actions which right the executive branch had taken away by concluding that legislative vetoes were unconstitutional. Each house of Congress thus suffered a legal injury in *Chadha* because they were deprived of a legal right which federal statutory law explicitly conferred upon them. In contrast, in *United States v. Windsor*, the two houses of Congress do not have a statutory legal right to sue in federal court when the president declines to execute a law that he thinks is unconstitutional. The House of Representatives can impeach a president who it thinks is not faithfully executing the law, but it cannot sue him seeking an injunction from a court anymore than the State of Massachusetts can sue the federal government over an unconstitutional spending bill or over the EPA's exercise of its law enforcement discretion.



Article II, Section 3 of the Constitution does impose on the President the duty and obligation that "he shall take care that the laws be faithfully executed",[30] but this duty and obligation was fulfilled by President Obama in *United States v. Windsor*. The President's obligation to "take care that the laws be faithfully executed" is an obligation to enforce not only federal statutes but also the Constitution, as he

[30] **U.S. Const. art. III, section 3.**

understands it. Article IV, Section 2 says that "This Constitution, and the laws of the United States which shall be made in pursuance thereof *** shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[31] The Constitution is thus one of the laws, which the president is bound faithfully to execute. President Obama thinks quite sincerely and in good faith that Section 3 of DOMA is unconstitutional, a conclusion with which I agree. Accordingly, the Take Care Clause actually imposes a duty on President Obama that he NOT execute DOMA, a duty which he has fully lived up to.

The House of Representatives obviously disagrees with President Obama and thinks Section 3 of DOMA is constitutional. The House can express its displeasure with the President by impeaching him, by holding oversight hearings, and by cutting off appropriations. But, it cannot sue him in federal court over his exercise of law enforcement discretion. The President is an independent interpreter of the Constitution, and he has both the right and the duty to interpret and enforce the Constitution as he understands it, without regard to the contrary views of either the House of Representatives or of the Supreme Court. As President Andrew Jackson said in vetoing the Bank of the United States on constitutional grounds in 1832 notwithstanding the Supreme Court's decision in *McCulloch v. Maryland*[32]:



> "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to

[31] **U.S. Const. art. VI, clause 2.**
[32] 17 U.S. 316 (1819).

> support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[33]

The House of Representatives has the legal right to impeach a president over his exercise of law enforcement discretion or to hold oversight hearings or cut off funds, but it has no legal right to sue him in federal court. Article II, Section III imposes a duty on the President to execute laws that he thinks are constitutional and not a duty to execute laws that the House of Representatives thinks are constitutional. The House of Representatives may feel in some way "harmed" by President Obama's refusal to execute Section 3 of DOMA but not every harm is a "legal injury" over which one can sue in federal court. Neither BLAG nor the House of Representatives has suffered a "legal injury" because of President Obama's conclusion that Section 3 of DOMA is unconstitutional.



Justice Alito relies on one final case to support his argument that BLAG had standing to appeal in *United States v. Windsor*. In *Coleman v. Miller*, which was decided in 1939, Chief Justice Hughes, writing for himself, Justice Stone, and Justice Reed, concluded that a majority of the Kansas State Senate had standing in federal court to litigate the constitutionality of Kansas's ratification of an amendment to the federal constitution.[34] The two dissenters, Justices McReynolds and Butler, also

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[33] **Paulsen et al.,** supra note __, at 68-70 (quoting at length President Jackson's message vetoing the bill that would have renewed the Bank of the United States).
[34] 307 U.S. 433 (1939).

agreed that there was standing here. Justices Frankfurter, Roberts, Black, and Douglas wrote separately, however, in an opinion by Justice Frankfurter to say that the Kansas State senators did not have standing to sue in federal court in this case. These same four justices also joined an opinion by Justice Black saying that this case raised a non-justiciable political question.

To be perfectly blunt, a five to four standing holding in 1939 that was dependent on the votes of four pre-New Deal Supreme Court justices is a dubious source of legal authority at best, especially in the face of a contrary opinion by Justices Frankfurter, Roberts, Black, and Douglas. The standing holding of *Coleman v. Miller* has not generally been followed, and it is not well reasoned. As a general matter, majorities of legislative houses, either State or federal, have not brought lawsuits in the federal courts. There is a good reason for this. Article III does not create federal jurisdiction over these kinds of controversies, even though it does create jurisdiction over other kinds of controversies.



Given the text of Article III and the last two hundred and twenty-four years of practice, I think Justice Alito's argument that BLAG had standing to appeal this case is silly, poorly reasoned, and lawless. If followed, it would revolutionize our form of government by inserting the federal courts into the middle of political disputes between the President and the two houses of Congress over how best to execute the laws. This is not a road the Supreme Court ought to go down.

The final argument for standing in *United States v. Windsor* is Justice Kennedy's claim that prudential standing principles suggest that federal jurisdiction ought to be exercised here. This argument also fails. The prudential limits on

standing in the federal courts are judicially created doctrines, which can be overridden by Congress, that generally bar third party standing, the litigation of generalized grievances that are shared by all citizens, and the litigation of statutory matters not within the zone of interest of a statute. Congress cannot override the core Article III requirements as to standing, which are implicit in the case or controversy requirement. The federal courts have no power to waive standing rules for prudential reasons merely because the Justices want to hear a particular case.

