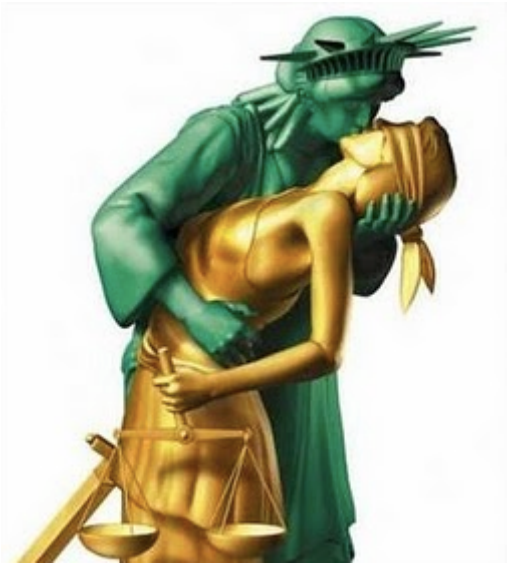
BEAUTIFUL EQUALITY COMES TO MARRIAGES IN AMERICA



Love will find a way, and it finally has. There are many, many friends I am thinking of right now, and they all know exactly who they are. Congratulations, and it was far too long coming. Here is the opinion.

EQUALITY

There is so much to say, that it is hard to know what to actually say. There are many quotes like this one, but it is indicative of the decision:

> "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."

What I don't find in the majority decision, as wonderful as it is, is discussion of heightened scrutiny, strict scrutiny, or other clear cut, across the board protection for the status of sexual identity. And that is disappointing. Also why I cried bit when SCOTUS, two years ago to this very day, callously refused to take the incredibly wonderful tee shot that Vaughn Walker gave them in the Proposition 8 case previously.

I guess the handwriting was on the wall when even the old liberal lion Steve Reinhardt, a man I have met, and a judge I truly love and revere, pulled up short and did not have the balls to

take the root concept of sexual identity “equality” where it naturally flowed when he had the pen in his wise hand. But he didn’t then, and his old friend Tony Kennedy has not today.

So, while there is so much to cheer right this moment, we, and this country, are still far from where we need to be with regard to inclusion of all our citizens in the concept of equality. It is more than black and white, it is straight, gay and trans too. We are all on this patch of earth together, and we all are equal, and that needs to be admitted legally by the highest court in the land and understood by all the people it serves.

So, there are still miles to be traveled. Let the four, count them four, spittle laced, bigoted, backwards, and disgusting dissents in the *Obergefell* decision speak for themselves. Honestly, they make me want to puke. For all that were celebrating the enlightened liberal thought of Chief Justice John G. Roberts yesterday, today is a rough reminder of who and what he really is. And you really have to read Scalia and Alito to understand the fucked up pathology of the dissenters. Wow.

9TH CIRCUIT EXTENDS EQUAL PROTECTION (AND BATSON) TO SEXUAL IDENTITY

In yet another win for equality, and equal protection, on issues involving sexual orientation and identity, the Ninth Circuit has issued an important opinion holding *Batson v. Kentucky* protections apply to sexual orientation issues in jury selection.

The case is *Smithkline Beecham Corp, dba GSK v.*

Abbott Laboroatories, and the decision is here.

This case evolved out of a licensing dispute between two pharmaceutical makers of HIV medications. GSK contended Abbott violated antitrust laws, dealt in bad faith and otherwise engaged in unfair trade practices by licensing to GSK the authority to market an Abbott HIV drug in conjunction with one of its own and then increasing the price of the Abbott drug fourfold, so as to drive business to Abbott's own combination drug.

Judge Steve Reinhardt set the table:

> During jury selection, Abbott used its first peremptory strike against the only self-identified gay member of the venire. GSK challenged the strike under Batson v. Kentucky, 476 U.S. 79 (1986), arguing that it was impermissibly made on the basis of sexual orientation. The district judge denied the challenge.
>
> This appeal's central question is whether equal protection prohibits discrimination based on sexual orientation in jury selection. We must first decide whether classifications based on sexual orientation are subject to a standard higher than rational basis review. We hold that such classifications are subject to heightened scrutiny. We also hold that equal protection prohibits peremptory strikes based on sexual orientation and remand for a new trial.

The fact the court unanimously found that heightened scrutiny applies is critical. Finding heightened scrutiny controlling on sexual preference issues has been the holy grail for a long time, and exactly what the Supreme Court ducked in *Windsor* (mostly) and *Perry* (completely through avoidance).

The *Batson* challenge was effectively uncontroverted materially by Abbot, and the

court found exactly that. The far more important discussion, however, comes in the analysis of whether the violation by Abbott violated the Equal Protection Clause. This is a necessary question because, while the Supreme Court in *J.E.B. v. Alabama* extended Batson protections to gender, and presumably other suspect class groups, it still stated:

> "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."

In short, if heightened scrutiny is not found to apply, Abbott's *Batson* violation would nevertheless be permissible (even if slimy). And the 9th Circuit, for all its claimed "liberal tendencies" had in the past avoided clear cut assignment of heightened scrutiny to sexual orientation in such well known cases as *High Tech Gays v. Defense Industrial Security Clearance Office* and *Witt v. Department of the Air Force*. In those cases, the 9th instead framed away and attempted to decide on Due Process grounds instead of Equal Protection, even though they often strained to do so.

But today Judge Reinhardt, writing for the unanimous panel, took the final step up he was too cowardly to do in *Perry v. Schwarzenegger*. I have always had an inclination Reinhardt was uncomfortable with the dodge he took in *Perry*, today we have some confirmation. Reinhardt notes the Supreme Court, through his friend Anthony Kennedy, still managed to avoid the critical Equal Protection question in the seminal Windsor opinion:

> Windsor, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary. Lawrence presented us with a nearly identical quandary when we confronted the due

> process claim in Witt. Just as Lawrence omitted any explicit declaration of its level of scrutiny with respect to due process claims regarding sexual orientation, so does Windsor fail to declare what level of scrutiny it applies with respect to such equal protection claims. Nevertheless, we have been told how to resolve the question. Witt, 527 F.3d at 816. When the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent "by considering what the Court actually did, rather than by dissecting isolated pieces of text."

