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THE RECORDER

VIEWPOINT

Same-sex marriage: The time has come

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June 26 was a day of celebration for all who believe in liberty and equality. The United States Supreme Court declared unconstitutional a core provision of the Defense of Marriage Act, which prohibited myriad federal rights and benefits to people in same-sex marriages that are legal in their states. The court also left open the path, taken by California's governor, for disregarding California's mean-spirited Proposition 8 which prohibited same-sex marriage.

In *United States v. Windsor*, a six-member majority of the Supreme Court held that the Bipartisan Legal Advisory Group of the House of Representatives had standing to defend in court §3 of DOMA, which amends the federal Dictionary Act to define marriage as only a legal union between a man and a woman. The president had directed his attorney general not to defend the statute. Having decided in essence that BLAG had standing to defend the statute, five of those six justices held that §3 of DOMA violates the equal protection of gay people under the Fifth Amendment to the Constitution. Justice Samuel Alito parted company with those five and would have upheld the statute. The other dissenters were Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas. Scalia's dissent is unusually vitriolic and *ad hominem*. Thomas joined Scalia's entire dissent, and the parts of Alito's dissent that addressed the constitutionality of the statute.

Somewhat paradoxically, in *Hollingsworth v. Perry*, a five-member majority of the Supreme Court decided that the official proponents of Prop 8 lacked standing to appeal from a federal district court decision that California's Prop 8 is unconstitutional. Like the president in the DOMA case, California's governor and attorney general refused to defend Prop 8.

Justice Anthony Kennedy authored both the majority decision in *Windsor* striking down §3 of DOMA, and the only dissent in *Hollingsworth*, in which the majority ducked the question whether Prop 8 is unconstitutional, but left standing former U.S. District Judge Vaughn Walker's decision that it is unconstitutional.

Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan and Sonya Sotomayor joined Kennedy in *Windsor* in declaring §3 of DOMA unconstitutional. Scalia, joined by Thomas, dissented on the grounds that there was no standing, but concluded that the statute was constitutional. Alito agreed with the majority that there was standing and concluded that the statute was constitutional. Only Roberts did not reach the merits of whether the statute was constitutional.

In *Hollingsworth*, Roberts, joined by Scalia, Ginsburg, Breyer and Kagan, held there was no standing to sue. Kennedy dissented, joined by Thomas, Alito and Sotomayor. No one addressed whether Prop 8 was constitutional.

The two cases involve different facets of the developing constitutional jurisprudence of same-sex marriage. The majority opinions and dissents in both cases speak to issues of constitutional rights, federalism and federal jurisdiction.

I will not parse the esoteric issues of Article III and prudential limits on federal jurisdiction here. It is enough to say that the justices' opinions about those issues, and the shifting voting patterns as to standing, will have some impact in future same-sex marriage litigation. They also are instructive on the murkiness of constitutional and prudential standing in general. I aired some of my thoughts about the constitutional and prudential limitations on judicial review, particularly as to how they played out in implementing *Brown v. Board of Education*, in an article some months ago on SCOTUSblog. See http://goo.gl/R1Ml3.

Despite the stubborn group of naysaying justices, our constitutional jurisprudence, like our society, is moving inexorably forward.

Here I write with much pleasure about what the LGBT movement has gained by the Supreme Court's DOMA and Prop 8 decisions, and a bit about what may come in the future.

Before I proceed, I must make some disclosures. First, my colleagues and I filed *amicus curiae* briefs in both *Windsor* and *Hollingsworth*, on behalf of several gay men forced into sexual reorientation therapy as minors, and the sister of a gay man who was inflicted with such therapy and later committed suicide. Our briefs tell their powerful and compelling stories. We also filed *amicus* briefs in the U.S. Court of Appeals for the

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Ninth Circuit on behalf of the same people, this time opposing challenges to California's statute that prohibits providing sexual reorientation therapy to minors. These briefs are available at http://goo.gl/lJKWd. Second, prior to the Supreme Court's decisions, I blogged about my personal journey to embracing same-sex marriage and the rights of LGBT people, and advocating a grand slam outcome in the Supreme Court. See http://goo.gl/XBQb9.

June 26 was a great day for human rights. Although it was not a grand slam, because the court ducked the question whether states may prohibit or fail to recognize same-sex marriages, the court did a great deal of good and no harm to the cause of equal rights for LGBT people.