The Supreme Court has said that Article III allows standing only where a party has suffered a legal injury that is concrete and particularized; where that legal injury is actual and imminent, not conjectural or hypothetical; where that legal injury is fairly traceable to the challenged action of the defendant; and where it is likely that a favorable judicial decision will prevent or redress the legal injury complained of.[35] Edith Windsor suffered a legal injury when she was denied a spousal exemption from the inheritance tax. The United States, however, did not suffer a legal injury when the District Court agreed with the Obama Administration and ruled that Section 3 of DOMA was unconstitutional. One is not legally injured by a court ruling that one has argued for and agrees is legally correct, even if complying with that decision will cost one money. Similarly, one cannot appeal from a decision that one agrees is legally correct in the hopes that one will lose in a larger jurisdiction.



Consider, for example, the case of a taxpayer who agrees with the federal government that he owes the IRS $35,000 in income taxes. Such a taxpayer does not

[35] Summers v. Earth Island Institute, get cite

have standing to sue the government because compliance with the tax code will cost him $35,000 that he agrees that he owes. A taxpayer does not suffer a "legal injury" when he is assessed for taxes that he agrees that he owes. There is a difference between things that "harm" or "burden" one and things that cause "legal injury."

The United States did not suffer "a legal injury" when the District Court ruled that it owed Windsor a $363,053 tax refund, which it agreed that it owed. Absent a legal injury, the United States did not have standing to appeal the District Court's ruling either to the Second Circuit or to the Supreme Court. All the prudential considerations in the world cannot convert a case where there is no legal injury and actual controversy between the parties into one in which the federal courts do have jurisdiction. The United States' failure to pay Windsor what it agrees it owes her does mean that Windsor has standing to ask the District Court to issue a writ of mandamus ordering that she be paid what she is owed. But, the United States' failure to pay Windsor what it agrees it owes her does not give the United States standing to appeal a ruling that it agrees is correct.



II.

The lawsuit in *Hollingsworth v. Perry* originated after the California Supreme Court held in 2008 that a ban on same sex marriage in California law violated the equal protection clause of the California constitution. *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384. In the wake of the State Supreme Court ruling, a number of same sex couples were legally married in California. Later that year, California voters passed Proposition 8, a statewide initiative that amended the California State Constitution to ban same sex marriage. Two same sex couples, Kristin Perry and

Sandra Stier and Paul Katami and Jeffrey Zarrillo, who wished to marry but were not allowed to do so by California state officials, then brought this lawsuit in Federal District court. Neither the Governor of California nor the State Attorney General of California chose to defend the constitutionality of Proposition 8 in federal court. The District Court did allow the official proponents of the initiative, including State Senator Dennis Hollingsworth, to defend the constitutionality of the initiative. The District Court held Proposition 8 to be unconstitutional, and the Governor and Attorney General of California declined to appeal. Hollingsworth and a bevy of private busybodies did, however, purport to appeal to the Ninth Circuit to defend the constitutionality of Proposition 8.[36]

The Ninth Circuit doubted whether Hollingsworth et al. had standing to appeal the District Court ruling. The Court of Appeals thus certified the following question to the California State Supreme Court:



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

The California Supreme Court ruled that Hollingsworth et al. did have standing to appeal the District Court's order, and the Ninth Circuit accepted that conclusion and ruled in favor of the merits of Perry et al.'s gay marriage claim. Hollingsworth et al.

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[36] In *Arizonans for Official English v. Arizona,* 520 U.S. 43 (1997) the Justices raised doubts that initiative proponents "have a quasi-legislative interest in defending the measure they successfully sponsored."

then appealed the Ninth Circuit ruling to the U.S. Supreme Court, which granted certiorari.

As I said above, a litigant only has standing to sue in federal court if he has suffered: 1) a legal injury that is: a) concrete and particularized and b); where that legal injury is actual and imminent, not conjectural or hypothetical. The legal injury that is being sued over must 2) be fairly traceable to the challenged action of the defendant; and 3) it must be likely that a favorable judicial decision will prevent or redress the legal injury complained of.[37] It is quite clear that under this test Hollingsworth et al. are merely private busybodies who have not suffered a legal injury.

It is an axiom of standing law that crime victims do not have standing to go to court to get a judicial order directing state or federal prosecutors to prosecute an individual who the victims believe committed a crime against them. The power to enforce the criminal law rests entirely with federal and state prosecutors, and in the seminal case of *United States v. Cox*,[38] the Fifth Circuit held that a federal district judge could not jail for contempt of court either a U.S. Attorney or the Acting Attorney General of the United States, Nicholas deB. Katzenbach, because of their refusal to bring a perjury prosecution against two African American civil rights workers who the District Judge in question wanted the Justice Department to prosecute. The Fifth Circuit held that the executive branch had judicially unreviewable discretion to refuse to bring a criminal prosecution where it believed it would be unjust for it to do so. This holding was supported by Attorney General



[37] Summers v. Earth Island Institute, 555 U.S. 488 (2009).
[38] 342 F.2d 167 (5th Cir. 1965).

Roger B. Taney's *Opinion on the Jewels of the Princess of Orange*,[39] December 28, 1831, and by President Thomas Jefferson's order that the prosecution of William Duane for violating the Sedition Act of 1798 be dropped on the ground that that statute was unconstitutional. President Jefferson defended this decision by writing that:

> "The President is to have the laws executed. He may order an offense then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into a legal train… . There appears to be no weak part in any of these positions or inferences."[40]

It is thus just as clear as day that no third party has standing to challenge a presidential or Justice Department decision to forego a prosecution or to bring one. A federal defendant who is prosecuted has standing to raise constitutional arguments in his defense, but a third party does not. Thus, when federal death row prisoner Gary Gilmore was executed by firing squad in 1977, his mother Bessie was denied standing to argue that Gilmore's punishment was cruel and unusual under the Eighth Amendment.[41] The Supreme Court ruled that this claim was Gilmore's alone to make, that he had waived it by asking to be executed, and that his mother Bessie lacked standing to raise the claim on Gilmore's behalf. The same standing analysis applies in State criminal prosecutions as well.