And from there, the barn door opened for full on, and clear cut, assignment of heightened scrutiny under the Equal Protection Clause. After an explanation of the evolution from Kennedy's decision in *Lawrence v. Texas* through *Windsor*, The Ninth states:

> Windsor review is not rational basis review. In its words and its deed, Windsor established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, Windsor requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

and…

> Rational basis is ordinarily unconcerned with the inequality that results from the challenged state action. See McGowan, 366 U.S. at 425–26 (applying the presumption that state legislatures "have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality"). Due to this distinctive feature of rational basis review, words

> like harm or injury rarely appear in the Court's decisions applying rational basis review. Windsor, however, uses these words repeatedly. The majority opinion considers DOMA's "effect" on eight separate occasions. Windsor concerns the "resulting injury and indignity" and the "disadvantage" inflicted on gays and lesbians. 133 S. Ct. at 2692, 2693.

and…

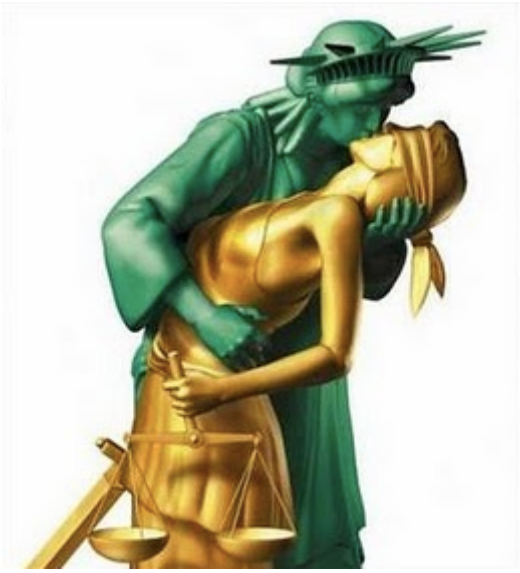
> Windsor requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, Windsor requires heightened scrutiny. Our earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with Windsor. See Miller, 335 F.3d at 892–93. Because we are bound by controlling, higher authority, we now hold that Windsor's heightened scrutiny applies to classifications based on sexual orientation.

There is more, much more, justification and reasoning laid down by Steve Reinhardt. And it is beyond persuasive. This is the decision Reinhardt should have stuck in the face of the oh so timid Supreme Court in *Perry*. It may not have created a different ultimate result, but at least the framing of the question would have been straight up for all to see, and the nine justices forced to confront. When Reinhardt framed his Perry opinion in terms of *Romer* and state law, he weakened both *Perry* and *Windsor*. Today, he makes some amends.

Coupled with the decision of Judge Shelby in the

Utah case of *Kitchen v. Herbert* (and apparent receptiveness of the 10th Circuit to upholding it) and in a very similar case the 10th Circuit is being asked by all parties to consolidate, the table is being set rather rapidly for the Supreme Court to have to decide once and for all whether or not to apply heightened scrutiny and give sexual orientation the suspect class protection it deserves. The 9th has now said it is the only logical conclusion, and the 10th Circuit looks lined up to do the same. The time is coming, and likely a lot faster than the Supremes wanted.

THE MARRIAGE EQUALITY DECISIONS



The moment of truth has finally come on the long and tortured path through the Supreme Court for the marriage equality movement. Without further adieu, the Defense Of Marriage Act has been struck down as unconstitutional under Equal Protection grounds in a 5-4 opinion authored by Anthony Kennedy. A lack of standing has been found by the court in the California *Hollingsworth v. Perry* Prop 8 case, thus meaning the case will revert to the Ninth Circuit decision.

Frankly, everybody in the universe is going to have instantaneous analysis and opinion on the nature and import of these two decisions. I will

likely be along with the same on particular aspects later, but for now I want to get the decisions and opinions up here so that one and all can read and discuss them. Below I will give the links to the opinions and the critical language blurbs from each.

United States v. Windsor (DOMA): Here is the opinion. As stated above, it is a 5-4 split authored by Justice Kennedy, joined by the liberal bloc of Ginsburg, Breyer, Sotomayor and Kagan. Chief Justice Roberts, Scalia, Thomas and Alito dissent in separate dissents written by Roberts and Scalia.

The opinion is very broad in range and focuses on Section 3 of DOMA, which will effectively obliterate the law. The key holding comes at the end of Kennedy's majority opinion:

> DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA in- structs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the mar- riages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Hollingsworth v. Perry (Prop 8): Here is the opinion. As stated above, the court found a lack of standing by the appellants Hollingsworth (Prop 8 Proponents). ROBERTS, C. J., delivered

the opinion of the Court, in which SCALIA, GINSBURG, BREYER, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS, ALITO, and SOTOMAYOR, JJ., joined. So, just to be clear here: The *liberals* are the reason the court could not issue a decision granting ALL Americans the right to marriage equality that citizens in California, and the other few states who have state law marriage equality, will enjoy.

Anthony Kennedy, by his crystal clear decision and language he penned in the Windsor DOMA decision, and his willingness to find standing and rule on the merits in the Prop 8 case, was ready to make it happen. And all the *liberal* justices, save for Sonia Sotomayor, prevented it.

The court has remanded Hollingsworth back to the 9th Circuit with instructions to enter a similar ruling based on lack of standing/jurisdiction. That means that the broad and sweeping decision entered by Vaughn Walker in the district court trial will become law in California.

Now, to again be clear, I expect there will be litigation attempts by the Equality Haters to try to restrict Walker's decision to the two plaintiff couples and/or the two respective counties at issue in the original *Perry* complaint. I do not believe that will bear any fruit and fully expect full marriage equality to exist across all of California, but it may not be as immediate as it should. We shall see.

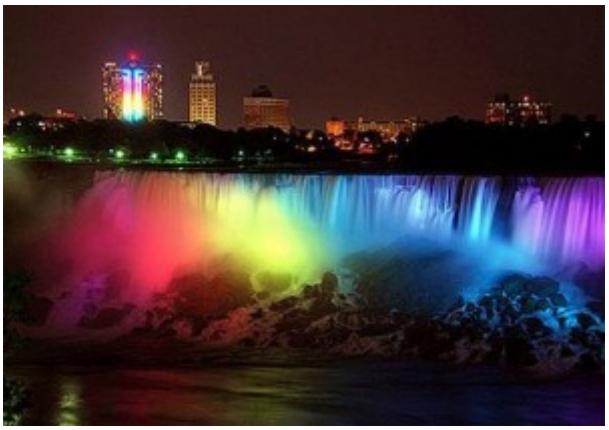
In closing, a very good day for marriage equality and LGBT rights. The DOMA decision is broad and provides for heightened scrutiny in evaluating marriage and sexual identity issues; that portends well for future rights litigation. And, of course, DOMA is dead. Also heartwarming that all of California's citizens will have their rights protected; it is, however, sad that this will not extend to all Americans.

