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.

MITT ROMNEY GUILTY OF A HATE CRIME

Yes, I am absolutely serious about the implication in the title of this post.

I was scrolling through my twitter feed about lunchtime here, after doing some work, and found this exchange between two people I follow, Carrie Johnson and Dan Froomkin:

Well, after reading the article Froomkin referred to in his tweet, an AP report on an Amish hate crimes conviction handed down today, I thought there were clear parallels with Mitt Romney's known pattern of misconduct. Here is the key gist of the AP report on the Amish hair cutting hate crime:

> Sixteen Amish men and women were convicted Thursday of hate crimes including forcibly cutting off fellow sect members' beards and hair…….A federal jury found Samuel Mullet Sr. guilty of orchestrating the cuttings of Amish men's beards and women's hair last fall in attacks that terrorized…

Hmmmm, where do I remember a completely similar,

in every way, violation of a human individual's sanctity and rights to individualism and free expression, not to mention of course, forced hair cutting, under the Constitution of the United States? Oh, yes, it was from the once and always juvenile and self entitled Mitt Romney:

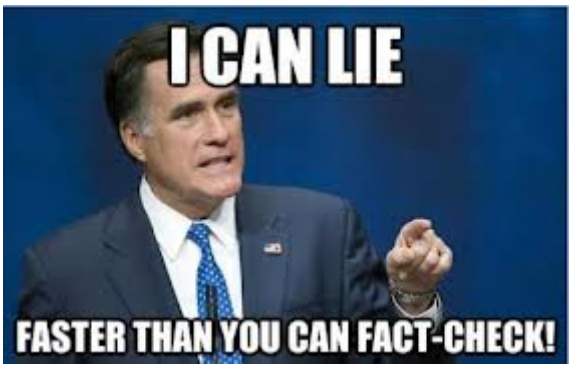
> Many of today's principals would be likely to throw the book at a student who pinned down a classmate and clipped his hair, as Republican presidential candidate Mitt Romney did as a high school senior in 1965.
>
> Romney was not disciplined at the time. If such an attack happened in the public schools of 2012, it would probably lead to suspension and might also be referred for expulsion, a number of local school leaders said following a Washington Post report of the incident involving Romney.

Yes, one would hope that "today's principals" might treat the brutish otherism and hatred of Willard "Mitt" Romney a bit different today. But, seriously, the same intellectual, moral and character deficits that are present now, were present to any competent mind then. Mitt Romney's hate crime conviction worthy act was not mere misguided words, as so many engaged in at during those times, but instead it was a violent and injurious physical felonious assault. You can call it partisan to say this, and you would be a bloody ignorant and simpering fool to do so. I trust most of you in the national, main stream media, who actually have the time and claimed IQ to actually read this and react intellectually.

This is the "intellect" and "mind" that now seeks to lead the, still, most powerful nation on earth? Mitt Romney would be headed to federal prison if past were but falsely discarded prologue.

Mitt Romney is now, and always has been, a self important, self entitled, brutish chameleon that

blithely does whatever he wants, and is willing to say whatever it takes, to get over on others. That is not a leader; it is the mark of a congenitally entitled power mad, craven, flip flopping, and hollow shill.



It is the mark of a man who is a pliable and troubled soul in need of counseling, and the antithesis of a leader for the enlightened and informed free world. Which also kind of explains Mr. Romney's craven and supremely self serving attempt to try to capitalize on the death of US ambassador Chris Stevens while the event was still very much in play as an United States foreign relations interest.

That is not the mark of a leader, it is the mark of a cowardly lout. Such was, and is, the best the GOP had to offer in their self proclaimed can't lose year of destiny.

For any halfway informed citizen, and certainly for the supposedly intelligent members of the political press, the foregoing are some things you ought to consider and report. To report a false horserace that is serving to yourself (as Romney always is to himself) is one thing; but to ignore facts in craven servitude thereof is yet another. I know leading members of the press will see this, where will you go? Have you even the small balls to follow on?

There are choices in the political landscape. They may be constrained to where it is a choice between the lesser of two very much evils. That is indeed the choice before the nation today. The problem is the evils are painted as equal, and that is a lie.