Third parties also lack standing to sue seeking the enforcement of other federal or state laws, which the government declines to enforce. Thus, on June 15, 2012, President Obama ordered that the removal provisions of the Immigration and

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[39] **Paulsen et al.,** supra note __, at 319-321.
[40] **Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray, The Constitution of the United States** at 318 (2nd ed. 2013).
[41] Gilmore v. Utah, 429 U.S. 1012 (1976).

Nationality Act (INA) not be enforced against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States. This unilateral exercise of presidential prosecutorial discretion had the effect of writing into federal law the so-called "DREAM Act," which Congress had declined to adopt up to that point. Notwithstanding the huge and dramatic scope of the President's action, no one has ever thought that the deportation advocates have standing to challenge the President's act here in court. Private litigants may be dismayed and upset by presidential exercises of law enforcement decisions, but they are not "legally injured" by them. No one has a legal right to sue over presidential exercises of prosecutorial discretion.



These same principles apply to the attempt by State Senator Hollingsworth to appeal the District Court's holding that California's Proposition 8 amending the State Constitution to ban gay marriage is unconstitutional. Neither the Governor nor the Attorney General of California agreed with Hollingsworth's view that Proposition 8 was constitutional. Article 5, Section 1 of the California Constitution provides that "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."[42] Article 5, Section 13 then says the following about the powers of the Attorney General of California:

> "SEC. 13. Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their

[42] **CA Const. art. v, section 1.**

> respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office."[43]

It is crystal clear that between them the Governor and Attorney General of California have the power to execute or direct the execution of all laws, criminal and civil, in the State of California. Indeed, the Governor has the explicit power and duty to make sure "that the law is faithfully executed."

The Ninth Circuit, concerned that it did not have jurisdiction over Hollingsworth v. Perry, certified a question to the State Supreme Court as to whether the official proponents of a California initiative had standing to defend the constitutionality of that initiative in federal court when it was challenged and when the Governor and State Attorney General declined to enforce it on constitutional grounds. The California Supreme Court held that Hollingsworth et al. did have standing to appeal as a matter of California law. Article III standing, however, is a federal constitutional prerequisite before the Article III federal courts have jurisdiction to hear a federal case. While state court decisions as to property, contract, or tort law may, in effect, expand the range of state legal injuries a litigant can sue in federal court over, a State court decision that a bunch of private



[43] **CA Const. art. v, section 13.**

busybodies have standing to defend a California law which the Governor and Attorney General of California think is unconstitutional is far more doubtful.

Imagine, for a moment, what would probably happen if Hollingsworth et al. were to prevail in the instant lawsuit. A federal court ruling would exist in *vacuo* which County Clerk Registrars would be advised by the Governor and the State Attorney General they should defy. It is thus entirely speculative as to whether the injury that Hollingsworth et al. complain of would be redressed if they won in federal court. Federal jurisdiction is not permissible under these circumstances as was recognized long ago in *Hayburn's Case*. The federal courts do not sit to issue advisory opinions.

Moreover, the legal injury that Hollingsworth is suing over is the injury that he feels he has suffered because gay couples are being granted marriage licenses in California in defiance of Proposition 8, which amended the California Constitution to ban gay marriage. This is not the sort of traditional legal injury as to which litigants in federal court in the past have been entitled to sue. I begin by noting that the federal courts do not generally allow people who are disgruntled or annoyed by someone else's marriage to sue over it. If one of our children or a close friend chooses to marry someone of whom I disapprove, I may be very upset, but I have not suffered "a legal injury" such that I can sue in federal court. One could search the reported federal court decisions for many years and not find a single reported case allowing an individual standing to sue over the marriage of another couple of which he morally disapproves. Unless there has been a violation of bigamy laws or laws against incest, such a litigant would not be deemed to have suffered "a legal

injury", and even then, a court proceeding would almost certainly take place through a criminal trial of which the State Attorney General and the Governor approved. A private suit challenging a specific gay couple's marriage in California when that State's Attorney General and Governor approved of the marriage would be dismissed because the plaintiff had not suffered a legally cognizable injury.

Hollingsworth et al. might sue claiming that their State constitutional right as Californians to amend the State's Constitution through the initiative process has been taken away from them unconstitutionally as a result of the refusal of the Governor and Attorney General of California to defend the constitutionality of Proposition 8. This claim too must ultimately fail. Article 2, Section 8 sets out most of the provisions of the California State Constitution that govern a citizen's right to legislate by initiative.[44] It provides that:



> "SEC. 8. (a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.
>
> (b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.
>
> (c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.
>
> (d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.

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[44] **CA Const. art. 2, section 8.**

> (e) An initiative measure may not include or exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of that political subdivision.
>
> (f) An initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure."

There is not a single word to be found anywhere in Article 2 of the California State Constitution that suggests that the proponents of an initiative in California have the legal right to defend its constitutionality in federal court when the Governor and the Attorney General of the State decline to do so.

The California Supreme Court did hold in *Perry v. Brown*[45] that the proponents of Proposition 8 had standing "under California law to appear and assert the state's interest in the initiative's validity and appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." Id., at 1127. The Supreme Court of California based its decision on the California Elections Code and on Article 2, Section 8 of the California Constitution. The plain language of Article 2, Section 8, however, is quoted in its entirety above, and it nowhere supports the California Supreme Court's holding that Hollingsworth et al. had standing to appeal the decision of the District Court. The question of whether or not a litigant has suffered a legal injury and has standing in the federal courts is ultimately a question of federal law. The standing



[45] 52 Cal. 4th 1116, 265 P. 3d 1002 (2011).

inquiry may be intertwined with State law, but neither Congress nor the States can create standing to satisfy the curiosity of third party busybodies.