[As always on these Prop 8 posts, the absolutely incredible graphic, perfect for the significance

and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]

DOMA'S DAY AT THE SUPREMES

UPDATE: HERE IS THE AUDIO OF TODAY'S ARGUMENT



HERE IS THE TRANSCRIPT OF TODAY'S ARGUMENT

I am going to do something different today and put up a post for semi-live coverage – and discussion – of the DOMA oral arguments in the Supreme Court this morning. First, a brief intro, and then I will try to throw tidbits in here and there as I see it during and after the arguments.

The case at bar is styled *United States v. Windsor, et al.* In a nutshell, Edith Windsor was married to Thea Spyer, and their marriage was recognized under New York law. Ms. Spyer passed away in 2009 and Windsor was assessed $363,000.00 in inheritance taxes because the federal government, i.e. the IRS, did not recognize her marriage to Spyer in light of the Defense of Marriage Act, or DOMA. Litigation ensued and the 2nd Circuit, in an opinion written by Chief Judge Dennis Jacobs, struck down DOMA as unconstitutional and ruled in favor

of Edith Windsor. Other significant cases in Circuit Courts of Appeal hang in the lurch of abeyance awaiting the Supreme Court decision in *Windsor*, including *Golinski v. Office of Personnel Management*, *Gill v. OPM* and *Pedersen v. Office of Personnel Management*.

As an aside, here is a fantastic look at the restaurant where Edith Windsor and Thea Spyer met nearly 50 years ago.

Arguing the case will be Solicitor General Donald B. Verrilli again for the United States, Paul Clement for the Bi-Partisan Legal Advisory Group (BLAG) on putative behalf of Congress, because the Obama Administration ceased defending DOMA on the grounds it was discriminatory and unconstitutional, and Robbie Kaplan for Edith Windsor. Clement and Verrilli are well known by now, but for some background on Robbie Kaplan, who is making her first appearance before the Supremes, here is a very nice article. Also arguing will be Harvard Law Professor Vicki Jackson who was "invited" by SCOTUS to argue on the standing and jurisdiction issue, specifically to argue that there is no standing and/or jurisdiction, because the Obama Administration quit defending and BLAG will argue in favor of standing and jurisdiction.

Here is a brief synopsis of the argument order and timing put together by Ed Whelan at National Review Note: I include Whelan here only for the schedule info, I do not necessarily agree with his framing of the issues).

Okay, that is it for now, we shall see how this goes!

Live Updates:

10:39 am It appears oral arguments are underway after two decisions in other cases were announced.

10:51 am RT @SCOTUSblog: #doma jurisdiction arg continues with no clear indication of whether majority believes #scotus has the power to decide case.

11:00 am By the way, the excellent SCOTUSBlog won a peabody award for its coverage of the Supreme Court.

11:05 am @reuters wire: 7:56:34 AM RTRS – U.S. SUPREME COURT CONSERVATIVE JUSTICES SAY TROUBLED BY OBAMA REFUSAL TO DEFEND MARRIAGE LAW

11:15 am Wall Street Journal is reporting: Chief Justice John Roberts told attrorney Sri Srinivasan, the principal deputy solicitor general, that the government's actions were "unprecedented." To agree with a lower court ruling finding DOMA unconstitutional but yet seeking the Supreme Court to weigh in while it enforces the law is "has never been done before," he said.

11:20 am Is anybody reading this, or is this a waste?

11:32 am @SCOTUSblog Kennedy asks two questions doubting #doma validity but nothing decisive and Chief Justice and Kagan have yet to speak.

11:40 am Wall Street Journal (Evan Perez) Chief Justice Roberts repeatedly expressed irritation at the Obama administration, telling Ms. Jackson, the court-appointed lawyer, and without specifically mentioning the administration, that perhaps the government should have the "courage" to execute the law based on the constitutionality rather instead of shifting the responsibility to the Supreme Court to make a decision.

11:45 am Wall Street Journal (Evan Perez) Paul Clement, attorney for lawmakers defending the law, argued that the went to the very heart of Congress's prerogatives. Passing laws and having them defended was the "single most important" function of Congress, he argued.

11:52 am Wall Street Journal (Evan Perez) Justice Scalia and Mr. Srinivasan parried on whether Congress should have any expectation that laws it passes should be defended by the Justice Department. Mr. Srinivasan said he wouldn't give an "algorithm" that explained when

Justice lawyers would or wouldn't defend a statute, but ceded to Justice Scalia's suggestion that Congress has no "assurance" that when it passes a law it will be defended. That's not what the OLC opinion guiding the Justice Department's actions in these cases says, Justice Scalia interjected.

11:56 am Associated Press (Brent Kendall) One of the last questions on the standing issue came from Justice Samuel Alito, who asked whether the House could step in to defend DOMA without the Senate's participation, given that it takes both chambers to pass a law.

11:59 am Bloomberg News During initial arguments today on the 1996 Defense of Marriage Act, Justice Anthony Kennedy suggested that a federal law that doesn't recognize gay marriages that are legal in some states can create conflicts. "You are at real risk of running in conflict" with the "essence" of state powers, Kennedy said. Still, he also said there was "quite a bit" to the argument by backers of the law that the federal government at times needs to use its own definition of marriage, such as in income tax cases.
Justice Ruth Bader Ginsburg said that when a marriage under state law isn't recognized by the federal government, "One might well ask, what kind of marriage is this?"

12:05 pm @SCOTUSblog Final update: #scotus 80% likely to strike down #doma. J Kennedy suggests it violates states' rights; 4 other Justices see as gay rights.

12:07 pm The argument at the Court is well into the merits portion of the case now

12:09 pm Wall Street Journal (Brent Kendall) Justice Kennedy, however, jumped in with federalism concerns, questioning whether the federal government was intruding on the states' territory. With there being so many different federal laws, the federal government is intertwined with citizens' day-to-day lives, he said. Because of this, DOMA runs the risk of

running into conflict with the states' role in defining marriage, he said.