Where will the national press go? I think I

know, and I suspect it is to feign ignorance. But just to make the stakes clear, if the national press covered the facts and results of Matthew Shephard, and now are willing, through AP or otherwise, to report on the Amish hair cutting hate crime, then YOU NEED to make the analogy to the current man who is guilty of the same effective conduct and hate crime, and who now seeks to be elected President of the United States.

Really, it is the *least* you can do national press. Can you keep up national press? Can you truly exercise your duty of fair reportage and duty to the American people? Can you? Show your work.

Can the major media pick up on the resolute similarity, and absolute analogy, of these cases? I am not sure the national media has that root awareness, nor public responsibility in their bones.

It will be interesting to see where the national press really stand. I have no illusions of intelligence in that regard. We shall see.

Gosh, silly me, for condoning, much less expecting, such honesty.

[Impossibly perfect graphic by the one and only twolf. Seriously, twolf is our friend; follow him!]

PROP 8 APPEAL TAKES A STEP FORWARD; BUT NOT THE BIG ONE IT SHOULD HAVE

Those of us watching and covering the Proposition 8 case, formally known as *Perry v. Brown*, got a cryptic notification from the court

yesterday afternoon. The notice read:

> This is to inform you that a filing is expected on Tuesday, June 5, 2012, at approximately 10 a.m., in Perry v. Brown, case 11-16577, also know as the Proposition 8 case. The filing will be available from the Ninth Circuit Court of Appeals website, www.ca9.uscourts.gov/opinions. We are advised that this is not a large document. If you have difficulty downloading the filing, please contact us by email.

The fact the court said the document would appear in their "opinions" section seemed prophetic. It was. The opinion was just released and my prediction on it was right, it *did* signal a final opinion and a declination of en banc consideration.

Here is the order. The key takeaway language:

> The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.
>
> The mandate is stayed for ninety days pending the filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court.

Notable is the sniping dissent lodged by Judges O'Scannlain, Bybee and Bea, and the broadside shot right back by Steve Reinhardt and Mike Hawkins, who were the accused when O'Scannlain said:

> Based on a two-judge majority's gross misapplication of Romer v. Evans, 517 U.S. 620 (1996), we have now declared that animus must have been the only conceivable motivation for a sovereign State to have remained committed to a definition of marriage that has existed for millennia, Perry v. Brown, 671 F.3d 1052, 1082 (9th Cir. 2012).

Interesting is the sniping back and forth, but ultimately of no moment. The ruling today is important, however, because the ultimate destination for the Prop 8 Perry case is now straight to the Supreme Court. As I explained when the original panel decision was issued, authored by Steve Reinhardt, it was different than expected:

> It is a narrower and shallower victory than I had hoped and predicted though.
>
> > All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and social recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those opposite-sex couples. the Constitution simply does not allow for "laws of this sort." Romer v. Evans, 517 US 620, 633 (1996).
>
> By basing on *Romer* instead of the full constitutional protections of due

> process and equal protection, the court has likely increased the odds the decision stands up to further appeal, but has done a disservice to those seeking true equality, both as to marriage and otherwise, for gays and lesbians. In short, it does not move the ball nearly as much as it should have, and was hoped for. The decision of the 9th does not go nearly as far as Vaughn Walker did, and wastes much of the meticulous taking of evidence, making of findings of facts and law, and crafting of his decision. It was hand tailored to go MUCH further, and that now appears at least significantly squandered.

That analysis of the panel decision in *Perry* still stands. The bigger problem is that many experts on this issue have been putting their eggs in the basket of the DOMA litigations. And the problem with that is that the biggest of the DOMA cases just got decided in the 1st Circuit last week, and it too is grounded on *Romer* and is painfully narrow and depressing as to hope for full extension of protected status to sexual orientation by individuals.