This we know: Section 3 of DOMA is unconstitutional, which will lead to fair and equal treatment under federal laws of married gay and lesbian couples, whose marriages are valid under state law. At present, same-sex marriages are valid in 12 states and the District of Columbia, and the number is likely to increase. We also know that California's governor and attorney general are taking immediate measures requiring all government officials to obey the district court's injunction in the *Hollingsworth* case prohibiting enforcement of Prop 8.

The legal work to obtain full recognition of the equal rights of LGBT people remains unfinished.

The DOMA majority decision has its roots deep in principles of federalism as well as equal protection rights. Just ask the dissenters in *Windsor*, especially Scalia who makes much of the federalism underpinnings in the decision's penultimate sentence: "This opinion and its holding are confined to those lawful marriages," i.e., marriages recognized by the states who recognize them. And as Roberts observes: "We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples," and those questions were not reached in the Prop 8 case.

It follows that we do not know whether states still may constitutionally prohibit same-sex marriages. It also follows that we do not know whether marriages valid in the states or countries in which they are performed must be treated as valid by states that prohibit or do not recognize same sex marriage. Section 2 of DOMA presumes to free states from recognizing laws of other states that legalize same sex marriages and provide legal rights to same-sex couples. It was not passed on in the *Windsor* case.

Finally, and most important, we do not know what level of scrutiny will be applied to decide these questions. Kennedy's decision in the DOMA case did not address that issue. Again, just ask Scalia, who makes sharp note of this, and ask Alito who goes through an analysis of the standards and comes out at the other end saying he would uphold DOMA. Oddly, Kennedy, Scalia and Alito all agree that equal protection scrutiny ladder from rational to strict is no more than a sometimes useful construct for deciding cases. Scalia and Alito (and Thomas, who joined them) seem satisfied with throwing up their hands and endorsing any government action that cannot be worked into the scrutiny ladder construct. Kennedy, on the other hand, has worked hard over two decades to craft majority gay rights decisions that face this problem head-on, by addressing government actions that do not fit neatly onto any rung of the scrutiny ladder, but that nevertheless injure human rights and dignity by giving force to animus against particular individuals and groups.

Despite the pronounced antagonistic bent of Scalia and Alito, joined by Thomas, I am optimistic that the thrust forward from the *Windsor* decision, fueled by the ever-increasing popular support for validating same-sex marriage, will cause more states to legalize and recognize same-sex marriage. I am optimistic that the evolution toward full equality and liberty for LGBT people that Kennedy observed in his majority decision in *Windsor* will proceed with ever-increasing speed.

Despite the stubborn group of naysaying justices, our constitutional jurisprudence, like our society, is moving inexorably forward in a way that could be analogous to the jurisprudence and politics of implementing the *Brown* decisions in the 1960s and 1970s, but without the benefit of 9-0 Supreme Court decisions. Even so, perhaps the next step will come in a case like *Loving v. Virginia*, 388 U.S. 1 (1967), where the Supreme Court struck down Virginia's anti-miscegenation law on the appeal of a mixed race couple who had married in the District of Columbia.

BAR-OMETER

⬆ San Bruno blast victims

The ham-handed moves by CPUC general counsel (and former PG&E lawyer) Frank Lindh are a gift to plaintiffs in separate civil litigation against the company.

⬇ Wells Fargo

It hasn't been able to escape a class action over flood insurance purchase practices, and now the judge is looking for top-flight counsel to step in to lead plaintiffs' case.

⬇ Goodwin Procter

Though it's done well in Silicon Valley, other California offices have had more trouble, a point underscored by the firm's decision to shut its San Diego outpost.

⬆ Therese Stewart

David Boies and Ted Olson can take their bows for beating back Prop 8, but everyone around here knows this was her war. And her win.

The movie *Milk* attributes a statement to Harvey Milk, about how, as gays increasingly come out, most people will learn that they have gay relatives and friends, and that will change everything. That sort of education is happening in America and much of the industrialized world, as the younger adult generations and the generations that are becoming adults teach their elders to respect LGBT people and their humanity in common with those who are heterosexual. Like the president, increasing numbers of political figures who used to oppose marriage equality now embrace it. I cannot say it any better than this quote apparently wrongly attributed to Victor Hugo: "Nothing is more powerful than an idea whose time has come."

The Recorder *welcomes submissions to Viewpoint. Contact Vitaly Gashpar at vgashpar@alm.com.*