12:12 pm It is pretty clear to me, from a variety of sources I am tracking, that the Court has serious problems with DOMA on the merits. Clement is getting pounded with questions on discrimination, conflict with state laws and federalism concerns. Pretty clear that if standing is found, DOMA is going down.

12:15 pm Wall Street Journal (Brent Kendall) Justice Ginsburg again says the denial of federal benefits to same-sex couples pervades every area of life. DOMA, she said, diminished same-sex marriages to "skim-milk" marriages. Justice Elena Kagan (pictured) follows a short time later saying DOMA did things the federal government hadn't done before, and she said the law raised red flags.

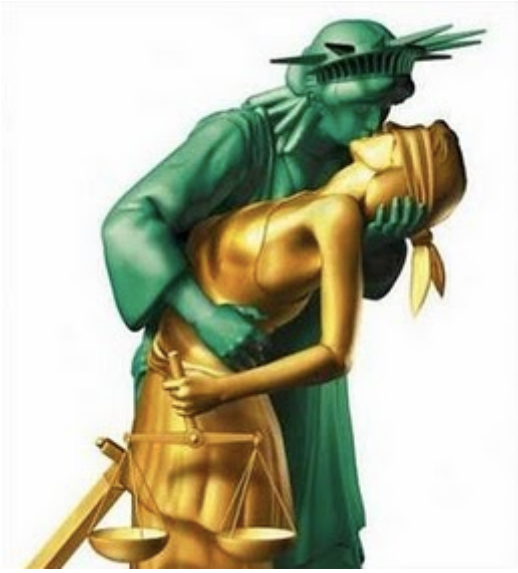
12:19 pm @reuters wire: U.S. SUPREME COURT CONCLUDES ORAL ARGUMENTS ON FEDERAL LAW RESTRICTING SAME-SEX BENEFITS

12:30 pm @AdamSerwer Con Justices contemptuous of Obama decision not to defend DOMA but still enforce law. Kennedy said "it gives you intellectual whiplash"

Okay, as I said earlier, if the Justices can get by the standing issue, it seems clear that DOMA is cooked. I *think* they will get by standing and enter a decision finding DOMA unconstitutional as to Section 3, which is the specific part of the law under attack in *Windsor*. That effectively guts all of DOMA.

That is it for the "Live Coverage" portion of the festivities today. It should be about an hour and a half until the audio and transcript are available. As soon as they are, I will add them as an update at the top of the post, and will then put this post on the top of the blog for most of the rest of the day for further discussion. It has been bot a fascinating and frustrating two days of critical oral argument; please continue to analyze and discuss!

THE PROP 8 ORAL ARGUMENTS BEFORE THE SUPREME COURT



A momentous morning in the Supreme Court. All the work, analysis, speculation, briefing and lobbying culminated in an oral argument in *Hollingsworth v. Perry* lasting nearly an hour and a half – half an hour over the scheduled time. There are a lot of reports and opinions floating around about what transpired.

Here is Tom Goldstein

Here is Reuters led by Lawrence Hurley and David Ingram

Here is Lyle Denniston of SCOTUSBlog

Here is USA Today

Here is Huffington Post's Mike Sacks with a video report

Here is Ryan Reilly and Mike Sacks with a written report at HuffPost

Suffice it to say, we do not know a heck of a lot after oral arguments than we did right before them. The full range of decision is on the table. However, there were certainly some hints given. Scalia and Alito are very hostile, and Thomas is almost certainly with them in that

regard although he once again stood mute. Ginsburg, Kagan and Sotomayor seemed receptive to the Ted Olson's arguments. Breyer oddly quiet and hard to read. As is so often the case, that left Anthony Kennedy in effective control of the balance.

If Kennedy's tenor at argument is any guide, and it isn't necessarily, he is unlikely to sign on to a broad ruling. In fact he may be struggling with standing, but that is very hard to read. Several commenters I have seen interpreted Kennedy's questions as having a real problem with standing and signaling a possibility of punting the case on that basis. From what I have read so far, I wouldn't say that…and neither does Adam Serwer, who was present at argument.

So, in short, I would summarize thusly: Standing is a bigger issue than I had hoped, and there is more resistance to a broad ruling than I had hoped. But the game is still on. Remember when Jeff Toobin's train wreck/plane wreck take after the ACA oral arguments; you just don't know and cannot tell.

I will likely be back later after analysis of the pertinent material. For now, let me leave you with that material and media so you too can hear and see the groundbreaking day in the Supreme Court:

Here is the full transcript of the oral arguments

Here is the audio of the proceedings

Enjoy, and I look forward to discussing this! And, again, there will be updates to this post throughout the day, so keep checking for them.

[As always on these Prop 8 posts, the absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]

THE CASE AGAINST MARRIAGE EQUALITY BACKLASH

One of the relentless memes that keeps cropping up in the marriage equality battle is that, were the Supreme Court to grant full broad based and constitutionally protected marriage equality in the *Hollingsworth v. Perry* Prop 8 case, there would be a destructive backlash consuming the country on the issue.

A good example of the argument was propounded by Professor Eric Segall at the ACSBlog in a piece entitled "Same-Sex Marriage, Political Backlash and the Case for Going Slow":

> There may be a better way. The Court could strike down DOMA under heightened scrutiny making it clear that government classifications based on sexual orientation receive heightened scrutiny. The Court could dismiss the Proposition 8 case on standing grounds (there are substantial standing arguments which the Court asked the parties to brief). This combination would leave all state laws (except perhaps California's) intact but subject to likely successful challenges. Obviously, this would be a slower and more expensive route to marriage equality, but it might make the right more secure over time while decreasing the chances of serious backlash.
>
> I know that it is easy for a straight male like me to suggest that the Court should refrain from quickly and

> forcefully resolving the same sex marriage issue on a national basis. But issues that some gays care deeply about are not limited to marriage equality, just like feminists face many challenges other than abortion such as equal pay, equality in the military, and glass ceiling barriers. Where gender equality would be without Roe is unknowable but even Justice Ruth Bader Ginsburg has observed that the right to choose today might be more secure if the Court hadn't decided it "in one fell swoop." I don't know what will happen if the Court announces a national rule on same-sex marriage but history strongly suggests that a more incremental approach might better serve the long term interests of people who identify themselves as liberals and progressives, including gays and lesbians.

I like and respect Eric quite a lot, but I cannot agree with him, nor other advocates of this position (for further discussion of the "*Roe* backlash" theory, see Adam Liptak in the New York Times). I have long strongly advocated for a full, broad based, ruling for equality for all, in all states, most recently here. But the issue of "backlash" has not previously been specifically addressed in said discussions that I recall.

