

## PROP 8 AND DOMA

Brenda Feigen attended the Supreme Court hearings on California's Proposition 8 and the Defense of Marriage Act (DOMA) on March 26th and 27th, 2013, as a guest of Justice Ruth Bader Ginsburg. Each day after the hearings, she wrote the articles below and they were posted on the *MS Blog*, the Equality California Blog and the WOWOWOW website. On the Thursday after the hearings, Ms. Feigen appeared on the Stephanie Miller radio show.

### THE SUPREMES AND SAME-SEX MARRIAGE: DAY 1 MARCH 26, 2013

#### BY BRENDA FEIGEN

My feelings are full and complex after today's Proposition 8 hearing at the U.S. Supreme Court. Since the hearing on *Hollingsworth v. Perry* started with Chief Justice John Roberts interrupting the Prop 8 proponents' lawyer, Charles Cooper, barely a sentence into his speech to say he wanted to hear about whether they even had standing to bring the case to court, there was a full-throated bombardment from virtually every justice (except Clarence Thomas who never says anything) on that issue. My conclusion is that there may be five justices who don't think they should be hearing the case, which, of course, brings up the question of why did they take it in the first place?

I think Justices Antonin Scalia, Samuel Alito and maybe even Sonia Sotomayor alluded to a real problem: If these people who are arguing the case for California's Proposition 8 don't have standing, who does? Someone should. Attorney Ted Olson—on the side in opposition to Prop 8 (as was U.S. Solicitor General Donald Verrilli)—says that people who represent an initiative (the proponents of Prop 8) have no fiduciary duty to the state and, therefore, should not be able to represent it as they're trying to do here. Does that mean he'd prefer to let the lower-court decision that Prop 8 is unconstitutional ride? No. He'd like the court to rule on the constitutional question, but this remains a big open issue in the case: I'm not sure we have a majority willing to reach the broad question of whether it's constitutional, in any state, to prevent us from marrying.

Later in the hearing, the Solicitor General was grilled on the jurisdiction of the Supreme Court and the sweep of its ruling. Justice Stephen Breyer asked pointedly how he can argue that a state that does nothing to protect us can be left alone, but a state like California—or any other state that has civil unions or domestic partnerships and thus has tried to be more fair to same-sex couples—can be forced to let us get married (vs. allow those other states to relegate us to no fairness at all). When the issue of the constitutionality of Prop 8 was addressed head on, Justice Anthony Kennedy seemed clearly on the side that Prop 8 is unconstitutional. That was clinched for me when he asked Cooper if he really thinks we should prevent parents of the 40,000 children of same-sex couples from “full recognition and full status”—from getting married. It became clear that the justices leaning

toward holding Prop 8 unconstitutional would grill Cooper most, whereas the conservatives reserved their fire-power for Ted Olson.

Justice Breyer asked the obvious question: If procreation is the issue, as Cooper kept insisting, why should California allow sterile couples to marry? And Justice Kagan, picking up on this, asked Cooper if it would be constitutional to prevent people over 55 from marrying. After some jokes about whether it would pass muster to ask people who want to marry if they're both fertile (or not) Cooper actually said that very few men outlive their own fertility, meaning they can father babies forever. This does not speak to the issue of how women in those marriages might actually bear children. At this point, Cooper, who said he feels it's good for men over 55 to be married so they wouldn't go around impregnating random other women, seemed not only flustered but pathetic.

Justice Ruth Bader Ginsburg then observed that people in prison are allowed to marry—people who will never get out of jail and thus cannot make babies. How is that OK, but preventing same-sex couples from marrying is not? (I hope the strength of this point will carry her on to a broad ruling on the prohibition against same-sex marriage in most states. Having sat at the counsel table with her when she argued the most important gender discrimination case of the '70s, I know she will rule on the merits for same-sex couples, if not now then in the very near future.)

It finally came time to stop Cooper and let Ted Olson have his turn. He was eloquent when he stated that the right to marry is fundamental, part of the right of privacy, association, liberty and the pursuit of happiness.

Of course, Justice Scalia, who believes the constitution is now what it was in the beginning and always will be, wanted to know exactly when it became unconstitutional to exclude gays and lesbians from marrying. I could see others metaphorically scratching their heads with this question. Olson advised him that in California this happened when the state Supreme Court ruled we had the right to marry. This led Scalia to counter with this query: If Prop 8 had happened before the state court ruling, would we have any argument about its unconstitutionality? This, of course, is his way to get to the issue of what the Court should do about states that now have in place prohibitions on same-sex marriage. To Scalia, if the Court grants same-sex couples the right to marry, we can expect those couples to have the right to adopt children—and he thinks that's controversial. For me, this harkens back to Florida in the 1970s when Anita Bryant started her Save the Children campaign and where it's still impossible for gays & lesbians to adopt children. Justice Ginsburg countered on this point that it is legal for same-sex couples to adopt in California, which is all that technically matters here.

