

PROP 8 LIVEBLOG: “JUNE IS THE MONTH FOR MARRIAGES”



Teddy and I are in the ceremonial court room to watch the Prop 8 Trial. bmaz is making friends down in the actual court room. Teddy's doing a full liveblog over there where the wireless signal is strong. Until he needs a break, I'm just going to write some impressions and transcribe bmaz's comments (he's got no signal).

bmaz, in the court room writes,

Talked to Ted Olson on the elevator and walking down the hall to court room. He is excited and cautiously optimistic. In courtroom now Walker about to take the bunch. There is a strange hushed buzz of excitement about the room. You can tell this is special; there are two sketch artists! It is electric here.

After all the lawyers introduce themselves, Walker says, "Well this is an impressive array of legal talent." Then, explaining that the delay between the trial and the closing argument (caused in part by ACLU dispute over disclosure), he says the delay may be appropriate. "June is, after all the month for weddings."

bmaz:

The respective parties are at long rectangular counsel tables, actually perpendicular to the bench. Leaves the attys facing each other – kind of unusual. Walker makes a joke that June is historically 'good month for weddings' so is right for closings on this case.

If I were the defendant-intervenor team, I'm not sure I'd take that as a good omen.

Olson up. State has changed constitution to take away right from these plaintiffs.

Olson: Present marriage from four positions.

Proponents. In words of lead counsel, central and defining purpose of institution of marriage is to promote procreation. Core need that marriage aims to meet is child's need to be practically and legally affiliated with man and woman who brought child into world. Proponents of prop 8 see marriage as an institution of, by, and for the state, and to promote procreation and raising of children by biological children.

Olson quotes from Prop 8 campaign lit: "Protect our children from learning that gay marriage is okay."

Olson: For obvious reasons the "gays are not okay" message was abandoned during the trial in favor of the procreation and deinstitutionalization thesis.

bmaz:

Olson goes right at di arguments. He is effectively painting it as religious based state action/enforcement. Walker tags him with fact he has burden of proof. Olson insists strict scrutiny is the relevant test (he is right)

Walker: But it is the plaintiffs who bear the burden of proof is that not right?

Olson: Up to a point.

Walker: and that standard being?

Olson: Strict scrutiny.

Walker: Are you focusing on facts pertinent to CA, or facts generally with respect to gay marriage in the country?

Olson: I'd like to juxtapose the proponents

depiction of marriage with the other perspectives. I'd like to show vacuum with what the proponents did when they passed this.

Walker: SCOTUS in MN v. Cloverleaf, equal protection, any debatable proposition will support the enactment. While one challenging on equal protection, when challenging that classification is irrational.

Olson: it has to be a debatable proposition, not that there's a debate about the proposition.

Olson: Same sex marriage will not stop heterosexual couples from marrying or having babies. In fact, evidence shows that it will help. After 3 week trial and oppty to present any expert they wished, best case they could put forth was that Prop 8 was constitutional bc CA voters don't KNOW whether same sex marriage will affect marriage.

[This is clever—he's using the Prop 8 attack on lack of knowledge to point to impossibility of knowledge on part of CA voters.]

Walker: Opposite sex couples can procreate w/o intervention of third parties.

Olson: We're talking about taking away intimate relationship that SCOTUS has called right of privacy, right of liberty. You have to explain why preventing these other indivs will somehow stop people from procreating. That's one of

Walker: But doesn't CA accommodate gays and lesbians by providing domestic partnership rights.

Olson: Will put excerpts of testimony from witnesses on both subjects.

Olson: I've counted 14 cases SCOTUS has commented on. Most important relationship in life, One of liberties protected by due process clause. Liberty right equally available to people in homosexual case as in heterosexual. SCOTUS has said again marriage is liberty, privacy, spirituality, autonomy. It is a right of individuals, not an indulgence dispensed by

state of CA. It is a right belonging to Californians, not a right belonging to state of CA. Right of marriage has never been tied to procreation. It hardly can be tied to interest in procreation. Marriage, contraceptives, divorce, and homosexuals.

Walker: Why cannot Californians establish access to that right.

bmaz:

Walker goes straight at the presumptions inherent in a proposition passed by people/voters. That is also the right question. They are boring right to the core. Heck not going to be any nonrepetitive work left for Dls.

Olson: Unless they're taking away a right.

Walker: Would this case be different if CA SC had invalidated the 18000 marriages performed?

Olson: Hetero, if they are a child molestor, wife beater, person in prison, indivs such as plaintiffs may not marry person of choice. We have 3 strikes law, you can go to prison for life, but if you're homosexual you can't get married.

bmaz:

Apparently none of these lawyers, on either side, realize it is after Memorial Day and summer suits are okay to wear. Bunch of men in black.