Fortunately, there are already superb voices who have addressed this issue. The first is from Harvard Law Professor Michael Klarman in the LA Times:

> What sort of political backlash might such a decision ignite?
> …
> Constitutionalizing gay marriage would have no analogous impact on the lives of opponents. Expanding marriage to include same-sex couples may alter the institution's meaning for religious conservatives who believe that God

> created marriage to propagate the species. But that effect is abstract and long-term. The immediate effect of a marriage equality ruling would be that the gay couple already living down the street would become eligible for a marriage license — and nothing would change in the daily lives of gay-marriage opponents. That is why strong initial support for a state constitutional amendment to overturn the Massachusetts court ruling rapidly dissipated once same-sex couples began to marry.
>
> …
>
> Thus, while a broad marriage equality ruling would undoubtedly generate some backlash, its scope would be far less than that ignited by Brown or Roe. A majority of Americans would immediately endorse such a decision, and support would increase every year. Opposition would be far less intense than it was to school desegregation or abortion because the effect of same-sex marriage on others' lives is so indirect. Some politicians would roundly condemn the ruling, though many Republicans and most Democrats would not. State officials would have no way to circumvent such a decision, nor would many same-sex couples be intimidated out of asserting their right to marry. Outright defiance is conceivable, though it seems unlikely that any state governor would be willing to go to jail for contempt of court.
>
> The likeliest scenario, in the event of a pro-equality ruling, is immediate, strident criticism from some quarters, followed by same-sex couples marrying in states where they previously could not. Very little will change in the day-to-day lives of opponents, and the issue will quickly fade in significance.

Klarman's article goes through pretty much every facet of the "backlash" theory, and knocks them all down in order. It is an excellent read, and I suggest you do so as there is much more there.

And Professor Scott Lemieux writing at his blog Lawyers, Guns & Money, opines:

> The specific, oft-cited argument made by Ginsburg is, I think, wrong in two crucial respects. First of all, Ginsburg's argument that the decision would have been more broadly accepted had it rested on equal protection grounds is almost certainly wrong. The public evaluates decisions based on results, not reasoning, and essentially nobody without a professional obligation to do so reads Supreme Court opinions. Second, I don't understand the argument that a "minimalist" opinion just striking down the Texas law wouldn't have generated a backlash. The Texas law, while extreme in terms of its language and implications, wasn't "extreme" in the sense of being an outlier; more than 30 states substantively identical abortion statutes that also would have been struck down. And following that, of course, would have been additional rounds of litigation to determine whether arbitrary panels of doctors and other "reform" laws were constitutional. That's not a formula for lesser conflict.
>
> In terms of application to the same-sex marriage cases, then, liberals shouldn't be hoping to win by losing or whatever. There's no reason to believe that a broad opinion invalidating same-sex marriage would produce any more backlash than legislative repeals would. There would be more "backlash" only if you (plausibly) assume that absent Supreme Court decisions many states would

> maintain their bans on same-sex marriage for a long time. In other words, you can avoid backlash by just not winning, an argument I consider self-refuting.

For a much longer explication on the false premise of the "*Roe* backlash" phenomenon, see Lemieux's law review length article "*Roe* and the Politics of Backlash: Countermobilization Against the Courts and Abortion Rights Claiming" which opens up with a discussion of the backlash created by a case directly analogous to the Prop 8 situation, *Lawrence v. Texas*. Suffice it to say that, as Scott notes, there was some early collateral backlash, but there was not anything like predicted and, almost exactly a decade later, it seems like a distant memory that hardly happened.

This is important, because *Lawrence v. Texas* was a broad sweeping decision invalidating a single state's (Texas) anti-sodomy law, but giving a full mandate that settled the issue once and for all, for all citizens nationwide. Despite many commenters having opined before the decision that the *Lawrence* court must rule narrowly and "go slow". Sound familiar? It should. Same goes mostly for the *Loving* decision on interracial marriage. There was some grousing, but then people moved on.

Marriage equality is more popular, and trending ever more so at nearly light speed, than interracial marriage and invalidation of anti-sodomy laws were at the time of *Loving* and *Lawrence* respectively. Even the conservatives are figuring out that many of their sons, daughters, sisters, brothers and friends are gay. Not all may personally accept gay marriage, but the air is out of the hate against it. Even Chief Justice John Roberts' niece is out and gay. And she will be sitting in the Roberts family section today at the oral argument on *Hollingsworth v. Perry/Prop 8*.

As one of Scott Lemieux's commenters, "Just Dropping By" succinctly, and quite correctly,

noted:

> To put it another way, opposing same-sex marriage once such marriages start happening makes you look like a monster who wants to break up other people's marriages. Opposing abortion makes you look like someone who wants to save cute babies from being killed. People don't like imagining themselves as monsters; they do like imagining themselves as heroes. This is why millions of hours, and billions of dollars, have been spent fighting *Roe v. Wade*, while there's no major national group devoted to overturning *Loving v. Virginia*.

Exactly right. That is the case against the "backlash". The fear is overstated, and the time is now for equality for all, in all the states. For the Supreme Court to do less would be nothing less than a direct sanction for continued regional and state based bigotry and discrimination. That is not American, it is not constitutional, and it is no longer tolerable.

A PATH TO CIVIL RIGHTS HISTORY FOR THE SUPREME COURT, OBAMA AND VERRILLI

Just about a month ago, in urging the Obama Administration to file a brief in favor of marriage equality in the *Hollingsworth v. Perry* Prop 8 case before the Supreme Court, I described the stakes:

> 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.
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> 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.

It was true then, it is true now. To the everlasting credit of of President Obama, Solicitor General Verrilli and the Administration, they did indeed file a brief in support. It was a surprisingly strong brief with a clarion call for full equality based upon heightened scrutiny; yet is was conflicted with a final ask only for a restricted ruling limited in application to either just California or, at most, a handful of somewhat similarly situated states. In short, the ask in the Administration's brief was not for equality for all, in all the states; just in some.

On the eve of one one of the seminal moments of

Supreme Court history – it is easily arguable this is far more of a defining moment than the ACA Healthcare scuffle was – it is again incumbent on the Administration to give the justices the headroom to make a broad decision granting equality for all.

