

THE SUPREMES AND SAME-SEX MARRIAGE: APRIL 28, 2015

BY BRENDA FEIGEN

I got there early but the crowds were everywhere – outside as well as in various lines snaking throughout the Court. Bag and coat safely in a locker, I made my way into the Gallery. I had already run into an old colleague who directed the ACLU's Women's Rights Project right after me. I realized as I sat down that Valerie Jarrett was there from the White House and I spotted Gavin Newsom, with whom I chatted later, a few rows away. The court was packed as the Clerk shouted out his familiar Oyez, Oyez... Justice Ginsburg (Ruth) seemed even smaller than when last I saw her two years ago.

The first of the two cases was called, and the lawyer for Petitioners from Michigan started to speak. Her job: to convince the Court that same sex couples must be allowed to marry. The conversation quickly turned to what could possibly be Michigan's reason for not allowing same-sex marriage, the main purpose of which, we think, is to demean us. Ruth in her soft, deep voice observed that heterosexual marriage has been traditionally male/dominant, female/subservient. SO, same-sex marriage might well have a beneficial effect since in our unions we don't fall into those predictable behaviors.

After this, the discussion turned to how other countries deal with same-sex unions, followed by an even more esoteric discussion of ancient Greece and Rome. Scalia brought our attention back to the task at hand when he wanted to know if any society permitted same-sex marriage before ours. (Answer: The Netherlands.) That didn't seem to lead anywhere except to Alito's wanting to know how to reconcile our position with what to do if 2 women and 2 men all wanted to join in one marriage.

While I'm feeling somewhat optimistic about Chief Justice Roberts, I couldn't figure out what to make of his citing the rapid rate of change in Maine. In 2009 same-sex couples there were barred from marrying but by 2012 marriage equality was mandated. This might mean that he's in favor of people and legislatures having the last word, not judges. Last night, I was at a party for Jim Obergefell, the plaintiff in the Ohio case, and had a conversation with HRC's legal policy person who thinks as I do, that Roberts might just come down on our side. Apart from judicial philosophy, he may well want to be on the right side of history, in favor of marriage equality.

Somewhere in here, Scalia wanted to know how we can be sure that ministers won't be forced to officiate at same-sex weddings. That just seemed preposterous, and soon Elena Kagan observed, as though swatting a noisy fly, that a rabbi can't be forced to conduct a wedding between a Jew and a non-Jew, which pretty much quashed that concern. That's when all hell broke loose. A man in the row behind me started shrieking: "Abomination!" "You'll all rot in hell", over and over before 10

Marshalls converged on him, banging into my row, dragging him, kicking and screaming out. For as long as he was in the courthouse, his crazy shrieks resonated, and at least one justice made a wry, soft comment – like they're kind of used to stuff happening.

Somewhere in here, Breyer observed that the right to be married is as basic a fundamental right as there is – in a clear statement that the due process clause must come into play. And then the chief justice made what sounded like a very important admission: “Sue loves Joe; Tom loves Joe.” Should we prevent Tom and Joe from marrying? The only difference is their sex.” That about sums up the equal protection argument, to me.

Next up was the Solicitor General, arguing on behalf of same-sex marriage. His concluding comment brought more tears to my eyes:

“In a world in which gay and lesbian couples live openly as our neighbors, they raise their children side by side with the rest of us, they contribute fully as members of the community, it is simply untenable untenable to suggest that they can be denied the right of equal participation in the institution of marriage, or that they can be required to wait until the majority decides that it is ready to treat gay and lesbian people as equals. Gay and lesbian people are equal. They deserve equal protection of the laws, and they deserve it now.”

This was the crux of the matter: Must we wait for people (and their legislators) to get it, or may the court, as it did in *Loving v. Virginia*, determine that this minority group must be granted equal rights now? The lawyer for the respondent states tried really hard to make a convincing argument that recognizing our marriages would adversely affect heterosexual marriages – and the children born into them. It didn't work at all.

By the time we got to the second issue: whether a state must recognize a same-sex marriage validly entered in another state the Justices seemed to want to have fun. Kagan wanted to know if a state could refuse to issue marriage licenses to any couples who don't want to have children. Ruth wanted to know if a couple, both 70 years old, could be refused the right to marry – on the ground that marriage should be reserved for heterosexual couples in pursuit of procreation. In fact, all three female justices were enjoying going after the young fellow who was trying to defend the folks who want to deny our equality.

The opponents' troubles were magnified by the acknowledgment that embedded in our constitution is the Full, Faith and Credit Clause and by the Chief Justice's statement that it was only a matter of time and that it's rare for any state not to recognize the official acts of another state. Ruth wondered why a divorce, but not a marriage, in one state need be recognized by another. Sotomayor wondered if a state could decide not to recognize the birth certificate of a child born in another state.

By the end, I figured that we, of course, have a majority, with Kennedy and the four liberals. But I also think we've got a chance of getting Roberts. I can't be too optimistic about Alito, and I can't even think about Scalia and Thomas, the man of no words.

Finally, it was over. I headed outside into the throngs even larger than they were at the beginning. They were held back by the invisible boundary that kept everyone from surging down the steps and into the Court. Allowing myself to enjoy the moment and the crowd of folks who feel as I do about so many things, I pushed my way out, ready for an interview with Women's Media Center's Robin Morgan. As I left the taxi, I glanced at my phone only to notice a voice message from Justice Ginsburg's Chambers. They were expecting me to stop and say hello to the Justice. This amended an earlier message they'd left that she wouldn't have any time. Shucks, I thought, as I told them I was by now far away. I just cannot do it all.