

THE ASPEN INSTITUTE

ASPEN IDEAS FESTIVAL 2015

THE SUPREME COURT'S MARRIAGE EQUALITY RULING: THE MOST  
CONSEQUENTIAL RULING IN OUR LIFETIMES?

Belly Up Aspen  
Aspen, Colorado

Tuesday, June 30, 2015

LIST OF PARTICIPANTS

NEAL KATYAL

Paul and Patricia Saunders Professor of National  
Security Law, Georgetown Law  
Partner, Hogan Lovells

THEODORE B. OLSON

Attorney  
Gibson, Dunn and Crutcher LLP  
Former US Solicitor General

DAVID BOIES

Chairman  
Boies, Schiller & Flexner LLP

\* \* \* \* \*

THE SUPREME COURT'S MARRIAGE EQUALITY RULING: THE MOST  
CONSEQUENTIAL RULING IN OUR LIFETIMES?

MR. KATYAL: I have the privilege of moderating the discussion between two great legal giants, Ted Olson and David Boies. I'm going to be brief --

(Applause)

MR. KATYAL: -- because I think they really need no introduction. But Ted was the solicitor general, the top courtroom lawyer for President Bush. He was also before that the head of the Office of Legal Counsel, the top kind of internal executive branch lawyer. He's also a partner today at Gibson, Dunn & Crutcher where he runs their Supreme Court practice.

David Boies, really a star top litigator who is running one of the nation's most important law firms. Among many other things he did, he was the Justice Department lawyer as a private lawyer; the Justice Department didn't feel they had a lawyer good enough to take on Microsoft, so they went outside and hired David. Both of them met in 2000 and maybe they've met before, but they met across the courtroom in 2000 representing Gore and Bush, I won't say who won that.

MR. OLSON: They don't like to hear that in here anyway.

MR. BOIES: Me either.

MR. KATYAL: Me either.

(Laughter)

MR. KATYAL: These two legal giants join together for something else and that's what we're here to talk about what I think of is the most important Supreme Court ruling easily in our lifetimes, indeed one of the three most Supreme Court rulings in American history that came down on Friday. The case has a difficult to pronounce name, it's called Obergefell versus Hodges, just came down on Friday, just four days ago. And I was

thinking, you know, a week ago as I was thinking about this talk, this is actually my favorite rock club, I was just saying that to Michael Goldberg (phonetic), the owner. I've been here for like 50 different shows and I was thinking, man, if I had to get on the stage and mourn what happened on Friday that would be a real disaster. But fortunately because of the work of these two, because of the work of so many other people across the country we are here to celebrate and talk about what is an incredible victory by the LGBT community.

So, let me just tell you a word before getting to the discussion about what happened. So you got a guy named James Obergefell and he had married Jim Arthur and they couldn't get married in their home state which is Ohio, so they got married in Maryland which permitted same-sex marriages. And they wanted their marriage to be recognized when they move back to Ohio and they were told, no, the state of Ohio only recognizes marriage as between one man and one woman.

And so they brought a lawsuit to try and challenge that and that's what culminated in the decision. And sadly, Jim's husband passed away a year before this -- the Supreme Court decision. And if you haven't seen the clips of Jim standing on the Supreme Court steps on Friday, they're worth watching and about the way in which he honored his husband. I can tell you, I was in the courtroom when the decision came down.

And the Supreme Court they don't tell you when decisions come down, you just have to keep going. And I kept going for a week-and-a-half at that point. And the kind of conventional wisdom was that it's going to happen on Monday the last day of the term, the people thought not on Friday. And there was a rumor that Justice Scalia was going on vacation, and so people thought, oh, maybe it will be on Friday because he's leaving town on Saturday. Well, but basically everyone thought it wasn't coming down until 9:59. The Court announces the decisions at 10 o'clock.

At 9:59 Justice Stevens who is retired, he retired a few years ago walks into the courtroom for to

hear opinions. And at that point the buzz in the room just became intense. Everyone knew what was about to happen. And this is of course a day after the historic healthcare decision on Thursday upholding President Obama's healthcare plan.

So, the Chief Justice begins by saying, Justice Kennedy has the opinion for the court in Obergefell versus Hodges. We didn't know really what that meant get, kind of everyone knew Justice Kennedy who's the swing vote of the nine justices would have the opinion, but we didn't know what he'd say. And for the first two minutes, it was kind of dry, you know, marriage is this, there's a tradition of marriage and it has been for centuries, one man and one woman, pause, but it does not stop there. And that's when you knew.