As Reuters explains:

> “The federalism aspect of the decision makes it a stronger case to bring some conservatives along,” said Paul Smith, a lawyer for the same-sex couples.
>
> The Supreme Court has become increasingly concerned with states’ rights over the past 10 years, striking down numerous federal laws that intrude on state authority, said New York Law School professor Arthur Leonard. The conservative justices have tended to defend traditional areas of state control. Justice Antonin Scalia, for example, criticized the majority decision in Romer for creating a new level of equal protection for gays and

> lesbians, but he based his argument on a defense of states' rights.
>
> The DOMA litigation is clearly presented as a battle between federal and state powers. The plaintiffs only challenged the law's central provision that denies federal economic benefits to married same-sex couples. They left alone the part of the law that says a state doesn't have to recognize same-sex marriages performed in other states.
>
> While the focus on states' rights could lead the Supreme Court to strike down DOMA, it could also make it more difficult for gay rights advocates to achieve their ultimate goal: making same-sex marriage a federal constitutional right.
>
> The focus on federalism could also undercut arguments against state laws like Proposition 8 that ban same-sex marriage. Schowengerdt, the lawyer from the Alliance Defense Fund who is currently defending gay marriage bans in Hawaii and Oklahoma, said he plans to cite the recent Massachusetts ruling to support his position that the definition of marriage should be left up to the states.
>
> He pointed out that 31 states had passed constitutional amendments defining marriage as between a man and a woman. "At the end of the day, federalism helps proponents of traditional marriage," he said.

By having both *Perry* and the 1st Circuit DOMA rely on the *Romer* paradigm, the main thrust of LGBT litigation is now set up under a states rights analysis as opposed to full equal protection status across the board and uniformly nationwide.

While many of the experts, pundits and lay

people closely watching these cases may be cheering today, it seems a tad hollow. This is not the posture that Vaughn Walker worked so hard to put in place, the posture that the affected citizens deserve.

[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.]

A VICTORY ON DOMA FOR KAREN GOLINSKI

Well, while we ponder what will transpire on the mind numbingly restricted "win" for the Perry Plaintiffs in the 9th Circuit, yet another Northern District of California (NDCA) judge has followed in Vaughn Walker's footsteps and has sent a large and loud message in favor of Constitutional protection of marriage equality. Judge Jeff White has doomed DOMA in the Karen Golinski case!

> These motions compel the Court to determine whether the Defense of Marriage Act ("DOMA"), 1 U.S.C. Section 7, as applied to Ms. Golinski, violates the United States Constitution by refusing to recognize lawful marriages in the application of laws governing benefits for federal employees. Having considered the parties' papers, relevant legal authority, and the record in this case, the Court HEREBY DENIES BLAG's motion to dismiss; DENIES as moot BLAG's motion to strike; GRANTS Ms. Golinski's motion for summary judgment; and GRANTS the OPM's motion to dismiss.
> ….

> Here, having analyzed the factors, the Court holds that the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny. See also In re Levenson, 587 F.3d at 931 (holding that "some form of heightened constitutional scrutiny applies"); Witt, 527 F. 3d at 824-25 (Canby, J., concurring in part and dissenting in part) ("classifications against homosexuals are suspect in the equal protection sense" as gay and lesbian individuals have "experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities" and "they also exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are a minority."). In short, this Court holds that gay men and lesbians are a group deserving of heightened protection against the prejudices and power of an often-antagonistic majority.

The finding of heightened scrutiny because sexual orientation is exactly the proper finding and the further step that Judges Stephen Reinhardt and Michael Hawkins cowardly failed to take in the recent Perry decision. It is the right finding.

Judge Whit goes on in Golinski to knock back all the lame justifications given by H8ters for DOMA, much the same way Walker did at the trial level in Perry. Responsible procreation and child-rearing, nurturing the institution of traditional, opposite-sex marriage, defending traditional notions of morality, preserving scarce government resources….he kills them all. As an extremely nice touch, White also frames his decision against the Constitutionality of DOMA on alternate concurrent inspection as well,

fully analyzing and finding against it under a rational basis analysis as well as heightened scrutiny. This dual track type of analysis could have, and should have been done by Reinhardt in Perry, but, for some inexplicable reason, was not.