The U.S. Supreme Court recently addressed the question of who has standing to sue in federal court in its recent decision in *Summers v. Earth Island Institute*.[46] Justice Scalia explained in his opinion for the Court in that case that:

> "In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–560 (1992) ; *Los Angeles* v. *Lyons*, 461 U. S. 95, 111–112 (1983) . This limitation "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975) . See *United States* v. *Richardson*, 418 U. S. 166, 179 (1974) .
>
> The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." 422 U. S., at 498–499. He bears the burden of showing that he has standing for each type of relief sought. See *Lyons, supra,* at 105. To seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 180–181 (2000) . This requirement assures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party," *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 221 (1974) . Where that need does not exist, allowing courts to oversee legislative or executive action "would significantly alter the allocation of power … away from a democratic form of government," *Richardson*, *supra*, at 188 (Powell, J., concurring)."



To put it quite simply, Hollingsworth et al. do not face an actual or imminent legal

[46] 555 U.S. 488 (2009).

injury because of the way in which California administers its marriage laws. No one has a federal or state legal right either to object to the legality of someone else's marriage or even to sue if they feel upset about someone else's marriage. This is quite simply not a legal injury that has formed the basis for a lawsuit in 800 years of English and American law. Nor do Hollingsworth et al. have standing to defend on appeal a state initiative, which the State's Governor and Attorney General decline to defend. The federal Constitution contains no definition of marriage and still leaves that question to the States, as it has done for the last 224 years. The federal Constitution also does not provide for State initiatives and referenda at all nor does it give the proponents of such measures standing to defend them in federal court.



To the extent that the federal Constitution does address the constitutional questions that are raised by initiatives and referenda, it does so in Article IV, Section 4, which provides that:

> "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."[47]

In *Pacific States Telephone and Telegraph Co. v. Oregon*,[48] the Supreme Court reached the very dubious conclusion that the constitutionality of direct democracy via initiatives and referenda raised a political question insofar as it was inconsistent with the Constitution's guarantee of a republican form of government. I think that decision was arguably wrong as an initial matter although the question is now

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[47] **U.S. Const. art. iv, section 4.**
[48] 223 U.S. 118 (1912).

settled precedent and that Article IV, Section 4 originally forbade direct democracy in the States, but even if the *Pacific States Telephone and Telegraph Co.* case were rightly decided it does not justify giving Hollingsworth et al. standing to bring the present case. I see no reason to extend the right of citizens to legislate through initiatives and referenda beyond the scope of the actual wording of the California Constitution by writing into that document a right of private busybodies to defend the constitutionality of initiatives and referenda when the Governor and the Attorney General decline to defend them themselves. The California Supreme Court may be willing to engage in such free-style constitution rewriting, but there is no reason at all why the federal courts, which are courts of limited jurisdiction, should defer to them on this.



Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Kagan were right. Hollingsworth et al. lacked standing to appeal the judgment of the District Court holding Proposition 8 unconstitutional. *Hollingsworth v. Perry* is correctly decided.

III.

The asserted basis for federal court jurisdiction in *United States v. Windsor* and in *Hollingsworth v. Perry* is that they arise under the first clause of Article III, Section 2, which provides as I noted in the introduction that:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which

shall be made, under their authority;"[49]

In the Judiciary Act of 1789, Congress provided in Section 25 of that act that the U.S. Supreme Court would have jurisdiction to hear appeals from State Supreme Courts where the validity of a federal law or treaty was called into question by the State courts.[50] The lower federal courts were not, however, given a broad grant of federal question jurisdiction by Congress until well after the Civil War -- in 1875. For more than eighty years, therefore, the lower federal courts were almost exclusively confined by Congress to hearing diversity suits and admiralty cases. The Federal Question grant of jurisdiction as to the lower federal courts lay dormant and unused.



On March 3, 1875, Congress passed the Jurisdiction and Removal Act, which granted the lower federal courts general Federal Question jurisdiction. That Act provided in relevant part that:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, ***"[51]

The language of the grant of the federal question jurisdiction to the lower federal courts in 1875 is directly modeled on the language of the Judiciary Act of 1789, which explicitly provided for federal court diversity jurisdiction over "all suits of a

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[49] **U.S. Const. art. iii, section 2, clause 1.**
[50] 1 Stat. 73.
[51] 18 Stat. 470.

civil nature at common law or in equity." As the U.S. Supreme Court explained in *Ankenbrandt v. Richards*,[52] which is the leading case on the domestic relations exception to the federal courts diversity jurisdiction:

> "The Judiciary Act of 1789 provided that the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Act of Sept. 24, 1789, § 11, 1 Stat. 78. (Emphasis added.) The defining phrase, "all suits of a civil nature at common law or in equity," remained a key element of statutory provisions demarcating the terms of diversity jurisdiction until 1948, when Congress amended the diversity jurisdiction provision to eliminate this phrase and replace in its stead the term "all civil actions." 1948 Judicial Code and Judiciary Act, 62 Stat. 930, 28 U.S.C. § 1332.