(Applause)

MR. KATYAL: And that you could see people cry in the courtroom, that Justice Kennedy reading very much like a dispassionate lawyer just reading the opinion and then -- but it was very clear and he announced the holding.

And then the Chief Justice, Chief Justice Roberts who had just voted the day before to uphold the healthcare plan says, I'm reading a dissent. And this is the first time he's ever read a dissent from the bench in 10 years. This is a significant thing and it's pretty tough on Justice Kennedy calling it pretentious and so on, left unsaid was Justice Scalia's dissent which is even more over the top. And we'll talk about that with the experts in a minute.

But the magnificent thing was walking out of the courtroom, and this is the last thing I'll say. But just, you know, I had walked into the courtroom at 9:15 walking up the steps, there's about a 1,000 people on the plaza, maybe 400 supporters of same-sex marriage, 400 against it and they have their banners and then 200 other people there for, you know, heavens knows what reason.

By the time we walked out at about 10:40, there

were about 5,000 people on that plaza. The word had gotten out over Twitter and so on. And they were the -- the opponents were pretty much drowned out. It was an Aspen conversation on the Supreme Court Plaza and it was overwhelming. I mean, the national anthem was being sung, people were bawling, people come from all over to be there and to celebrate that moment.

And that moment is as I said, a culmination of a lot of people's work. But it is really I think a large part of the story starts with you two and it starts with you two doing something really unusual in today's day and age, Democrat, Republican coming together and saying, you know, there's something wrong in this country. So can you start by telling us a little bit, maybe I'll start with you David about how this, you know, kind of odd bedfellows partnership began?

MR. BOIES: Well, Ted and I had become friends. We've known each other slightly, but we've become good friends during Bush v. Gore. And afterwards we talked about wanting to work together. And we haven't really found the right thing to do. And after the Proposition 8 had passed, a number of people in California who were interested in the radical idea of actually bringing a case under the federal constitution to establish the right to marriage equality contacted Ted and to see whether he would be willing to do that or not. It was a counterintuitive decision for many of the people. But when they found out that he was willing to do it, they were thrilled that somebody with his experience and ability would be prepared to take that case on. He contacted me, asked me if I wanted to join him, I did. And we immediately went to work on the case.

It was a great opportunity I think for both of us to work on something of this importance. But it was also a great opportunity for us to work together. And I think that one of the things that has been most meaningful to me other than the result, which is far and away the most meaningful thing I've ever been involved, is the ability in the friendship that Ted and I had and developed and ripened in that -- during that case.

MR. KATYAL: Now, I want to ask you the same question. But it's a little harder for you. I mean, I expect you didn't lose too many friends taking this case on. But Ted I'm not quite sure that's true for you?

MR. OLSON: Well, I think there were some people who were disappointed in me and some people are still disappointed in me, but that -- I really put that aside. First of all, I want to say how great it is for David and I to be here, for Michael to have us in this fabulous place. We were here a number of years ago and they turned off all the electricity in Aspen. So there was no -- and it was a very hot day, so there was no air-conditioning, nothing but emergency lights and no amplification of our voices. So, David and I were up here talking about what the Supreme Court had done, but we did have some great wine from Michael.

(Laughter)

MR. OLSON: And I think everybody had a good time. And this is my favorite place in the world to be, with the people here at Aspen, so thank you.

(Applause)

MR. OLSON: It is such a great environment here. There's something about this place and the feeling that people bring into this room. Secondly, it's important to say, and David and I have said this many, many times, that we didn't start this, this battle for marriage equality. There were many, many, many people who fought many battles before us in Massachusetts, in Hawaii, in the academic world and so forth. So we were building upon the work that had been done before many, many, many people.

But when I was called and it was Rob and Michele Reiner who most people know their names in Los Angeles called me and asked me because they had heard from a friend of mine that I might be interested in taking on this case, and I said, I was. I grew up in California, I was -- California was the second state in the United States after Massachusetts where the court recognized the right of persons to marry the person that they loved who

happened to be of the same sex. That was the California Supreme Court in May of 2008. And the people of California wiped that off the books in November of 2008 with Proposition 8 that said marriage is only recognized and valid in California between a man and a woman. That took away the rights of thousands of people who had been so gleeful about the opportunity to marry the person that maybe they had been with for 10, 20, 15 years or 40 years or however long it was been. That was Proposition 8. It was passed by the citizens of California on the same election that the citizens of California helped elect Barrack Obama as president of the United States.

