

Perry v. Schwarzenegger: Day 1

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There is perhaps no more polarizing issue in American Politics today than the issue of gay marriage. Elections have been won or lost depending on a candidates' stance on this issue. Churches such as the Episcopal Church have split over support of gay marriage, while other churches such as the Evangelical Lutheran Church in America are likely to do the same thing. Tens of millions of dollars have been spent by groups fighting to be on the winning side of the gay marriage issue, bankrupting many community organizations, and reducing the amount of money these organizations, including churches, have to spend on disaster relief efforts and helping the needy. Even the United States Supreme Court, an institution that isn't supposed to be ideological, voted along conservative and liberal ideological lines in its 5-4 decision not to allow cameras in the courtroom during California's trial to potentially overturn Proposition 8.

The case, *Perry vs. Schwarzenegger* which began January 11th, is perhaps the most important case in deciding the future of gay marriage in the United States. There are several reasons for this. First off, California, as the nation's most populous state, and the world's 7th largest economy, has often been seen as a bellwether state. When Gavin Newsom proudly declared on the day the California Supreme Court ruled that gay marriage should be legal, that "As California goes, so goes the nation", he was a bit premature, but wasn't entirely off-base. While gay marriage in California was taken away by the voters in November 2008, states such as Iowa, Maine (Maine voters have since repealed this right), Vermont, New Hampshire, Connecticut, and Washington D.C. have all legalized gay marriage in the last year. More importantly, if the California Supreme Court deems the vote of the California people as unconstitutional, and there is a good chance they will, this could set a precedent that influences the outcome of other state's gay marriage bans. It is also likely this case will likely end up before the United States Supreme Court, and whatever decision they come to will likely decide the fate of gay marriage nationwide.

Secondly, because it's California, this trial will be followed closely by the rest of the country, and that makes it an opportunity for the marriage equality community to change the hearts and minds of independent America on this issue. Most liberals already support gay marriage because it feels like the right thing to do, not because it's necessarily the legal thing to do. Most social conservatives have already decided they will never support gay marriage because their church or faith tells them not. But the center left to center right of the country, including fiscal conservatives, have not yet come down hard on one side of the gay marriage debate. Previous efforts by the gay community have tried to appeal to voters on an emotional level, a tactic that appeals to those who already support their cause, but one that will never fly

with independents and conservatives, which make up the majority of America. All too often only emotion would come through in these appeals, a tactic made even less effective when marriage equality activists would hypocritically turn to name calling when someone disagreed with them. This time, they must appeal to one's sense of logic and the law.

Enter Theodore Olson, the former U.S. Solicitor General during George W. Bush's presidency, and one of the plaintiff's attorneys trying to overturn Proposition 8. The other attorney, David Boies, is a high profile lawyer who represented Vice President Al Gore in *Bush v. Gore* in 2000. Ironically, Theodore Olson represented George Bush in this case. The fact that these two men, who come from obviously different political philosophies, could see eye-to-eye on this very important issue is very symbolic for how this case should be seen to everyday Americans. It's not a left or right issue, a conservative or liberal issue, Christian or non-Christian issue. It's about the law, the role of the courts, and it's about the role of government in our lives.

In the first day of testimony, Theodore Olson made a very important point about the historical implications of this case, and how it relates to one of those points; the role of the courts. He reminded the court, that up until the 1960's, laws existed that forbid interracial marriage in this country, and that, had those laws been kept in place, President Obama's parents would likely been barred from marriage. The presiding Judge, U.S. District Judge Vaughn Walker questioned Olson why is it that the courts shouldn't just stay out of the gay marriage debate for now and allow the political process to continue to resolve the conflict. "That is why we have courts," Olson rightly replied. "That's why we have a constitution." And that's a point that must be clearly conveyed at this trial. Conservatives and indeed many independents like to argue that they come to their political and personal conclusions based on logic rather than emotion. Yet all too often, the claim of "judicial activism" is used as an excuse to justify the will of the majority discriminating against the rights of the minority. That is simply wrong, and devoid of any historical context. Conservatives, more than anyone should know the Founding Fathers fear of a government with too much power, and an electorate with majority rule and no protection of minority rights. One of the roles of the courts has always been to provide a check on the will of the people, and to make sure no one's rights are being infringed upon. The Founding Fathers rightly knew that a majority looks out for themselves, and does so often at the expense of the minority. Take for instance the Case of *Brown v. Board of Education* that effectively desegregated U.S. schools. At the time, it was likely considered a case of "judicial activism"; the court thwarting the majority opinion of the country at the time. But Americans today know, regardless of whether they are conservative or liberal that was the right decision for the court to make.

So day one of the Prop 8 trial is off on the right foot. The role of the courts is a big part of the argument that must be made. The role of government in our lives, why Prop 8 is unconstitutional, and the personal stories of those it affects will also need to be part of the

prosecution's case. While some on the left will undoubtedly question the sincerity of a lawyer who worked in the Bush administration, they will hopefully soon realize that no one can speak with greater credibility to those that need to be convinced, than one of their own.