Even in the short time since the Obama Administration filed their brief, between February 28 and now, the mounting tide of public opinion and desire for full equality has grown substantially in multiple ways. Colorado, a state where the thought was once beyond contentious, passed full civil union equality and Governor Hickenlooper signed it into law. And a new comprehensive Washington Post/ABC News public poll has found that a full 58% of Americans now support the legality of gay nuptials, and a whopping 81% of adults between the ages of 18 and 29 so support.

The writing is on the wall, and the trend overwhelming. And it simply does not make sense for the Obama Administration to buck this tidal wave and argue only for equality in a handful of states, with equality for some, but far from for all. Barack Obama and Donald Verrilli laid every bit the foundation needed to argue for broad based full equality – in all states – in their brief.

It is time for Mr. Obama and Mr. Verrilli to step up and forcefully tell the Supreme Court that full equality is the right way to rule. The Court granted Solicitor General Verrilli time to express the Administration's position in the oral argument Tuesday; he should use it in the name and cause of full broad based equality. It is a time for leadership; this is a moment for Mr. Obama and his attorney to display it.

By the same token, it is also time for the Supreme Court to do the same. So often it has been argued the "Court should not get out in front of popular opinion". Bollocks, the Court should refuse to put themselves behind public opinion, and an ever strengthening one at that, by shamefully ducking the perfect opportunity to

stand for that which the Constitution purports to stand, equal protection for all.

There are a myriad of legal arguments and discussions, and just about every commenter and expert in the field has been offering them up over the last week. I will leave that to another day, after the court has heard the oral arguments, we have our first inclination of what the justices are focused on, and the case is under advisement for decision.

For now, here are a couple of warms ups for Tuesday's oral argument in *Hollingsworth v. Perry*/Prop 8 and Wednesday's oral argument in *United States v. Windsor*/DOMA. First a nice little video "Viewer's Guide to Gay Marriage Oral Arguments" with Supreme Court barrister extraordinaire, and SCOTUSBlog founder, Tom Goldstein. Here is a handy flow chart of all the different possibilities, and the why for each, of how the court may rule on both cases. It is really pretty neat and useful tool.

The briefing is long done now and the Justices understand the issues. But if the ACA/Healthcare cases taught us anything, it is that Justice Roberts is concerned about the legacy and esteem of the court. And Justice Kennedy has already shown how committed he is to fairness in social justice issues and willing to even go out on limbs ahead of controversial public opinion with his written opinions.

At this point, the most effective leverage is not repeated discussion of the minutiae of law, but rather the demonstration of the righteousness of full equality. History will prove fools of those who sanction continued bigotry against marital equality, and anything less than a broad based heightened scrutiny finding, for equality for all people, in all states, is a continuation of such unacceptable bigotry.

UPDATE: Professor Adam Winkler of UCLA has a piece out today that embodies my point in the post perfectly. Discussing the disastrous and

ugly 1986 decision of the Supreme Court in *Bowers v. Hardwick* to uphold sodomy laws when times and opinion had already changed, and the profound regret felt by Anthony Kennedy's predecessor, Lewis Powell, Professor Winkler writes:

> Kennedy is clearly a justice who considers how his legacy will be shaped by his votes. In 1992, when the Supreme Court was asked to overturn Roe in a case called Planned Parenthood v. Casey, Justice Kennedy originally sided with the conservatives to reverse the controversial privacy decision. Like Justice Powell in Bowers, Justice Kennedy then changed his vote. He went to see Justice Harry Blackmun, the author of Roe, and explained that he was concerned about how history would judge Kennedy's decision to end constitutional protections for women's right to choose.
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> Like many people, Justice Kennedy may believe that the public tide against marriage discrimination is growing and that gay marriage is inevitable. History is not likely to be kind to those justices who vote to continue relegating LGBT people to second-class citizenship. As the swing justice ponders how to rule in the gay-marriage cases, Justice Powell's well-known regret over Bowers, and the widespread recognition that Bowers was wrongly decided, will almost certainly weigh on his mind.

Adam's article is worth a full read. And I agree with it completely.

JOHN ROBERTS: SECOND CLASS CITIZEN

When we were covering the Prop 8 Trial in San Francisco, Teddy Partridge made a very astute point. As the Prop 8 intervenors questioned a witness who (dubiously) talked about how adoptive families are less successful than biological parents in an effort to dismiss claims that gays and lesbians should be able to marry so their kids have more security, Teddy noted that the claims the Prop 8 people were making about adoptive families also applied, to Chief Justice John Roberts, who has two adopted kids.

It's a point I've been obsessed with as the case made its way towards SCOTUS. I even thought about getting an amicus brief together representing opposite sex adoptive families, because the Prop 8 argument threatened their families with second class status, to emphasize the insult at the core of the Prop 8 case.

Turns out no one had to do that. (h/t Americablog)

> "You're looking at what is the best course societywide to get you the optimal result in the widest variety of cases. That often is not open to people in individual cases. Certainly adoption in families headed, like Chief Roberts' family is, by a heterosexual couple, is by far the second-best option," said John Eastman, chairman of the National Organization for Marriage. Eastman also teaches law at Chapman University law school in Orange, Calif.

As Teddy suggests, that NOM demeaned the Chief Justice's family just two weeks before the arguments in this case is not only testament to their hard bigotry, but their stupidity.

But hey. If it helps Olson and Boies show how

outrageous the distinct treatment of gay families is, all the better.

FURTHER REFLECTIONS ON THE OBAMA AMICUS BRIEF IN PROP 8

After the flurry of fast analysis on the fly, getting a post up for discussion and the crucible of discussion here and on Twitter – and a bit of sleep – I have some further thoughts on the amicus brief filed late yesterday by the Obama Administration in *Hollingsworth v. Perry*.

My ultimate conclusions on what the Obama amicus means and portends has not changed much, but there are several things that should be said both to explain my criticism and give a little more credit to the Administration where due. First an analogy explaining my criticism of the Obama brief.

Imagine if, when *Brown v. Board of Education* was being considered, the Eisenhower Administration had instructed it's Assistant Attorney General and OLC chief, J. Lee Rankin, to amicus brief that only Kansas and a handful of other similarly situated states, but not the rest of the country where the bigotry of segregation was at its most prevalent worst, should be granted desegregation. How would history have held Mr. Eisenhower and Mr. Rankin? That is, of course,

not what happened in *Brown*; the Eisenhower Administration filed an amicus brief demanding equality and desegregation for all citizens, in all states.