In concluding, White even gets in a shot at 'Ole Balls & Strikes Roberts:

> As Supreme Court Chief Justice John G. Roberts said during his confirmation hearings: "Judges are like umpires. Umpires don't make the rules, they apply them. … it's [the judge's] job to call balls and strikes, and not to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee).
>
> In this matter, the Court finds that DOMA, as applied to Ms. Golinski, violates her right to equal protection of the law under the Fifth Amendment to the United States Constitution by, without substantial justification or rational basis, refusing to recognize her lawful marriage to prevent provision of health insurance coverage to her spouse. Accordingly, the Court issues a permanent injunction enjoining defendants, and those acting at their direction or on their behalf, from interfering with the enrollment of Ms. Golinski's wife in her family health benefits plan. The Clerk is directed to enter judgment in favor of Ms. Golinski and against defendants the Office of Personnel Management and its director John Berry as set out herein pursuant to Federal Rule of Civil Procedure 58.

That is a nice day's work Judge Jeffrey White.

Well done!

9TH CIRCUIT PROP 8 DECISION: EQUAL PROTECTION NOT AT THE END OF THE RAINBOW

The highly anticipated Ninth Circuit decision on the appeal from Judge Vaughn Walker's groundbreaking opinion in *Perry v. Schwarzenegger* (now captioned "*Perry v. Brown*") has arrived! IT IS A VICTORY for supporters of marriage equality and constitutional protection of sexual identity interests!

The full text of the decision is here. Authored by Judge Stephen Reinhardt, it is a long opinion discussing several key issues of law. Generally, they break down into three areas: 1) whether Vaughn Walker was qualified to sit as the trial judge in light of the fact he is an acknowledged homosexual, 2) whether or not the proponents of Proposition 8 (referred to in the trial court as "Defendant-Intervenors" or "D-I's") have standing to bring the appeal, and 3) whether or not the merits of Judge Walker's decision trial court decision to grant constitutional due process and equal protection status to the plaintiffs Perry, and thus find that Proposition 8 is unconstitutional, should be upheld. We will take those in order.

Vaughn Walker's Qualification

The new Chief Judge in the Northern District of California, James Ware, wrote a very strong opinion finding it completely proper for Walker to sit as the trial judge in Perry. And the 9th Circuit had already slapped down an attempt by

the Prop 8 Proponents (hereinafter “Proponents”) to disqualify Panel Judge Stephen Reinhardt because his wife worked for the ACLU. So, it would have been shocking for the 9th to bite off on the nonsense that Vaughn Walker could not impartially serve as trial judge for the case. There is no shock delivered today, the 9th has joined Ware in blasting this craven argument, in fact the court states that it adopts Ware’s basis effectively in full.

Standing To Appeal

The issue of standing is arguably the most critical in the appellate case. Since the State of California made the calculated decision not to appeal and give the nominal cover their participation would provide to Proponents, if the Proponents do not have individual standing, there is effectively no appeal. There are actually two parties that have sought standing, the Proponents, and Imperial County of California through its court clerk.

As to Imperial County, I, along with others on the ECF mailing list got accidental notice of the court’s ruling yesterday when the 9th Circuit slipped up and transmitted the separate ruling on their motion to intervene in the appeal. It is denied as being untimely brought.

The Proponent’s intervention was certainly not untimely though, and it was unanimously certified by the California Supreme Court as being proper on the merits. In light of the strong decision finding standing for proponents by the California Supremes, after the 9th Circuit had asked them to make the determination, it would be pretty hard for the 9th to not follow the certified advice and grant standing. And they have done exactly that:

> It is for the State of California to decide who may assert its interests in litigation, and we respect its decision in holding that Proposition 8’s Proponents have standing to bring this appeal on behalf of the state.

Constitutional Merits Issues

The big kahuna, of course, is whether or not Vaughn Walker's meticulously laid out and reasoned decision granting protection to plaintiffs Perry under the Equal Protection and Due Process Clauses would be upheld. And, as I have consistently predicted would occur, the 9th has indeed upheld Judge Walker's ruling. WAHOOOO!

It is a narrower and shallower victory than I had hoped and predicted though.

> All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and social recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those opposite-sex couples. the Constitution simply does not allow for "laws of this sort." *Romer v. Evans*, 517 US 620, 633 (1996).

As I said, this is much narrower than hoped for. By basing on *Romer* instead of the full constitutional protections of due process and equal protection, the court has likely increased the odds the decision stands up to further appeal, but has done a disservice to those seeking true equality, both as to marriage and otherwise, for gays and lesbians. In short, it does not move the ball nearly as much as it should have, and was hoped for. The decision of the 9th does not go nearly as far as Vaughn Walker did, and wastes much of the meticulous taking of evidence, making of findings of facts and law, and crafting of his decision. It was hand tailored to go MUCH further, and that now

appears at least significantly squandered.