As the U.S. Supreme Court elaborated in *Ankenbrandt v. Richards*,

> "We thus are content to rest our conclusion that a domestic relations exception exists [to the federal courts diversity jurisdiction] as a matter of statutory construction [because of] Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity." As the court in *Phillips, Nizer, Benjamin, Krim & Ballon* v. *Rosenstiel*, 490 F. 2d 509, 514 (CA2 1973) observed, "[m]ore than a century has elapsed since the *Barber* dictum without any intimation of Congressional dissatisfaction. . . . Whatever Article III may or may not permit, I thus accept the *Barber* dictum as a correct interpretation of the Congressional grant." Considerations of *stare decisis* have particular strength in this context, where "the legislative power is implicated, and Congress remains free to alter what I have done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989).
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> When Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase "all civil actions," I presume Congress did so with full cognizance of the Court's nearly century long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters. With respect to the 1948 amendment, the Court has previously stated that "no changes of



[52] 504 U.S. 689 (1992).

> law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227 (1957); see also *Finley* v. *United States*, 490 U.S. 545, 554 (1989). With respect to such a longstanding and well known construction of the diversity statute, and where Congress made substantive changes to the statute in other respects, see 28 U.S.C. § 1332 note, I presume, absent any indication that Congress intended to alter this exception, see *ibid.;* Fed. Rule Civ. Proc. 2, Advisory Committee Note 3, 28 U. S. C. App., p. 555, that Congress "adopt[ed] that interpretation" when it reenacted the diversity statute. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). **[n.5]"**

The Supreme Court thus concluded that the federal courts lack jurisdiction under the diversity statute because that statute gave them jurisdiction in 1787 to hear only "suits of a civil nature at common law or in equity" and in 1787 such suits could only be heard in Great Britain by the Court of King's Bench, the Court of Common Pleas, the Court of Exchequer, and the Court of Chancery. As I noted in the introduction, suits regarding marriage, divorce, alimony, child support, and probate were heard in Great Britain, in 1787, by the Ecclesiastical Courts of the Church of England. It was not until Parliament passed the Matrimonial Causes Acts of 1857 to 1878 that an ordinary court, the Court of Divorce and Matrimonial Causes, acquired the jurisdiction to hear family law cases which had previously not been among the cases in law and equity as to which the royal courts of justice on the Strand in the City of Westminster in London, England had jurisdiction to hear. In 1875, the High Court was created to try all important English cases, and it was given a Queens Bench Division, a Chancery Division, and a Family Division. The Family Division acquired all of the jurisdiction over matrimonial causes, which had previously belonged to the Ecclesiastical Courts of the Church of England or the Court of Divorce and Matrimonial Causes.

The important point for this essay is that when the Judiciary Act of 1789 was written to give the federal courts diversity jurisdiction over all "suits of a civil nature at common law or in equity" that phrase would not initially have been understood to encompass matrimonial causes since the English courts of law and of equity did not have jurisdiction over matrimonial causes at all until at least 1857. It is for this reason that the U.S. Supreme Court explicitly held in 1858 in *Barber v. Barber*[53] that there is a domestic relations exception to the federal court's diversity jurisdiction. Domestic relations cases were originally understood quite simply not "suits of a civil nature at common law or in equity" which could have been brought in 1789 before the Royal Courts of Justice at the Strand. In *Ankenbrandt v. Richards,* the Supreme court held in an opinion by Justice Byron White that the 1948 reformulation of the diversity jurisdiction to replace the phrase all "suits of a civil nature at common law or in equity" with the phrase "all civil actions" was not meant to change the meaning of the jurisdictional grant and that it thus did not eliminate the domestic relations exception to the diversity jurisdiction. *Ankenbrandt v. Richards* thus remains very much the governing caselaw law down to the present day.



As mentioned above, the federal statute, which in 1875 conferred federal question jurisdiction on the lower federal courts was directly modeled on the grant of the diversity jurisdiction in the Judiciary Act of 1789. The 1875 Act gave the lower federal courts jurisdiction to hear "all suits of a civil nature at common law or

[53] 62 U.S. 582 (1858).

in equity." This language was quite simply a term of art in 1875, which gave the lower federal courts the power to hear cases that could have been heard in Great Britain by the Court of King's Bench, the Court of Common Please, the Court of Exchequer, or the Court of Chancery in 1789. But, it could be argued that the 1875 Act was not originally understood as granting to the lower federal courts the jurisdiction to hear matrimonial causes of the kind the Ecclesiastical Courts could hear in 1789 in England. This was confirmed in *In re Burrus*,[54] a case in which the Supreme Court held it did not have habeas jurisdiction over a matrimonial dispute because it did not arise under federal law and it was not a suit of a civil nature in common law or in equity.[55]



Indeed, Professor Meredith Johnson Harbach notes that "Few of what are regarded as the foundational cases [of the domestic relations exception to federal court jurisdiction] arose in the context of diversity jurisdiction." [56] Professor Harbach observes that *Barber v. Barber*, 62 U.S. 582, 583-84 (1849) arose under the federal court's diversity jurisdiction, but four other important domestic relations cases did not arise as diversity cases. Thus, *Ohio ex re. Popvici v. Agler*, 280 U.S. 379, 382 (1930) came before the Supreme Court on a writ of certiorari from the Ohio

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[54] 136 U.S. 586 (1890).

[55] The literature on this issue includes: Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 **Wash. & Lee L. Rev.** 131, 143n.46 (2009); Michael Ashley Stein, *The Domestic Relations exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 **Boston College L. Rev.** 669 (1995); http://www.circuitsplits.com/2013/04/from-dicta-to-disarray-split-on-the-domestic-relations-exception.html.

[56] Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 **Wash. & Lee L. Rev.** 131, 143n.46 (2009).

