# NEW YORK'S ENLIGHTENMENT & SOME THOUGHTS ON PERRY PROP8 CASE

Liberty & Justice by Mirko Ilic

## New York gets it done for marriage equality:

> Lawmakers voted late Friday to legalize same-sex marriage, making New York the largest state where gay and lesbian couples will be able to wed and giving the national gay-rights movement new momentum from the state where it was born.
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> The marriage bill, whose fate was uncertain until moments before the vote, was approved 33 to 29 in a packed but hushed Senate chamber. Four members of the Republican majority joined all but one Democrat in the Senate in supporting the measure after an intense and emotional campaign aimed at the handful of lawmakers wrestling with a decision that divided their friends, their constituents and sometimes their own homes.
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> Senate approval was the final hurdle for the same-sex marriage legislation, which was approved last week by the Assembly. Gov. Andrew M. Cuomo signed the measure at 11:55 p.m., and the law will go into effect in 30 days, meaning that same-sex couples could begin marrying in New York by late July.

Outstanding. A friend in New York told me this

was going to happen and that it would be done late and on Friday night, because that is how monumental and controversial legislation gets done in Albany historically. And that is exactly how it came down. You can almost feel the awesomeness of New York all the way out here in the desert.

But I want to touch on the bigger picture and what the enlightened New York action means to the push for marriage equality for all across the nation. In short, this is huge. And the Times notes just that:

> In New York, passage of the bill reflects rapidly evolving sentiment about same-sex unions. In 2004, according to a Quinnipiac poll, 37 percent of the state's residents supported allowing same-sex couples to wed. This year, 58 percent of them did. Advocates moved aggressively this year to capitalize on that shift, flooding the district offices of wavering lawmakers with phone calls, e-mails and signed postcards from constituents who favored same-sex marriage, sometimes in bundles that numbered in the thousands.
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> But New York could be a shift: It is now by far the largest state to grant legal recognition to same-sex weddings, and one that is home to a large, visible and politically influential gay community. Supporters of the measure described the victory in New York as especially symbolic — and poignant — because of its rich place in the history of gay rights: the movement's foundational moment, in June 1969, was a riot against police inside the Stonewall Inn, a bar in the West Village.

The trend is not limited to New York, nationwide the latest numbers have 53% of Americans

favoring same sex marriage. Quite frankly, it is hard to believe that the numbers might not be even higher if the relevant question was framed in the more appropriate language of “marriage equality” instead of the more charged “same sex” marriage; but even with the more inflammatory framing, a distinct majority now favor it. The right wing wedge canard is losing its luster; it is increasingly clear marriage equality is going to happen for all, it is simply a question of when.

Which brings us back to the point of the prime spear for accomplishing the deed: *Perry v. Schwarzenegger* (now technically Brown). *Perry* is now, and has been from the outset, the best vehicle for not only bringing marriage equality for all, but doing so in a transcendent and binding legal opinion, and likely with a finding and basis that it is mandated by the Constitutional edicts of Equal Protection and Due Process. That is the holy grail because it would almost certainly place such discriminatory animus against the gay within some level of elevated scrutiny, and that will bleed over immediately into the DOMA fight and the consideration of any and all discrimination against such individuals.

But there is one potential problem – if there is not some vehicle for the Defendant-Intervenors in Perry to establish standing on the appeal, the case may go no further than the 9th Circuit and, even with victory, be binding on no more than the state of California (and it is remotely possible only for the counties Los Angeles and San Francisco as those were the two jurisdictions originally plead in *Perry*).

Therein is exactly why I have always said Ted Olson, David Boies, AFER and the *Perry* plaintiffs were mistaken, and tactically incorrect, to affirmatively contest standing on appeal as they point blankedly have. The movement of society on marriage equality ideologically has been in the right direction for some time now. Even, as the Gallup poll

cited above indicates, by the general populous that does not have the sophistication to understand it in Constitutional terms.

No matter what the result in the trial level of *Perry*, and there was never any real doubt how Vaughn Walker was going to rule – not because he was gay, but because he was a very good and proper judge – the matter was going to go to the 9th. There has been, and remains, little doubt how the 9th will rule. But that does not necessarily get the case to the Supreme Court, and that is why the standing issue is so critical.

As you may recall, the issue of standing was punted by the 9th down to the California Supreme Court, where the matter is currently pending.

Between last night's marvelous happening in New York, the clear cut and admirable new policy by the Obama Administration, and the ever enlightened movement of society, I think the writing is on the wall for the California Supreme Court, and I think they will indeed find that the D-Is have the requisite standing, the 9th will roll with that and away we go to the United States Supreme Court. I truly believe the New York passage will leave such a marker that will carry all this through, and that is a beautiful thing.

As I am going out on a limb here, let me go one step further out. The Supremes will seal the deal. If you read *Lawrence v. Texas*, penned by Anthony Kennedy, and are a Kennedy watcher, it is extremely hard to see how he will not maintain consistency with his *Lawrence* decision and vote for marriage equality. I think that was the case from the start, and the action of New York, and, yes the Obama Administration, makes it almost certain. Justices do not want to look like asses in history, the way things are going, the margin may be even more favorable than 5-4 if we get to that point. Wouldn't that be beautiful?

[The absolutely incredible graphic, perfect for

the significance and emotion of the moment is by Mirko Ilić. Please visit Mirko and check out his stock of work.]