

WHO IS (NOT) PASSING THE BUCK ON GAY RIGHTS?

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Things have been happening so fast in the gay/lesbian legal world that I am dividing this into three sections. The first is, once again, about Prop 8 in California; the second addresses the federal Defense of Marriage Law (DOMA) that is being challenged in federal courts in California and Massachusetts; the third is about the horrible Don't Ask, Don't Tell federal law that infringes the constitutional rights of gays and lesbians in the military and is finally being attacked. My thesis is that these sorts of constitutional issues are not appropriately decided by voters, as Prop 8 was. It provides the perfect example of the tyranny by the majority of a minority group. There is certainly a role for state legislatures and Congress to legislate the wrongs away, but there is also plenty of room for the courts to decide what does or does not offend the 14th amendment of the U.S. Constitution.

I. Prop 8

When I last wrote about the Prop 8 mess in California, I expressed my delight that two big-deal litigators, Ted Olson and David Boies, have started a lawsuit (Perry v. Schwarzenegger) in the U.S. District Court in San Francisco challenging Prop 8 as being unconstitutional. The argument being that it denies gays and lesbians both equal protection and due process rights. The big surprises came first when CA Attorney General Jerry Brown wrote a brief agreeing with the unmarried gay plaintiffs that Prop 8 unfairly deprived them of equal rights. And then even Republican Governor Arnold chimed in that the matter is for the courts to decide. It is rare, to say the least, to have the highest ranking state officials disapprove of their own state constitution. That said Obama's Justice Department will undoubtedly be all alone in its defense of California's newly, badly amended constitution.

It's really too bad that most of the groups lobbied hard to defeat Prop 8 are deploring this lawsuit. I, on the other hand, can't imagine anything worse than having this fight repeat itself at the polls on every two years. The Supreme Court isn't going to get any more liberal. The older members are all Democratic appointments. They, including outgoing Justice David Souter, are the most likely to leave sooner rather than later. Obama will appoint liberals to replace them, but the balance in the Court is unlikely to change for a very long time, given the relative youthfulness of the Republican appointees. What are the detractors really waiting for? Another chance to spend millions of dollars going back and forth on Prop 8, its repeal, its return and so on, like a ping pong ball. Finally, Hollywood has awakened to the issue and to how bad it is, so we'll get the support of a gaggle of movie stars, but that's still feels like taking or asking for a handout. As I've said before, I do NOT want my rights determined by voters, even a majority of voters. I belong to a

minority group (gays and lesbians) who do not deserve to be tyrannized by the majority in any way whatsoever.

II. DOMA

A challenge to the federal Defense Of Marriage Act has begun in federal court in Massachusetts. In that case, *Gill v. the United States*, eight sets of plaintiffs are suing under various sections of the U.S. constitution, challenging the Defense of Marriage Act. This is the extraordinarily unconstitutional piece of legislation that Bill Clinton signed into law. It allows states not to let gays and lesbians marry; it allows states not to recognize same-sex marriages performed in other states; and it allows the federal government to ignore same-sex marriages wherever they are performed for every purpose under the sun. Some of the issues raised in that case and that affect the plaintiffs importantly and directly are:

- * Social Security spousal protections that ground a family's economic security while living into old age, and upon disability and death;
- * protections for one spouse's essential monetary resources and the ability to stay in the family home when the other spouse needs Medicaid for nursing home care;
- * the ability to be included in a family policy of health insurance, and if receiving that family health insurance, to be free of income tax on the value of that insurance;
- * the ability to use the "Married Filing Jointly" status for federal income tax purposes that can save families money;
- * family medical leave from a job to care for a seriously ill spouse;
- * disability, dependency or death benefits for the spouses of veterans and public safety officers;
- * employment benefits for federal employees, including access to family health insurance benefits, as well as retirement and death benefits for surviving spouses;
- * estate/death protections that allow a spouse to leave assets to the other spouse – including the family home – without incurring any taxes; and
- * the ability of a citizen to obtain a visa for a non-citizen spouse and sponsor that spouse for purposes of citizenship.

I am optimistic that the federal district court there will rule that DOMA is unconstitutional and that decision will be upheld by the federal court of appeals in the 1st circuit. Then I can only assume the case will be appealed to the Supreme Court (by Obama's Justice Department). And it's there that I have hopes that Justice Kennedy, who ruled for same-sex sex in *Lawrence v. Texas*, will again join the "liberal" bloc and denounce DOMA in yet another 5-4 decision. If he doesn't, it won't be any easier when Sonia Sotomayor takes her seat on the Bench. She'll just be replacing Souter who's been on our side all along. So, what are the groups that worry this may be too soon thinking? What are we supposed to be waiting for? The only answer is a repeal of DOMA by Congress. That would be great, but, again, waiting for it may take a painfully long time.

Meanwhile, another challenge to DOMA (*Smelt v. the United States*) has been brought by a married gay couple in federal court in Southern California. They have argued, among other issues, that their (fundamental) right to travel is impaired because their marriage won't be recognized if they move to a state that doesn't recognize same-sex marriages. To me, the big problem in that case is that they may lack standing. Generally, one has to actually suffer a real injury before a court will take the case. These folks aren't as strong plaintiffs as the ones in *Gill*, and the Obama administration on the attack: "DOMA" it claims in its brief, "does not impinge upon rights that have been recognized as fundamental...." OH REALLY?! HOW MANY STRAIGHT MARRIED COUPLES WOULD BE OKAY WITH THE IDEA THAT IN OTHER STATES THEY AREN'T DEEMED MARRIED?? The brief even states: "While the Supreme Court has held that the right to marry is 'fundamental,' ..., that right has not been held to encompass the right to marry someone of the same sex." A footnote on this is that the California Supreme Court in its moment of sanity in 2008 indeed deemed the right to marry someone of the same sex "fundamental".)