Also of note, it is a split decision, with Reinhardt and Mike Hawkins joining the majority, and N. Randy Smith dissenting. Although Smith is a Mormon, and reasonably conservative, the strength of his dissent is somewhat surprising compared to his seeming attitude at oral argument of the appeal.

So, where does that leave us? With a good decision for those same sex couples wanting to marry in California, and one more likely than a broader decision to stand up to appeal. But, it is by no means certain that even this narrow ruling will maintain; if the case was going to go to SCOTUS, it should go with all the gusto and Constitutional protection afforded that it can muster for all the same sex couples, in all the states, not just California. Today's decision falls shamefully short of that. It is somewhat of an embarrassment for one of the last great liberal lions like Steve Reinhardt actually. I have to believe he was choked somewhat by Mike Hawkins, but, frankly, such is surprising to me based on my knowledge of Hawkins, even though he is not nearly the wild eyed liberal Reinhardt is.

Not only is the decision disappointing, but it will likely also be stayed pending further review as well. so not even relief for those in California is in the offing anytime soon. Sigh.

[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.]

CALIFORNIA SUPREME COURT RULES THERE IS STANDING FOR PROP 8 INTERVENORS

When the Ninth Circuit initially referred the issue of standing for the Defendant-Intervenors in the Perry v. Schwarzenegger/Brown back at the start of the year, I wrote this:

> I still look for the California Supreme Court to certify this issue, and my best guess is they will find standing, the case will be sent back to the 9th Circuit for a merits decision and the 9th will uphold Vaughn Walker. Assuming all that is the case and plays out accordingly, it will sure eviscerate much of the ability of the US Supreme Court to avoid the merits on standing (which I think they otherwise would do). The bad news is this is going to take well over a year, and could easily be two years if there is an en banc process as well in the 9th. An attempt to repeal Proposition 8 will almost certainly be on the ballot for the 2012 election and if it gets repealed, this case is moot. That would not be so bad, as it would reinstate marriage equality in California. However if it fails, and Barack Obama loses in 2012, and there is a very early opening on the Supreme Court, the resulting extreme rightward shift would be very detrimental. There are a lot of ways this could go in the future, stay tuned!

The California Supreme Court just issued its opinion and I have been affirmed! In short, the highest California appellate court has certified to the 9th Circuit that, as a matter of state law, the DI’s have legitimate standing to

represent their side of the matter in Federal appellate courts.

The key finding is:

> At the request of the United States Court of Appeals for the Ninth Circuit, we agreed to decide a question of California law that is relevant to the underlying lawsuit in this matter now pending in that federal appellate court. (Perry v. Brown (9th Cir. No. 10-16696); see Cal. Rules of Court, rule 8.548.) As posed by the Ninth Circuit, the question to be decided is "whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so".
> ….
> Accordingly, we respond to the question posed by the Ninth Circuit in the affirmative. In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.

Here is the full decision.

The opinion was written by newly seated Chief Judge Tani Cantil-Sakauye, who was literally sworn in the day before the 9th Circuit dumped

this question in the laps of the California Supremes. It appears quite well sculpted and the full court signed on to her opinion; however, Judge Kennard issued a specially concurring opinion to “highlight the historical and legal events that have led to today’s decision and to explain why I concur in that decision”. As I said back in January, this was not really all that novel of an issue in California jurisprudence, and so the court has noted and, now, established with certainty.

Time for Steve Reinhardt and his merry band of 9th Circuit pranksters to fire up the cert alert in the stodgy halls of SCOTUS! And I think that will be happening sooner rather than later as the 9th has already received full briefing and oral argument on the merits. I would even go so far as to say there are draft opinions already written and ready to be tweaked and supplemented with today’s California Supreme Court ruling. So expect a ruling from the 9th fairly quickly.

I will be adding in some more analysis after a thorough reading of the full opinion.

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F1 GERMAN GP AT NURBURGRING & A NEW YORK RAINBOW IN THE NIGHT

This weekend does not bring the excitement of last did with the Women’s World Cup, but there are three notable events, two of which are even

sports related.