Supreme Court, although a federal law was at issue; *De La Rama v. De La Rama*, 201 U.S. 303, 308 (1906) arose under the federal courts' statutory jurisdiction over the territorial courts as did *Simms v. Simms*, 175 U.S. 162, 168-69 (1899); and *Perrine v. Slack*, 164 U.S. 452, 453 (1896) arose pursuant to the federal courts' habeas corpus jurisdiction as did *In re* Burrus, 136 U.S. 586, 596-97 (1890).[57]

In 1948, the statutes governing federal court jurisdiction were revised, and the federal question statute now provides that: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." As with the 1948 revision of the grant of diversity jurisdiction, however, the federal courts have not read the 1948 revision of the federal question statute as changing or expanding its coverage in any way. The 1948 revision has been treated as if it were purely stylistic.



In particular, the federal question grant of jurisdiction has been read since 1948 to encompass the well-pleaded complaint rule established by *Louisville & Nashville Railroad Company v. Mottley*.[58] Under this rule, statutory federal question jurisdiction cannot be based on a plaintiff's anticipation that the defendant would raise a federal statute as a defense to the plaintiff's claims. Instead, statutory federal question jurisdiction must be evident on the face of the plaintiff's well-pleaded complaint, which must directly allege that the defendant has violated the plaintiff's rights under the Constitution, laws, or treaties of the United States.

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[57] Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 **Wash. & Lee L. Rev.** 131, 143n.46 (2009).
[58] 211 U.S. 149 (1908).

Scholars of federal jurisdiction agree that the federal question grant of jurisdiction in Article III allows the federal courts to hear any case in which there is a federal ingredient, even if the federal question does not appear in the plaintiff's complaint. *Osborn v. Bank of the United States.*[59] The federal question statute is read more narrowly, however, and it confers federal question jurisdiction only when a "suit arises under the law that creates the cause of action." *American Well Works v. Layne*.[60] State lawsuits that are likely to lead to a federal law defense are not federal questions under 28 USC 1331 even though they are federal questions for the purposes of Article III. *Louisville & Nashville R. Co. v. Mottley*.[61]

The relevance of the survival of the well-pleaded complaint rule during the 1948 revision of the federal jurisdictional statutes underlines the point that the Supreme Court made in *Ankenbrandt v. Richards* that the 1948 revision was purely stylistic and was not in any way substantive. Statutory limits on the federal question and diversity jurisdiction of the federal courts survived the 1948 stylistic revision unscathed. As Judge Richard Posner wrote in 2006:



> "There is no good reason to strain to give a different meaning to the identical language in the diversity and federal question statutes. The best contemporary reasons for keeping the federal courts out of the business of … granting divorces and annulments, … approving child adoptions, and the like … are as persuasive when a suit is filed in federal court on the basis of federal

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[59] 9 Wheat. (22 U.S.) 738 (1824).

[60] 241 US 257 (1916).
[61] 211 U.S. 149 (1908).

law as when it is based on state law."[62]

In *Elk Grove Unified Sch. Dist. v. Newdow,* the Supreme Court said in 2004 that:

> "[W]hile rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts. … In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights ***. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law."[63]

Many commentators including Mary Anne Case, Cass Sunstein, and Dale Carpenter have read the *Newdow* language as suggesting that the Supreme Court does not want to decide a Fourteenth Amendment gay marriage claim right now.[64] Professor Harbach writes that:



> "A number of federal courts continue to apply [the domestic relations] exception to federal questions without reference to *Newdow*. … Some courts have explicitly advocated extension of the domestic relations exception to federal questions. … And still others have noted that it is unsettled whether the exception applies to federal questions. Perhaps surprisingly, *Newdow* itself has had considerable traction in the lower federal courts. A number of courts have relied on *Newdow* to apply the exception to federal questions."[65]

The question thus arises whether either Edith Windsor's or Kristin Perry's lawsuits

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[62] Jones v. Brennan, 465 F.3d 304, 307 (7th Cir. 2006).
[63] 542 U.S. 1, 12-13, 17 (2004).
[64] Mary Anne Case, *Marriage Licenses*, 89 **Minn. L. Rev.** 1758 (2005); Cass R. Sunstein, *The Right to Marry*, 26 **Cardozo L. Rev.** 2081 (2004); Dale Carpenter, *Federal Marriage Amendment: Yes or No? Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept*, 2 **U. St. Thomas L.J.** 71 (2004). Commentators who have examined the historical underpinnnings of the domestic relations exception include: Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 **Cardozo L. Rev.** 1761 (2005) and Jill Elaine Hasday, *The Canon of Family Law*, 57 **Stan. L. Rev.** 825 (2004).
[65] Harbach, supra Note 49, at 158-160.

challenging the constitutionality of DOMA or of Proposition 8 were "suits of a civil nature at common law or in equity" as that language was used in the 1875 Jurisdiction and Removal Act.

After much deliberation and soul-searching, I have come to think the answer to that question is yes. Challenges to the legality of a State statute setting forth whom one could legally marry would not have been "suits of a civil nature at common law or in equity" in 1787 or in 1875 but would instead have been cases that would have been litigated in England in the Ecclesiastical Courts and not in the Court of King's Bench, the Court of Common Please, the Court of Exchequer, or the Court of Chancery. Prior to 1875, the Supreme Court had construed the federal diversity statute's grant of jurisdiction to the lower federal courts as containing a domestic relations exception. Again, the Judiciary Act of 1789 had given the lower federal courts jurisdiction to hear only diversity "suits of a civil nature at common law or in equity." In *Barber v. Barber*, the Supreme Court construed this language, which was a legal term of art, as not encompassing matrimonial or family law cases.



