

I. TUESDAY 2/2 OUTLINE

a. Cases

i. Clapper v. Amnesty International

1. Posture: Plaintiffs (numerous human rights orgs, lawyers and journalists) challenged a provision for the Foreign Intelligence Surveillance Act (FISA) claiming that it violated the First and Fourth Amendments. The district court granted summary judgment to the government and the appeals court reversed. The case is here appealed further to the Supreme Court.
2. Facts: Plaintiffs challenged FISA's authorization of electronic surveillance by the government of non-U.S. persons outside the U.S. for foreign intelligence purposes. The new provisions would require plaintiffs to take costly measures to maintain confidentiality in their international communications. The District Court held that plaintiffs did not have standing to bring their challenge because they had no proof that they were subject to surveillance under FISA, but the Court of Appeals reversed, holding that plaintiffs had standing based on a reasonable fear of injury and costs incurred to avoid such.
3. Issue: Do plaintiffs have standing to seek speculative relief under FISA?
4. Holding: No. Claiming a possibility that their communications will be intercepted is not enough to establish an actionable future injury and no present injury can be established from plaintiff's decision to take costly measures to protect their communications. The dissenting justices argued that the future harm was not speculative and should have established standing because of the high probability that the government would intercept their communications in the future.
5. Class discussion: Could standing have been argued because people in other countries were unwilling to engage in communication with Amnesty International because of government surveillance under FISA? Probably.

ii. Hollingsworth v. Perry

1. Posture: Plaintiffs, one gay and one lesbian couple, sued the state of California claiming that Proposition 8, which amended the state Constitution to provide that "only marriage between a man and a woman is valid or recognized" violated their Fourteenth Amendment right to equal protection under the law. The state officials named in the suit refused to defend Proposition 8 so the petitioners in this case stepped in and countersued to defend it. The district court held that the law violated the U.S. Constitution and the court of appeals affirmed. The case is here appealed further to the Supreme Court.
2. Facts: California voters first passed Proposition 22 in 2000, establishing a legal understanding that marriage was a union between one man and one woman. The California Supreme Court reviewed the law in 2008 and held that it was invalid under the California Constitution, which

required the term “marriage” to include couples of the same sex. The citizens of California retaliated by passing Proposition 8 in the same year, which was the cause for plaintiffs to bring this suit. Petitioners were strong proponents of the law and countersued to ensure that marriage in California would continue to be limited to heterosexual unions.

3. Issue: Do the petitioners have standing to argue in defense of Proposition 8?
4. Holding: No. Federal courts only have authority to decide cases in which the complaining party has suffered a “concrete and particularized injury” for which the court can provide redress. Petitioners were not actually affected by Proposition 8 and only had a generalized grievance that it might be overturned. The dissenting justices argued that the Supreme Court should defer to states’ rights in determining which parties have standing. Because California law allows third parties to assert the state’s interest when officials decline to, the California Supreme Court’s determination of the petitioners’ standing should be binding.
5. Class discussion: Standing-like question of whether the party is the defendant in the lower court, if they must have standing to appeal.

iii. United States v. Windsor

1. Posture: Plaintiff widow filed suit seeking a declaration that the Defense of Marriage Act (DOMA) was unconstitutional. A group of representatives intervened when the government declined to defend DOMA and motioned to dismiss the case. The district court denied the motion and held that DOMA was unconstitutional. The court of appeals affirmed and the case is here appealed further to the Supreme Court.
2. Facts: Plaintiff and her wife were a homosexual couple who were married in Canada and had their marriage recognized under New York law. When plaintiff’s wife died and left her entire estate to the widow the federal government imposed \$363,000 in taxes that would have been exempted if the couple’s marriage were recognized under federal law. Plaintiff brought this suit in an attempt to overrule DOMA and the President and Attorney General announced that they would not defend it. The Bipartisan Legal Advisory Group of the House of Representatives intervened to defend DOMA and motioned to dismiss the case but this action was denied and the case was heard.
3. Issue: Does the Defense of Marriage Act deprive same-sex couples who are legally married under state laws of their Fifth Amendment right to equal protection under federal law?
4. Holding: Yes. States have the authority to define marital relationships and DOMA undermines that power. DOMA imposes a “disadvantage, a separate status, and so a stigma” on homosexual couples, thereby violating the Equal Protection Clause the Fifth Amendment. The

dissenting justices argued that the Supreme Court did not have the jurisdiction to review this case nor the power to invalidate democratically enacted legislation.

5. Class discussion: The executive declined to enforce the law and all parties involved wanted it repealed until the BLAG intervened. Is this sort of collusive behavior common and accepted?

b. Hypothetical discussion

- i. Defendant credit reporting company publishes false information about plaintiff, but it's false information that (allegedly) doesn't cause him any economic or even reputational damage (like falsely claiming he has an advanced degree).
- ii. Plaintiff sues under the Fair Credit Reporting Act (assume it's true that the publication violates that act), seeking statutory damages as provided by that Act for the violation
- iii. Defendant moves to dismiss, claiming plaintiff lacks an injury for standing purposes. What result?
- iv. Viable positions
  1. There is no injury because the false info causes no damage.
  2. Congress can create an injury by creating a legal right. Violation of a legal right created by congress is an injury.
  3. Having false information published is an actual harm which can suffice for standing, even if the false info is complimentary.

c. Mootness and ripeness

i. Mootness

1. If the matter being adjudicated is no longer an issue then legal proceedings can have no effect, rendering the issue moot.
2. Exception: Capable of repetition but evading review. Pregnancy is the classic example.
3. Defendant cannot make case moot merely by halting injurious behavior.

ii. Ripeness

1. May have claim that court can remedy in future, but not yet.
2. No standing if the injury is speculative and not imminent.