Messrs. Obama, Holder and Verrilli, however, fell short of such a demand for equality for all in the civil rights moment, the *Brown v. Board*, of their time. Let the record reflect they did have the courage to join the game, which is in and of itself a commendable thing, just that they did not muster the full courage to play to win for all Americans, regardless of their particular state of domicile – and especially not for those in the states with the most sexual orientation bigotry and discrimination.

In this regard, I think our friend at Daily Kos, Adam Bonin, summarized the duality of the Obama amicus quite well:

> To be sure, the brief argues all the right things about why laws targeting gays should be subject to heightened scrutiny, and that none of the proffered justifications for treating their relationships differently have merit ("Reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles.") Still, for those who were seeking a full-throated endorsement of 50-state marriage equality, you will find this brief lacking.
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> That said, from the day this suit was filed in May 2009, I have suggested that this limited path is the Court would ultimately take. And it can be dangerous to advance positions which the Court might reject, especially when they are not necessary for the resolution of the instant case. But, still, there was an opportunity for boldness here, and the Obama administration did not take it. As a great man once said:

> Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law — for if we are truly created equal, then surely the love we commit to one another must be equal as well.

Adam's point about the fear of overreaching when the *Perry* litigation was originally filed is a good one. As I think he has evolved to having less fear in that regard over time, the explanation for such a shift comes from the changed nature of the ground underneath the larger issue. It is a testament to the genius of the *Perry* litigation in its inception, and even more so to the way Judge Vaughn Walker framed an actual trial that laid bare, with both evidence and the inability for haters to provide credible evidence, the hollow immorality and rank bigotry of the Proponents of Proposition 8.

The space created by Judge Walker's amazing decision created the headroom for a cascade of events in DOMA cases, equality legislation in states and popular votes in other states, all in favor of marriage equality. This past election cycle provided the once unthinkable result of marriage equality going four for four in popular votes.

The ground has so seismically changed, the momentum of social conscience so strong, that we simply occupy a different place now than existed at the start of the *Perry* litigation. And that is the ground the Supreme Court will have to recognize when they hear oral arguments on March 26 in *Hollingsworth v. Perry* and March 27 in the DOMA cases.

Regardless of the messy way in which it did so, the Supreme Court (and its Chief Justice, John Roberts) proved in the ACA cases that they are aware of, and attend to, the legacy of the court. It is crystal clear that marriage equality, and equality for sexual orientation,

is happening. The only question at this point is how complete, how fast.

This is the great civil rights measure of this period in American history; I find it hard to believe Justice Anthony Kennedy, who has already displayed his social conscience in *Lawrence v. Texas*, wants to be on the wrong side of history. In August of 2010, on the release of Vaughn Walker's historic trial court opinion, I quoted Linda Greenhouse in laying out why I thought Justice Kennedy would swing the majority in favor of marriage equality when *Perry* made its way to the court for review:

> As the inestimable Linda Greenhouse noted recently, although the Roberts Court is increasingly dogmatically conservative, and Kagan will move it further in that direction, the overarching influence of Justice Anthony Kennedy is changing and, in some ways, declining. However, there is one irreducible characteristic of Justice Kennedy that still seems to hold true; she wrote of Kennedy:
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> > …he embraces whichever side he is on with full rhetorical force. Much more than Justice O'Connor, whose position at the center of the court fell to him when she left, Justice Kennedy tends to think in broad categories. It has always seemed to me that he divides the world, at least the world of government action — which is what situates a case in a constitutional framework — between the fair and the not-fair.
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> The money quotes of the future consideration of the certain appeal and certiorari to come on Judge Walker's decision today in *Perry v. Schwarzenegger* are:

> > Laws designed to bar gay men and lesbians from achieving their goals through the political process are not fair (he wrote the majority opinion striking down such a measure in a 1996 case, Romer v. Evans) because “central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”
> > ……
> > In a book titled “Justice Kennedy’s Jurisprudence,” a political scientist, Frank J. Colucci, wrote last year that Justice Kennedy is animated by an “ideal of liberty“ that “independently considers whether government actions have the effect of preventing an individual from developing his or her distinctive personality or acting according to conscience, demean a person’s standing in the community, or violate essential elements of human dignity.” That is, I think, a more academically elegant way of saying fair versus not-fair.
> >
> > So the challenge for anyone arguing to Justice Kennedy in the courtroom, or with him as a colleague in the conference room, would seem to be to persuade him to see your case on the fair (or not-fair, depending) side of the line.

I believe that Linda is spot on the

> money with her analysis of what drives Anthony Kennedy in his jurisprudence. And this is exactly what his longtime friend, and Supreme Court advocate extraordinaire, Ted Olson will play on and argue when the day arrives.

Well, that day is upon us now. Honestly, with the tide of momentum headed in the direction it is, I am less and less convinced John Roberts wants to be on the wrong side of civil rights history either.

But giving the Justices the moral and sociological headroom to grant equality to *all* the citizens, in *all* the states, especially those in the discriminatory swaths of the country, is key to the cause. The *Perry* Plaintiffs have done their part. Yesterday, the Obama Administration had the opportunity to go the distance, and they pulled up slightly short.

I feared Obama might come up so short their brief could be counterproductive; that did not occur. The song could have been, and should have been, stronger; but credit where due, they hit the necessary notes. It is filed and done, and it is overall an important and powerful thing. Perry Plaintiffs' attorney Ted Boutrous put it well:

> Their arguments from start to finish would apply to other states," he said. "The argument of the day (against same-sex marriage) is the responsible pro-creation argument. The United States takes it apart piece by piece. It's those same types of arguments that are used in other jurisdictions to justify the exclusion of gays and lesbians from marriage.

And as Marcia Coyle observed in the National Law Journal BLT article the Boutrous quote above came from:

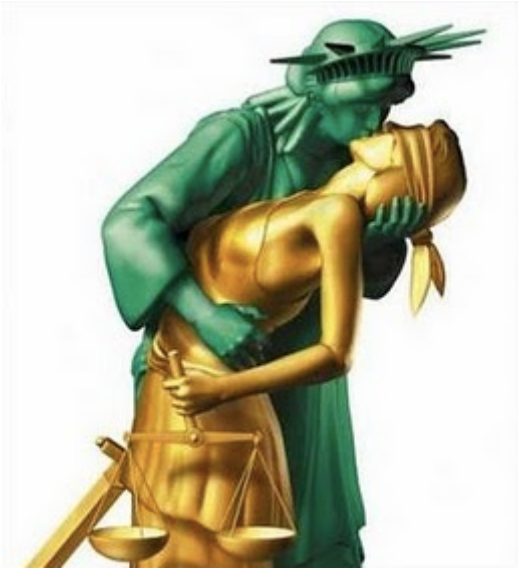
> And the heightened scrutiny analysis, he

> added, is “exceedingly important,” not just in the marriage context but in other contexts where gay men and women face discrimination.