So do we have a majority willing to answer the broad question of whether it's constitutional to prevent same-sex couples from marrying? I know that on the merits—if they get to them—Proposition 8 would be considered unconstitutional by at least the Court's four liberal justices (Breyer, Sotomayor, Ginsberg and Elena Kagan) and the swing-vote, Kennedy. However, I feel quite sure that a majority doesn't want to rule for the whole country right now. I would like to be surprised, but it seems that it will take another case brought by same-sex couples in a state that does not have the complicated history of Prop 8 to get to that. I still think that we will have a ruling that Prop 8 is

unconstitutional, but that the rest of the country—and maybe even the other states in the 9th Circuit—may have to wait for a broader ruling on same-sex marriage.

Postscript: I chatted with California Attorney General Kamala Harris before the hearing and she was as excited as me. Afterwards I talked with California Lt. Gov. Gavin Newsom—the man who launched same-sex marriage efforts in California in 2004 when he directed the issuance of marriage licenses to same-sex couples as mayor of San Francisco—and he was as confused as me about the likely outcome. But now that I've had a chance to review the transcript and to think more calmly, I feel it was a victory to be in that courtroom, to hear the ways LGBT people have been discriminated against, and to feel the inevitable tug of history into a future of equality for all of us.

## THE SUPREMES AND SAME-SEX MARRIAGE: DAY 2 MARCH 27, 2013

BY BRENDA FEIGEN

As I got close to the U.S. Supreme Court on my way to the DOMA hearing today, I was greeted with big, ugly posters spouting “Hate Fag” language. Fortunately, I soon saw “our” people, and they took up the rest of the street. And once inside the gallery, I saw a bunch of folks I know. All the heads of LGBT organizations seemed to be in the Bar section (where attorneys who are members of the Supreme Court Bar can be seated, space permitting). Once again, I was so grateful to my old friend Justice Ruth Bader Ginsburg for the gift of my tickets.

Eddie Windsor—the Windsor of the case at hand, *United States v. Windsor*, was right in front of me. I also noticed Nancy Pelosi and we had a conversation—she hates DOMA! I don't know, however, whether she can muster the votes necessary in the House to repeal it if the Court fails to act against the law. So let's hope it doesn't come to that.

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Moving along, I was glad to see Ted Olson, who argued so brilliantly yesterday against Prop 8—which I told him. Finally—and by this time we'd all been waiting at least an hour inside the Gallery—I saw Obama senior advisor Valerie Jarrett, and I had a very strong feeling she'd be rushing back to the White House later to fill in the President.

At the stroke of 10 a.m., I walked the justices. Chief Justice John Roberts, after housekeeping details and the issuance of a ruling in another case, called on Vicki Jackson, a Harvard law professor asked by the Court to argue that the Court does not have authority to rule on DOMA (I know, too complicated to explain), whose very first sentence was: “There is no justiciable case

before this Court.” And thus began a more-than-hour-long examination into whether the Court may, by the Rules of Civil Procedure, determine DOMA’s constitutionality since the executive branch of the government agrees with Windsor that DOMA does not pass muster. Is there a real case and controversy? On this point, Roberts said he didn’t see why the President didn’t have the courage of his convictions and stop enforcing DOMA, rather than ask the Supreme Court to decide for him.

I feel that Justice Anthony Kennedy, who on the merits is no doubt the swing vote in this case, may be tempted to fuss that the case is not properly there. But given what he said later, I don’t think he’s going to abandon the need for the LGBT community to have equal protection. Whether or not BLAG has standing, I do feel that five justices, at least, will get to the merits against DOMA. We should note here that we want BLAG to have had standing, BLAG having been appointed and hired by the House to defend DOMA when the Administration decided it would enforce but not defend it. If BLAG were to be found not to have standing, chaos reigns. The 2nd Circuit’s decision that DOMA is unconstitutional would stand and Edie would get the money back that she had to pay in taxes when her wife Thea died.

What would happen in the other Circuits and for other federal benefits is quite a muddle, though, and requires an entirely different and way too complicated discussion than we can embark on here. In fact, Nancy Pelosi gave me more bad news on this: Not only, she said quietly, did the Chair of the House Administration Committee authorize \$1.7 million to pay for BLAG’s lawyers so far, there is another \$3.3 million of our tax dollars ready for BLAG’s next legal bill. She, who has a lot of power in the House, seemed appalled at this.

