

# OBAMA, HOLDER, VERRILLI AND THE MARK OF CIVIL RIGHTS HISTORY

Leaving aside the heinous 3/5 compromise set forth by James Wilson and Roger Sherman at the founding Philadelphia Constitutional Convention, American history is marked by significant moments of dedication to civil rights for its citizens. Far from perfect, it has been a struggle and evolution. As Ralph Waldo Emerson noted:

Nothing great was ever achieved without enthusiasm.

Which is certainly true, from the Founding Fathers, to Lincoln and the Emancipation Proclamation, to the 19th Amendment protecting the right of women to vote, to the Civil Rights Act of 1964, moments of enthusiasm, sweat, toil and, eventually, greatness mark the struggle for equality for all in the United States.

And here we are on the cusp on the next defining moment in the quest for equality for all in the US. It is not for origin, not for skin color, not for gender, but for something every bit as root fundamental, sexual identity and preference. Marriage equality, yes, but more than that, equality for all as human beings before the law and governmental function.

For all the talk of the DOMA cases, the real linchpin for the last measure of equality remains the broad mandate achievable only through *Hollingsworth v. Perry*, the Proposition 8 case. The case for full equality in *Hollingsworth* has been made beautifully, and strongly, in the Respondent's Brief penned by Ted Olson, David Boies, Theodore Boutrous and Jeremy Goldman.

But there is still a missing voice in the discussion, that of the United States government. The government has the voice, and spoke it loudly in the DOMA litigation, first in a policy declaration letter to Congress, then in lower court briefing and finally in Supreme Court briefing. Mr. Obama's initial policy declaration noted that we must "suspicious of classifications based on sexual orientation" and concluded:

...that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Indeed that is true, but it only takes the equality movement so far, it still leaves room and ability for bias against sexual orientation by individual states, most notably on the front of marriage equality, but potentially a host of other invidious modalities as well.

That is not good enough. It is time for the government, by and through the Obama Administration, to take the final step in cementing full equality for all citizens, not just as to the federal government, but as to the states as well. The government needs to file an amicus brief supporting full equality in *Hollingsworth v. Perry*.

Three men are in the crucible – President Barack Obama, Attorney General Eric Holder and Solicitor General Donald Verrilli, Jr. History will remember these men either way, but they have the opportunity to be remembered among the giants in civil rights history. It is a defining moment for their once and future legacy.

What a major moment in history this is, and will be, if the if the Obama Administration Solicitor General files a brief in support of full heightened scrutiny based protection for sexual orientation.

It brings to mind the scene from "Lincoln" where

President Lincoln says

■ “Now, Now, Now”

and forces the 13th amendment through because “Now” was the moment to eradicate slavery in one fell swoop and waiting posed unconscionable risks and further damning inequality.

Such is exactly the time and place now as to the last recognized measure of fundamental equality, sexual orientation. The *Perry* Plaintiffs’ team has argued well in their brief for the broad principles of due process and equal protection heightened scrutiny that would resolve these issues “Now”. All the stars are aligning. Prominent Republicans have filed an amicus brief. So too a broad swath of leading American businesses. Openly gay Congress members are calling for it.

Now is the time to seize the moment and eradicate discrimination across the board against gay men and women. This is the moment for enthusiasm, and President Obama, Attorney General Holder and Solicitor General Verrilli have a historic opportunity to help make it happen. This is the moment, and they need to step up. Great men take such great steps.

The time is “Now, Now, Now”.

File the amicus brief for full equality in *Hollingsworth v. Perry* gentlemen.