Marcia is exactly right (and her report well worth a read), and between the Perry Plaintiffs’ merits brief and the Obama Administration amicus brief, there is a foundation from which to argue to all the Justices, but especially Anthony Kennedy and John Roberts, for equality for all across the board.

Mr. Obama and Mr. Holder can help immeasurably in the coming days leading up to oral argument and decision by the Justices by using their bully pulpit to advocate for full heightened scrutiny equal protection for all, in all states. The cause endures and their duty maintains. And we, as citizens can give them the support and positive feedback to help them do so. Let the final push for full equality begin.

THE OBAMA DOJ FILES A TIMID BRIEF IN PERRY/PROP 8!



The news was broken, right around 2:00 pm EST by NBC's Pete Williams, that the Obama Administration would indeed file a brief in support of marriage equality in *Hollingsworth v. Perry*. Here was the original tweet by NBC's Williams:

> Obama Justice Dept to file Supreme Court amicus brief today opposing Prop 8 in Calif and expressing support for same-sex marriage to resume.

Here was Williams' followup story at NBCNews.com. The inherent problem with the original report was that it tended to indicate the Obama Administration was briefing only on the restricted *Romer v. Evans* posture heinously crafted by Judge Stephen Reinhardt in the 9th Circuit.

So, we were left hanging wondering exactly how the Obama Administration really briefed the issue, was it a limited *Romer* brief, or one for full marriage equality and heightened scrutiny under the equal protection and due process clauses that would give all citizens, nationwide, equality as I argued for earlier this week?

We now have the answer, and the brief, and here it is the brief in all its not quite glory:

The Obama Administration has, shockingly (okay, I do not mean that in the least), tried to nuance its way and split babies. Typical cowardly bunk by Mr. Obama. Lyle Denniston at SCOTUSBlog depicted it thusly:

> The historic document, though, could give the Court a way to advance gay marriage rights, without going the full step – now being advocated by two California couples who have been challenging Proposition 8 since 2009 – of declaring that marriage should be open to all same-sex couples as a constitutional requirement.
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> Administration sources said that President Obama was involved directly in the government's choice of whether to enter the case at all, and then in fashioning the argument that it should make. Having previously endorsed the general idea that same-sex individuals should be allowed to marry the person they love, the President was said to have felt an obligation to have his government take part in the fundamental test of marital rights that is posed by the Proposition 8 case. The President could take the opportunity to speak to the nation on the marriage question soon.
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> In essence, the position of the federal government would simultaneously give some support to marriage equality while showing some respect for the rights of states to regulate that institution. What the brief endorsed is what has been called the "eight-state solution" – that is, if a state already recognizes for same-sex couples all the privileges and benefits that married couples have (as in the eight states that do so through "civil unions") those states must go the final step and allow those couples to get married. The argument is that it violates the Constitution's guarantee of legal equality when both same-sex and opposite-sex couples are entitled to the same marital benefits, but only the opposite-sex couples can get married.

Honestly, I think Mr. Denniston is being kind. President Obama's position bears the mark of a full throated coward. Clearly, when Mr. Obama said this to ABC News, he was blowing smoke up the posterior of the American public:

> …obviously, my personal view, which is that I think that same-sex couples should have the same rights and be treated like everybody else. And that's something I feel very strongly about and my administration is acting on wherever we can.

That statement would say that Obama actually supports full equal protection for ALL Americans. But the position staked out today in the Administration's brief filed by his Solicitor General puts the lie to Obama's rhetoric.

Mr. Obama has consistently lied about his dedication to civil liberties, privacy and the Fourth Amendment, I guess it should not be shocking that he would lie about his dedication to civil rights for all, across all the states, in the form of marriage equality. And that is exactly what he has done. And as Denniston's article makes clear, this decision bore the active participation and decision making of Obama personally. The cowardice is his to bear personally. Thanks for the fish Mr. Obama.

That is the biggest of the *Hollingsworth v. Perry* briefing news today, but certainly not the entirety of it. Also filed today, among others, was a brief by a group of 14 states led by Massachusetts and New York and an interesting brief by NFL players Chris Kluwe and Brendon Ayanbadejo. The brief by the 14 states is helpful in the way it portrays marriage in the states, both straight and gay, and in that it, on page four, adopts the position of Olson, Boies and the Prop 8 Plaintiffs that the Supreme Court must find for full heightened scrutiny protection for sexual orientation under the Equal Protection and Due Process Clauses. The

Kluwe and Ayanbadejo brief, frankly, is not particularly helpful in that regard as it only discussed the limited *Romer* based finding that would leave marriage equality up to the states.

The same group of American businesses who weighed in on the DOMA cases also filed a brief today in *Hollingsworth v. Perry*. In a more negative development, former Solicitor Walter Dellinger also filed an amicus brief today that is literally loathsome and dangerous in it's argument against even giving standing for appeal to the Supreme Court. Dellinger embarrassed himself, but so too did Barack Obama. Must be something in the water of centrist Democratic thought.

So, there you have it. It was a rather important, if not quite as fulfilling as should have been, day in the life of the *Hollingsworth v. Perry* litigation. I guess credit should be given to Mr. Obama even for weighing in at all, and undoubtedly most media and pundits will slather him with praise for just that. Somehow, I cannot. The full measure of greatness was there for the taking, and Barack Obama, Eric Holder and Donald Verrilli, Jr. whiffed at the full mark of greatness. They will be remembered for their support, and their failure to truly step up will likely dissipate with time; but let it be said here and now.

In spite of the cowardly and restrictive actions by the "liberal President Obama" the cause of true heightened scrutiny protection for ALL Americans endures and lives on. Just not with the support of the President of the United States of America. that "leader" took the cheap "states rights" cowardly way out. Let us hope Anthony M. Kennedy and the majority of the Supreme Court have higher morals and muster as men.

[As always on these Prop 8 posts, the absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by

Mirko Ilić. Please visit Mirko and check out his stock of work.]