Walker: wouldn't regime be more rational if CASC had invalidated those marriages?

Olson: it would be less irrational.

Olson: Rationalizations put forth at end of trial different than what was put forward during the election. They don't want to sound like animus. Now deinstitutionalization of marriage, whatever in the world that is.

Olson showing clips of plaintiff testimony.
"Love of my life, I love him probably more than
I love myself."

bmaz:

*The video clips selected by
Ps are very powerful. The
gallery is clearly moved even
by video clips.*

[It's kind of weird, in ceremonial courtroom,
they've got two screens, one with courtroom now,
one with it back in January. Gives a very odd
sense of duality.]

Olson now reviewing expert testimony: Cott. Not
primarily a vehicle by which states promotes
childbirth. Promote couples to live together, to
remain committed to one another, economic
partnership. Aspect of liberty, basic civil
right. Ability to marry expression of one's
freedom. Same things coming from expert on
marriage that SCOTUS has been saying for years.

From tape of Cott's testimony again:

*Mutual consent between partners who
freely choose each other.*

Olson now drawing connections between earlier
racial limitations on marriage. Particularly
given slaves' right to marry after they were
freed, this ties marriage very closely with
freedom.

One of the effects of showing a series of videos
is that it puts Walker back into a passive role.
Earlier it had been a back and forth.

Olson now ties language used by Sandy Stier, by
expert, by proponents, and another expert,
showing that the argument made in the campaign
precisely ties up with the language of
discrimination used by experts, plaintiffs.

In 2005, 37,000 children living in households
led by same sex couples.

Olson: Those children would be better in married households. Even Mr. Blankenhorn, proponents principal witness agree with that proposition.

bmaz

Walker been mute for a while. Must be ready to let loose some probing inquiry any second now.

[I'm sure Olson has been looking forward to showing this testimony since Boies elicited it during the trial.]

Blankenhorn: It would improve children of same sex couples to allow same sex marriage.

bmaz

Olson pointint out and showing video of Defs own stooge Blankenhorn actually making the PLAINTIFF's case. The gallery understands the absurdity of this plank bu Dls. Gallery has to struggle not to chuckle. One person rightfully murmurs "oops". No shit, Dls look idiotic by their own witness. For the uninitiated, this is a bad thing for a party.

[we were laughing up in the media room]

Olson calls him "Dr ... Mr Blankenhorn" Laughs in the ceremonial courtroom.

Olson: Proponents' principal witness believes that gay and lesbians would be better off, their children would be better off, by applying equal dignity, we would be more American if we permit same sex marriages.

Olson: On one side deinstitutionalization about marriage. On other side, the things SCOTUS has said in 14 trials, what plaintiffs have said, what experts have said. Plaintiffs have no interest in changing marriage. It is no contest. Merely wish for themselves, status CA accords to their friends. Same position as Mildred Jeter and Richard Loving. Only wanted to marry person

they loved, person of their choice, who happened to be person of different race.

Walker: Cooper said involves legislative facts. Would you agree?

Olson: Does the same thing that Romer decision, take away their rights based upon their sexual orientation. Harkening back to Lawrence v Texas, conduct is protected Constitutional right. Prop 8 takes away right to marry based on practice of something that has been decided to be fundamental right of liberty and privacy.

Walker: Is there a yes or no?

Olson: Yes. Well, yes or no. It could be decided on legislative facts, facts that are apparent that these people are being selected out and what SCOTUS says about fundamental rights. You decided we should have a trial. Marriage, classification of indivs. I now think that that was an exceedingly wise decision. We now have not just SCOTUS decisions, not just what we know about discrimination, but now we have heard what it matters in real life, we've heard from the experts. This has been a great education. Not just to the people in this room but those who read it.

Walker: Well

Olson: [Doesn't let Walker interrupt this time] Kind of record created in Brown v., VMI. I really don't know what legislative facts are. What we know about people, those support finding that this is unconstitutional.

Walker: Facts that it is appropriate for judiciary to decide. When is it appropriate for judiciary to weigh in on constitutional issues that may touch on sensitive issues?

bmaz

Olson now arguing the nature and weight of the evidentiary record. This is the 800 pound gorilla that simply cannot be overcome by the haters. Walker knows it too by his body language but is not

overtly letting on; is using Baker decision as a ruse to not let on how powerful this component is.

Walker: SCOTUS in Baker v Nelson decided issue was not ripe for SCOTUS to weigh in on. That was 1972. What's happened in 37 years?