When Congress used the identical same language to grant the lower federal courts statutory federal question jurisdiction, it can only be presumed that that language had the same meaning in 1875 that the Supreme Court held it to have in *Barber v. Barber*. And, just as the domestic relations exception to the diversity jurisdiction survived the 1948 statutory revision unscathed, so, too, did a domestic relations exception to the lower federal courts federal question jurisdiction survive the 1948 statutory revision unscathed. The federal courts thus did not originally

have the statutory federal question jurisdiction that would enable them to hear cases challenging the definition of marriage, divorce, alimony, child custody, or probate. These cases raised religious questions, which is why in England they were heard by the Ecclesiastical Courts and not by the common law courts or the courts of equity.

Sometimes a family law issue arises in a context where it is dispositive of a case at common law or in equity. In *Reynolds v. United States*,[66] George Reynolds was a leader of the Mormon Church who was criminally prosecuted by the United States for the crime of bigamy committed in the Utah territory in violation of federal law adopted under Article IV, Section 3, which gives Congress the power to pass all needful rules and regulations for the governance of federal territories. The Supreme Court quite correctly asserted federal jurisdiction over this case because it involved a federal crime committed under a federal law in a federal territory, which arguably violated the Free Exercise of Religion clause of the First Amendment. Section 5352 of the Revised Statutes provided that:



> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.

Reynolds' criminal prosecution clearly arose under federal law, and criminal cases were clearly cases in law and equity as to which there is and was federal question jurisdiction under the Constitution in 1787. It is true that the federal criminal case

[66] 98 U.S. (8 Otto.) 145 (1878).

against Reynolds rested on a federal definition of marriage, but the case itself did not seek a redefinition of marriage to accommodate bigamy but rather a constitutional free exercise of religion exemption from the law against bigamy. When the United States brings a criminal case against a defendant whose defense against that prosecution rests on a federal constitutional right, the case that results is a criminal case in law or equity as those words would have been understood in 1787.

Criminal cases involving the family are no more covered by the domestic relations exception to federal jurisdiction than are tort cases involving the family. And, in *Ankenbrandt v. Richards*,[67] the Supreme Court expressly held that a tort suit brought by a divorced wife against her former husband and his girlfriend alleging the sexual abuse of her children could go forward notwithstanding the domestic relations exception. Under the reasoning of *Ankenbrandt v. Richards*, the federal courts did have jurisdiction to review the constitutionality of George Reynolds' criminal prosecution for bigamy.



Similarly, the United States Supreme Court also had jurisdiction to review the decision below in *Loving v. Virginia*.[68] In *Loving*, a white man married an African American woman in violation of Virginia's criminal statute forbidding racial inter-marriage and miscegenation. The Lovings pled guilty to the criminal charge and they were sentenced to one year in prison with the sentence suspended for 25 years

[67] 504 U.S. 689 (1992).
[68] 388 U.S. 1 (1967).

so long as they left the State of Virginia, which they did. They eventually challenged the constitutionality of their criminal conviction and sentence before the U.S. Supreme Court. The Lovings' case was a criminal case and not purely a matrimonial family law case. The Lovings wanted to be free to travel into and out of Virginia and they could not do so because of their unconstitutional criminal conviction. *Loving v. Virginia* is thus like *Reynolds v. United States* in that both cases arose out of a criminal prosecution. Under the reasoning of *Ankenbrandt v. Richards*, the domestic relations exception to federal jurisdiction does not extend to criminal cases any more than it extends to tort cases.

The litigation in *Hollingsworth v. Perry* concerning the constitutionality of California's Proposition 8, which bans gay marriage, was brought by two gay couples who sought solely the right to marry: 1) Kristin Perry and Sandra Stier; and 2) Paul Katami and Jeffrey Zarrillo. The Governor and Attorney General of California agreed with them that Proposition 8 was unconstitutional, and California already provided for domestic partnerships for gay couples, which gave them all the tangible benefits of a heterosexual marriage. The only "legal injury" suffered by the plaintiffs in *Hollingsworth v. Perry* was that their legal status as a couple was called "a civil union" rather than "a marriage" by the State of California.



The question thus arises whether the "legal injury" suffered by the plaintiffs in *Hollingsworth v. Perry* gave rise to a suit of a civil nature at common law or in equity. The Court of King's Bench, the Court of Common Please, the Court of Exchequer, and the Court of Chancery would simply not have had jurisdiction in

1787 to hear a case that did nothing more than challenge the legal definition of marriage and that did not have a criminal or civil penalty aspect to the case. Perry et al.'s case is a pure family law case, which did not arise either under the common law or in equity as equity was understood in 1787 or in 1875. The only English courts that would have had jurisdiction to hear such a case would have been the Ecclesiastical Courts, which continued to hear all English family law cases until the middle of the Nineteenth Century. Perry et al.'s family law case arises under federal law and the Fourteenth Amendment in particular, but it does not arise under the original understanding of the Federal Question statute, which was written in 1875 to apply to "suits of a civil nature at common law or in equity."



The original understanding of equity jurisdiction either in 1787 when Article III was written or in 1875 when the Federal Question statute was adopted into law is, however, a very slippery thing. It is indisputable that equity jurisdiction arose in the first place in England to correct injustices that occurred from a stringent and technical application of the law. As 17th century jurist John Selden's famously said:

> "Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience."[69]

Equity jurisdiction is by its nature malleable and changeable, and it is for this reason that we think the Declaratory Judgments Act is best understood as comporting with

[69] J Selden, Table Talk, quoted in M B Evans and R We Jack (eds), Sources of English Legal and Constitutional History, Butterworths, Sydney, 1984, 223–224.