First up is the German Grand Prix from the famed Nurburgring in the Eifel Mountains. Nurburgring was also the site of the 1961 German Grand Prix. Continuing with this year's homage to the 50th anniversary of the Championship season for my late friend Phil Hill, let's go back for a minute to the sounds and smell of The Ring in 1961.

Nurburgring was a far different circuit in the 60s than it is today. Phil Hill took pole position in qualifying by shattering the lap record, becoming the first person to lap in under 9 minutes, with a stunning lap of 8 minutes 55.2 seconds (153.4 km/h or 95.3 mph) in the famed Ferrari 156 "Sharknose". In the race though, Phil could not match Stirling Moss in his Lotus-Climax. Here is the Wiki description:

> The race was won by British driver Stirling Moss driving a Lotus 18/21 for privateer outfit the Rob Walker Racing Team. Moss started from the second row of the grid and lead every lap of the race. It was the first German Grand Prix victory for a rear-engined car since Bernd Rosemeyer's Auto Union Type C took victory in 1936. Moss finished just over 20 seconds ahead of Ferrari 156 drivers Wolfgang von Trips and Phil Hill, breaking a four-race consecutive run of Ferrari victories. The result pushed Moss into third place in the championship points race, becoming the only driver outside of Ferrari's trio of von Trips, Hill and Richie Ginther still in contention to become the 1961 World Champion with two races remaining.
>
> It was the last home country appearance for points leader von Trips before his death at the Italian Grand Prix five weeks later. His second place finish saw Ferrari secure the constructors' championship. The remaining championship

> points scorers were all from British racing teams. Scottish driver Jim Clark (Lotus 21) was fourth for Team Lotus; former motorcycle World Champion John Surtees (Cooper T53) was fifth for Yeoman Credit Racing and young New Zealander Bruce McLaren was sixth in his factory-run Cooper T58.

The Nurburgring of today is a far different, more sterile and safer track, and much shorter, with a length of just under 3 miles as opposed to the former 14 miles plus. Mark Webber of Red Bull was fast in practice Friday and took pole today with a surprising P2 for Lewis Hamilton of McLaren. Sebastian Vettel in the other Red Bull is in P3, the first time he will not start from the front row this year. The Ferraris of Alonso and Massa will start in P4 and P5 respectively. The race day weather forecast is for cool temperatures, clouds and some rain, which should make for a very interesting race. Again, the assholes at Rupert Murdoch's Fox TV will make US F1 fans watch the race on a tape delay, starting at 12 EST and 9 am PST.

In other sporting news, it looks like the great NFL Football lockout is in its last throes. From Marke Maske at the Washington Post:

> NFL player leaders are scheduled to meet Monday in Washington, where they are likely to recommend approval of the lockout-ending collective bargaining agreement already ratified by the league's franchise owners, several people familiar with the deliberations said Saturday.
>
> The lockout could officially end next Saturday with the opening of the free agent market and teams beginning training camps, those people said, cautioning that those plans were subject to change. The 10-year labor agreement first would have to be ratified by a majority of the nearly 2,000 NFL

> players.
>
> But if free agency begins and training camps open Saturday, the preseason would be likely to be played as scheduled beginning Aug. 11, said those people familiar with the situation.

Lastly, and quite charmingly, we have the first vows in New York resulting from the recent passage of marriage equality in the state. As soon as the clock strikes midnight, Kitty Lambert and Cheryle Rudd are going to be the first married under the new law at a rainbow-lit Niagara Falls. From The HuffPo:

> Two Buffalo women plan to be the first to legally wed under the state's new same-sex marriage law, which goes into effect on Sunday, one month after Gov. Andrew Cuomo signed it into law. The pair, Kitty Lambert and Cheryle Rudd, are to be married the minute after midnight as the Niagara Falls are lit up with the colors of a rainbow.
>
> Sounding much like any other nervous newlywed-to-be, Buffalo resident Lambert told HuffPost they were "really excited, a little overwhelmed, a whole lot frightened." After 11 years together, she said, "I don't know why I'm frightened by this commitment."
>
> Jitters or not, the couple has a big ceremony planned. Lambert, 54, and Rudd, 53, have five adult children and 12 grandchildren. The umbrella advocacy group New Yorkers United for Marriage is promoting the marriage as the first of its kind in New York State. Local politicians will be in attendance along with an estimated hundreds of friends and gay rights advocates for a meal, speeches, and a candlelight procession on Goat Island that will lead across Bridal Veil Falls and then to Luna

> Island. And the falls, of course, will be illuminated to look like a rainbow, a symbol of the gay rights movement.