Olson: Romer case. Lawrence v. Texas case. Changes in ballot propositions. BTW, SCOTUS rejected oppty to take miscegenation case, 1955, then took it in 1957. SCOTUS in fundamental right for prisoners to get married.

Walker: What year was that?

Olson: Ummm.

Walker: One of your colleagues will find that.

Olson now correcting Walker that SD OConnor didn't change her opinion on Lawrence v Texas. Notes that hers was concurring on different basis.

Walker: How important in Romer was that initiative took away municipalities oppty to write

Olson: Court said it was significant. I don't know what I would have decided.

Walker asks again whether this case is different bc gay marriage was legal for a while. Olson responds that it makes it a stronger case, bc there are 4 categories, but it would still be constitutional in any case.

bmaz

Waler seems genuinely curious as to whether the fact there was a right to marry for six months makes this case constitutionally different than if there had never been such a right for such a short period. I think Olson

stumbles here a bit by trying to make out the position this case is even stronger because of that. I would have said constitutionally it doesn't matter it is either a right or not, it IS a right, and strict scrutiny standard applies. Period. What would be the case if there had never been the right for six months is freaking irrelevant.

Walker: Statute in Lawrence was criminal. Denial of right in same sex doesn't have any criminal sanction. Simply denial of access to state of marriage.

Olson: I submit it doesn't make any difference. Once Lawrence recognized constitutional right, what court repeatedly talked about is right of indivs, our laws and our tradition afford constitutional protection relating to marriage, contraception, education. Persons in homosexual relationship may seek autonomy just as heterosexuals do. Court can't say, because you engage in something that we say is constitutional they can't then say you can't do something else.

Walker: Should review be different wrt due process and equal protection claim.

Olson: Strict is important in either case. Due process, fundamental Constitutional right to engage in institution of marriage. Not false institution of marriage. Something that is not citizenship, but is called something else. Our fundamental rights cannot be taken away unless state has compelling reason. In equal protection, group of indivs who meet every one of standards for suspect classification that they are a minority. There wasn't any dispute

about that. There has been an argument about political power. Romer starts w/language: we do not make classifications among our citizens. Indivs before you today, do not have choice for person they wish to marry bc person is wrong sex.

Walker: if Prop 8 is unconstitutional, what happens to DP laws?

Olson: exactly where it was before this was passed. If people want a business relationship. Maybe they don't want to enter into marriage in spite of how great we've been saying it is. No one aspires as a child to grow up and enter into domestic partnership. Witnesses told us you don't have celebration when you enter into DP. Beacuse I say so is not a reason. You can't have continued segregation of schools bc you've always done so.

Olson: Straight people are not going to stop getting married. There was some evidence supposedly from Netherlands. But that evidence disappeared before our eyes when it was challenged in court.

Olson: Prop 8 discriminates on basis of sex, in same way that Loving discriminated on basis of race. Sexual orientation is same as it was in CO. Classification, "we did it because we don't know" is the same as saying we don't know why we did it.

Walker: Can't voters rely on every day impression that they had, make a decision even if it doesn't withstand scientific scrutiny.

Olson: Depends on the decision. As Blankenhorn said, we'd be closer to American ideal if we allowed same sex marriage.

[Olson wandering right now in response to common sense question.]

Olson: there's got to be a reason, it can't be a post hoc rationalization.

Walker: Do i have to find there was a discriminatory rationale? Unlawfully

discriminatory.

Olson: I'm saying that irrespective of the motive of people in voting booth. Nice people voted in favor of Prop 8, people voted in some awful motive, we heard some awful stuff. There's plenty of good CAs who voted for Prop 8, bc they're uncomfortable w/gay marriage. They didn't hear—and a pity they couldn't see—the evidence the experts said. You can have religious view that this is not acceptable. It was true in Loving case. Arg was made that it's god's will. People honestly felt that it would be wrong to dilute the races. They were permitted under Constitution to THINK that, but they're NOT permitted to put that in Constitution of their state.

Olson: This law is discriminatory, it imposes great social harm on people who are our equals. Members of our society, they pay their taxes, want to form a household, want to raise their children in same way their neighbors do. We are imposing great damage on them by saying they cannot have happiness, privacy, liberty that the rest of our citizens do. We have demonstrated during this trial that that causes grave, irreparable harm. [quotes from SCOTUS] Intimacy to the point of being sacred. If we had a reason, a really good reason, but there's no reason I heard. We've improved institution of marriage when we allowed interracial couples to get married, when we allowed women to get married, we will improve institution of marriage when we let same sex couples to get married. Testimony erects insurmountable barrier to proponents. SO long as it doesn't hurt CAs to get rid of stigma, then it's uncsontitutional.

Applause breaks out in ceremonial court room.