Article III because by that Act Congress in effect created a new equitable cause of action, although it denied it was doing any such thing. Equity is inherently protean and exists to correct rank injustices that might occur as a result of a technical and rigid application of the law. One can no more confine equity to the causes of action that existed under it in 1787 than one could confine the Necessary and Proper Clause to implied powers that were necessary and proper for carrying into execution enumerated powers in 1787.

The grant of equity jurisdiction by the Federal Question Act of 1875 and by the Federal Question Clause in Article III includes a judicial power whereby the federal courts may, as a matter of conscience, intervene to correct an injustice at law based on their own conscience that an injustice is being committed. Federal courts ought not to take lightly their power to expand their equity jurisdiction, but where the nation is closely divided on a fundamental claim of constitutional right as to the legality of bans on same sex marriage, it is appropriate for the federal courts to intervene. As Abraham Lincoln said on another similar occaision:



> "A house divided against itself cannot stand. I believe this government cannot endure, permanently, half slave and half free. I do not expect the Union to be dissolved — I do not expect the house to fall — but I do expect it will cease to be divided. It will become all one thing or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward, till it shall become lawful in all the States, old as well as new — North as well as South."[70]

The same principle applies to same sex marriage or for that matter to legal

[70] **Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 99-100 (2010).**

recognition of polygamous marriage. Over 100 years ago, Congress recognized that the Union could not tolerate the addition of even one polygamous state and so Utah was forced to ban polygamy as a condition for admission to statehood. Similarly, there are a host of problems and injustices that should bother the conscience of a court of equity if the federal Constitution were held to sanction same marriage in some states but not in others.

It is to correct injustices and to keep the law up to date and flexible that we have given the federal courts equitable jurisdiction. They ought to use that jurisdiction to decide on the merits today's cases on the constitutionality of bans on same sex marriage even though equity would not have gone so far in 1787 or in 1875. We would reach the merits in the same sex marriage cases and would hold that there is a right, enforceable in federal court, to same sex marriage under the Fourteenth Amendment.



Our confidence in this conclusion is strengthened by the fact that the Supreme Court exercised federal jurisdiction in two very important family law cases in the last twenty-five years: *Michael H. v. Gerald D,* 491 U.S. 110 (1989) and *Troxel v. Granville,* 530 U.S. 57 (2000). None of the justices and none of the litigants seemed to even have considered the question of whether federal jurisdiction over these two family law cases one of which involved visitation rights by adulterous fathers and the other of which involved visitation rights by grandparents. These are pure family law cases, yet the Supreme Court heard and resolved them without any justice suggesting an absence of federal jurisdiction and with no adverse response

from Congress to the Supreme Court's assertion of jurisdiction in both cases.[71] This confirms us in the view that the domestic relations exception to federal jurisdiction is archaic, inequitable, and ought to be overruled. Hopefully, the Supreme Court will say as much when it finally hears its next gay marriage case.

The federal District Court did have jurisdiction in our opinion over Edith Windsor's lawsuit against the United States challenging DOMA insofar as it subjected her to $363,053 in federal inheritance taxes that she would not have owed had she been married to a man instead of a woman. A suit for money damages against the government where there has been a waiver of sovereign immunity is clearly a "suit of a civil nature at common law or in equity" and thus presents a federal question for the purposes of 28 U.S.C. Section 1331. The English courts of law and of equity did frequently hear suits for money damages in 1787, and there is thus nothing untoward in the District Court's decision to hear Edith Windsor's case as an initial matter, even though the government lacked standing to appeal the case with which it agreed either to the Second Circuit or to the Supreme Court. We therefore conclude that the District Court in *United States v. Windsor* did have jurisdiction to order the federal government to pay Windsor her tax refund.



There remains one final wrinkle in the argument not yet dealt with. Under 28 U.S.C.A. Section 1257, the U.S. Supreme Court has federal question jurisdiction to review final judgments rendered by the highest court of a State in which a decision

[71] We thank Bradley Silverman for calling these two family laws to our attention in the context of the jurisdiction issues that surround the constitutional debate over same sex marriage cases.

could be had in which the validity of a State statute is called into question on the ground of its being repugnant to the Constitution, laws, or treaties of the United States. This provision descends from Section 25 of the Judiciary Act of 1789 referred to above. This raises the question of whether a State Supreme Court ruling on whether a State marriage statute violated the Fourteenth Amendment in a non-criminal case where no financial consequences were at stake could be heard by the U.S. Supreme Court as a case in law or equity arising under the Constitution. The answer is yes because the Supreme Court ought to recognize a new equitable cause of action allowing domestic relations cases to be heard in federal court.

It is the nature of the equity jurisdiction that it evolves over time to correct rigidities in the common law, and in a constitutional democracy, like ours, new equitable causes of action may sometimes be created by Congress and sometimes by the Supreme Court. Congress and the Supreme Court could and should abolish the domestic relations exception to federal jurisdiction. The word "equity" in Article III has an historical gloss upon it that it allows for its extension to domestic relations cases.



IV.

In conclusion, we think the Supreme Court lacked jurisdiction to hear the appeals in *United States v. Windsor* and in *Hollingsworth v. Perry*, although we agree with the Court's conclusion in the *Windsor* case that DOMA is unconstitutional, and we think the District Court in *Windsor* had jurisdiction to rule as it correctly did that

DOMA is unconstitutional. We also think that the federal courts lacked jurisdiction to hear the appeal in *Hollingsworth v. Perry*. The Supreme Court should grant cert. in one of the federal challenges to state bans on same sex marriage before it. The Court has jurisdiction to decide such a case, and it should hold that there is a Fourteenth Amendment right to enter into same sex marriages.