It wasn’t until 11:13 a.m. that the justices turned to the merits of the case, and the arguments had already taken up 55 pages of transcript! The lawyer for BLAG, Paul Clement, made almost no sense. Justice Ginsburg, in a tone that both warmed my heart and brought tears to my eyes by saying that every aspect of life is affected by DOMA, that the discrimination is pervasive. I am inserting here her words that set the tone for the rest of her remarks (as well as the remarks of Justices Breyer and Sonia Sotomayor):

*[Assume the] States’ decision that there is a marriage between two people, for the Federal Government then to come in to say no joint return, no marital deduction, no Social Security benefits; your spouse is very sick but you can’t get leave; people—if that set of attributes, one might well ask, what kind of marriage is this?*

It seems like such a short while ago that she told me it would be a long, long time for same-sex marriages to be recognized, but here she was:

*How about divorce? Same thing? That you can have a Federal notion of divorce, and that that doesn’t relate to what the State statute is?*

Great point. While I had been really, really worried about was Justice Anthony Kennedy and his seeming to feel that maybe the Supreme Court doesn’t belong in this case. But he did get it, after all:

*But when it [the federal government] has 1,100 laws [related to marriage], which in our society means that the Federal Government is intertwined with the citizens' day-to-day life, you are at—at real risk of running in conflict with what has always been thought to be the essence of the State police power, which is to regulate marriage, divorce, custody.*

Kennedy doesn't seem to like the federal government messing with matters that have been left to the states, and especially when we are being deprived of the benefit of 1,100 federal laws. Justice Ginsburg, not one to let matters ride, made a terrific observation, which brought laughter to the courtroom:

*You're saying ... [the] State said two kinds of marriage: the full marriage, and then this sort of skim milk marriage.*

Justice Elena Kagan, who had been quiet during the earlier part of the discussion, zinged in with what seemed like a rhetorical question about the state of Congress's mind when it passed DOMA in 1996:

*Do we think that Congress's judgment was infected by dislike, by fear, by animus, and so forth? I guess the question that this statute raises, this statute that does something that's really never been done before, is whether that sends up a pretty good red flag that that's what was going on.*

This is great, I thought—finally realizing how silent the four “conservatives” on the Court had been, the four who seem to believe in states' rights except maybe not here, where DOMA effectively disembowels the meaning of any state's definition of “marriage”.

Today's hearing didn't adjourn until almost 12:30 (they're usually done by noon). And now was the moment I had been anticipating since I'd been told by Justice Ginsburg's assistant that she would be happy to see me for 15 minutes before their 1 p.m. conference. In order to retrieve my coat and cell phone, I still had to go to the locker that the police would empty out, but the place was so mobbed I decided to risk losing coat and phone to go straight to Justice Ginsburg's chambers via the Marshall's office.

And then there I was. Justice Ginsburg (“Ruth” to me, after 40 years of working with and knowing her) was right there talking with her three clerks. After introducing me, she led me to her office, stopping to show off a birthday gift she'd just received: a big photo of Elizabeth Cady Stanton on her 80th birthday, the same birthday Ruth recently celebrated. She told me how much she admires Stanton, what a great writer and speaker she was. As we walked into her Chamber, I told Ruth how much I've enjoyed digging into all the briefs to prepare for the hearings of the past two days—how much, in fact, I enjoy the whole subject of Constitutional law. She quietly observed that there is a whole lot of civil procedure raised by these cases, too.

And then she showed me the bobble-headed figure an artist had made of her with little things at her feet, representing some of Ruth's biggest cases. As the clock ticked, I knew it was almost conference time. We headed to the hallway, and there, as if having been summoned, was Justice

Kennedy. I was introduced by her to him as the person who'd started the ACLU's Women's Rights Project with her. I mentioned that I live in California (he's from there), but Ruth noted that I'd lived on the east coast for many years before that. He said his children have moved to the D.C. area now. I said he was very lucky, thinking about how my daughter—who, like her mother, is also in a same-sex marriage—and grandsons are technically nearby (in the Bay Area) but oh so far when it comes to actually getting together.

That sounds like trivial conversation, but as the two justices entered the elevator to go to their conference, I thought again about how the last two days have been all about family—what it means and how we celebrate and appreciate each other. I hope my family and my daughter's and all the others like ours will be certified, by the decisions in these two momentous marriage cases, as being just as real as the families of straight married couples.