That is pretty darn cool. Hats off to the happy couple, and let's hope they find happiness on the other side of their rainbow.

OBAMA'S "EVOLUTION" ACCELERATES: DOJ FORMALLY DECLARES DOMA UNCONSTITUTIONAL

In a late filing in the Northern District of California (NDCA) case of Golinski v. US Department of Personnel Management, the Department of Justice has formally stated that the Defense of Marriage Act (DOMA) is unconstitutional.

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

New York gets it done on marriage equality, and it will have many profound, and positive, ramifications for the Perry Prop 8 case.

CELEBRATING 10 YEARS OF THE RIGHTS ASSOCIATED WITH MARRIAGE

The Third Way thinks it learned something worthwhile by offering a bunch of apparently straight people who have full civil rights a chance to judge the motivations of those who don't.

> At Third Way, for example, we went beyond traditional polling and conducted a series of innovative and intensive one-on-one interviews – akin to the sort of market research tool used by the Fortune 500. Those interviews proved revelatory and have profound implications for extending marriage to lesbian and gay couples.
>
> We started with a simple question: "What does marriage mean to you?" People spoke of the kinds of things you hear in a wedding ceremony: lifetime commitment, responsibility and fidelity. They called marriage "a big step" and "the most important decision of one's life." Nobody talked about legal rights or taxes.
>
> Then we asked them why gay people might want to get married. The overwhelming answer? "I don't know." But when we probed deeper, we found that they did have some idea – they had heard the messages from LGBT advocates. They would talk about how gay couples want rights, benefits, equality and fairness. Not surprisingly, that led them to the idea of civil unions, because they told us

> that if you want legal rights, you should have a legal contract. But that (in their minds) had nothing to do with marriage.
>
> To them, all the talk about rights indicated that gay couples "just don't get it" – that they couldn't really understand the true purpose of marriage.

Of course, the problem with their little project is that most people with full civil rights have a difficult time seeing the benefit of those rights because they've never had to think about doing without them. The Third Way's little project would have far more validity if they actually talked to people who had married for the rights it grants couples.

Like me.

You see, described at a very crass level, Mr. EW and I have a Green Card marriage.

That's not how we thought of it. Rather, after having lived together for about a year or so, we were facing career choices that might have forced one of us to move to a remote city. We knew we wanted to stay together as we embarked upon the career changes we were considering. But we also recognized that that would be far easier to do if we were married, not least because Mr. EW's visa was at that time tied to his job (and, of course, also because if we moved we could share health benefits). So on a Thursday, we decided to do it. And the following Monday, we got married. Our reception was a night with friends and our brothers at the local Irish pub.

(The picture above isn't actually from the wedding; it's from the celebration we had in Sedona the following year. The best picture of from the wedding day—of Mr. EW carrying me over the threshold of the Irish pub—is in some box somewhere.)

And that Monday—the day we swore our lifetime commitment before a judge for the legal benefits

such an oath would give us—was 10 years ago today.

Now, don't get me wrong. There has been plenty of that stuff that straight people who don't have to think about these rights cite when they think about marriage: commitment, responsibility, fidelity, the whole in sickness and in health bit. And we've been pretty schmaltzy in recent days as we think about how great the last decade has been together. But we are also aware—acutely so, when we see friends who for no rational reason aren't granted the same rights we have enjoyed—how much easier those rights have made it for us to sustain our commitment to each other.

So while it's very easy for the Third Way to congratulate itself that it got a bunch of people "from Middle America" to complain that gay men and women deprived of civil rights "don't get it," it's a fundamentally dishonest project. The people who "don't get it" are those who pretend they can separate the institution of marriage from society's full recognition of that institution, legally, through the rights it conveys.