In the Justice Department's DOMA brief, we are treated to a rambling discourse on the reasons that the Full, Faith and Credit Clause of the federal constitution does not require states to recognize same-sex marriages performed in other states. Would the federal government ever even before *Loving* dare have said that a bi-racial marriage performed in one state didn't have to be recognized by all the others?

The really good part of the brief follows:

"[DOMA] maintains the status quo of federal policy, preserving a longstanding federal policy of promoting traditional marriages, by clarifying that the terms "marriage" and "spouse," for purposes of federal law, refer to marriage between a man and a woman, and do not encompass relationships of any other kind within their ambit....DOMA ... limits federal benefits to those who have entered into the traditional form of marriage." DOMA says the Justice Department brief "simply provides...that... as a result of their same-sex marriage they will not become eligible for the set of benefits that Congress has reserved exclusively to those who are related by the bonds of heterosexual marriage." The brief smugly adds that "a certain subset of marriages that are recognized by a certain subset of States cannot be taken as an infringement on plaintiffs' rights."

That the Justice Department sneers at the right of gays and lesbians to have their marriages recognized nationwide can be inferred by what it compares same-sex marriage to:

"[T]he courts have widely held that certain marriages performed elsewhere need not be given effect, because they conflicted with the public policy of the forum...(marriage of uncle to niece..., marriage of 16-year-old female...marriage of first cousins...."

It is clearly irrational to keep gays and lesbians from marrying and unconstitutional for other states not to recognize same-sex marriages performed elsewhere. I don't want us to be compared to uncles and nieces or first cousins, and anyone who refuses to make the distinction should be ashamed.

And, of course, I add that I'd be absolutely delighted if Congress were to repeal this abhorrent law before it gets all the way to the Supreme Court. It is Congress' job to pass legislation. It is also up to the Supreme Court to decide if any particular piece offends the U.S. Constitution.

III. Don't Ask; Don't Tell

To top off the discussion of gay and lesbian rights in this country, a lawsuit was recently filed in the U.S. Supreme Court (*Pietrangelo v. Gates*), challenging the military's "Don't Ask; Don't Tell" policy that allows gays and lesbians to be in the military but doesn't allow them to say (out loud) that they're gay or even act on their being gay. The Supreme Court promptly decided not to take the case (there needs to be 4 votes to grant certiorari so we didn't even get our usual "liberal" bloc to agree on this one). What turned heads in the gay and lesbian community was the brief filed by Obama's Justice Department and, significantly, the Solicitor General, Elena Kagan former dean of my alma mater, Harvard Law School, who mouthed off with the old saw: Because "complex, subtle, and professional decisions as to the composition * * * of a military force" are "essentially professional military judgments," courts "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Footnote on this: It wasn't that long ago that black men weren't allowed to serve alongside their white compatriots or that women couldn't serve at all. Don't they get the idea that times really have changed?

So we didn't fare well in the Supreme Court. The next obvious question is what about Congress' repealing this odious law. And just as I was thinking that it's hard to imagine them not repealing it I read that Harry Reid, the Senate Majority Leader, had "no plans to introduce a bill to repeal 'don't ask, don't tell' in the Senate. Why? "I haven't identified any sponsors," he said. "My hope is that it can be done administratively." That is on the initiative of President Obama. Reid went on to clarify:

"We would welcome a legislative proposal from the White House on repeal so as to provide clear guidance on what the President would like to see and when. Working together, I believe we can find the time to get repeal done in this Congress."

It's actually hard to believe that "liberals" in the Senate would talk this way. They need guidance on how to repeal a law??? They care what the president wants to see and when??!! They need time to repeal a law that is of such dubious constitutional merit!??? The big problem is that the Obama administration has repeatedly resisted calls to suspend DADT by executive order. White House Press Secretary Robert Gibbs last month said that President Obama is looking for a "durable legislative

solution,” and Obama himself has written that repeal of the policy “needs Congressional action.” In fairness I will add that Reid did say “If the House moves on this, I would be happy to take it up.” Wow! What courage! He may be worried about a Republican filibuster, but again it merits noting that both the courts and the Administration think the ball is in Congress’ court. So what if it gets a little tough, if there’s a slight battle with the out-numbered Republican Senators.

Anyway, we have a colossal passing of the buck when it comes to right to serve one’s country? Where is the evidence that having gays and lesbians serve openly, instead of from inside the closet, will destroy whatever cohesion or any other military interest that might exist? Meanwhile, gay Americans continue to serve their country, in constant fear that they’ll be found out and thrown out, losing their right not only to defend us but their right to future benefits that straight soldiers automatically get – and on which they know they can rely.

So I admit it: I think Congress, as well as state legislatures, should do the right thing, but I also believe in activist judges like the ones who integrated schools in *Brown v. Board of Education*, like the ones who ended prohibitions on bi-racial marriages in *Loving v. Virginia* and the ones who, in the VMI case forced the all-male military academy, Virginia Military Institute, to accept women or lose their federal funding. I hope Sonia Sotomayor, in her confirmation hearings in the Senate, has the courage to agree with me that when neither the legislative nor the executive branches of government take aggressive steps to end inequality, the Supreme Court ultimately will come to the rescue.

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