And I grew up in California. I was surprised and disappointed. So when I was called about it, I was anxious to take on a federal constitutional challenge to Proposition 8. And the first thing that we thought of -- they -- Rob and Michelle first when it was suggested to them that I be involved in this thing that Rob said he's the devil --

(Laughter)

MR. OLSON: -- and Michelle Rainer said to the person who suggested to ask her whether she was brain dead or not. But the fact is that I felt it was very important to citizens in California, it's very important to the people of the United States. But I also felt because of my background that produce that kind of reaction that it was very important to find someone on the other side of the political spectrum, the finest lawyer in the United States happened to be available.

So David Boies and I took on this case together. And we felt it was a law case, a case in court, but it was a case in the court of public opinion, maybe we'll talk about that. We felt it was important to do everything we could to persuade the American people that this was the right outcome. So if we won in court, our clients would be -- the reception and acceptance of the American people of that in court.

There were many people on the conservative side who were surprised and disappointed. And I'm still

hearing a little bit of that. But the main thing is that we felt, both David and I felt that if we could talk to anyone, we could convince them. That was is now is true, but we felt that if we talked about the issues, we talked about love and we talked about how marriage between people who loved one another, did not hurt people who are heterosexual, who wanted to get married. And it was so important to those couples and their children and their families that this was something that we could all embrace.

And when we started there was a 17 point differential in the American public against marriage equality. Last week the NBC, Wall Street Journal poll was 57 to 37 in favor, that's only six years ago.

(Applause)

MR. KATYAL: So, you're -- we've talked about the conservative reaction, but actually you all had some trouble from your friends too, I think. It wasn't just folks who were on the other side of this. There are people who said, you're doing this too fast. The court's not ready, the nation's not ready for you to bring what became Hollingsworth versus Perry, the challenge to Proposition 8 that you were talking about. So how did you think about that and how did you navigate that in which you're getting so much grief from your allies?

MR. BOIES: Well, we certainly were concerned about it. When we announced that we were going to take this case or even before we actually brought the case when we let people know that we're considering bringing the case, there was almost universal opposition on the part of the men and women who had fought this battle for decades. The ACLU, land of (phonetic) legal defense, all of the organizations that had really led the battle for equal rights who are very much opposed to it.

There had been a case in the early 1970s in which a couple in Minnesota had challenged Minnesota's ban on same sex marriage under the federal constitution. That had been summarily dismissed by the district court, summarily affirmed by the Court of Appeals. And when they

tried to appeal to the Supreme Court, the Supreme Court essentially in one paragraph opinion dismissed it for lack of substantial federal question. And after that, no one had really thought about bringing seriously about bringing a federal constitutional challenge. And what they were afraid of is that we would bring the case and lose it and that we would get language in the majority opinion that was comparable to some of the language that was in the dissenting opinion in Lawrence against Texas.

Lawrence against Texas was a case in -- 12 years ago, 12 years ago last month -- 12 years ago this month, in which the Supreme Court for the first time struck down state laws that criminalized homosexual conduct. And there was a -- it was a six-three decision. But the dissenting opinions were extremely hostile, not just on the law, but they compared gay relationships to bestiality, the incest, to prostitution. One of the opinions said that if you struck down this law you are going to eliminate all laws based on morality. It was a very biting and -- decision.

And the kind of thing that I think people worried about, if we lost we're going to get that kind of opinion from the court in majority and what would that mean to the overall fight for equality. Now, we had a lot of good reasons for disagreeing with that. But that was serious opposition and opposition that we took very seriously.

MR. KATYAL: So, Ted, its 2008 when these decisions are happening and whether you're going to bring this lawsuit. Your job for decades has been to count noses on the Supreme Court. Do you think in 2008 you can -- that's a winnable case or is your view, I need to pair with David, change the court of public opinion and then change the Supreme Court's attitude?

MR. OLSON: Well, we felt, we felt from the beginning, right from the beginning that we could win this case. We would not have taken it if we didn't feel that we could have win this -- won this case.

Now, both David and I are subject to the kind of

thing that lawyers are infected by, that we think we can win any case.

(Laughter)

MR. OLSON: And we talked about the fact that we reflected back on Bush versus Gore, and David got four votes and I got five votes, now we've revealed that. That David would take care of those four and I'd take care of the five and it would be nine to nothing.

(Laughter)

MR. OLSON: But we really felt that based upon the Supreme Court decisions that we could count to five and then we could find five votes.

We also told the groups that said be cautious, wait till there's a better Supreme Court. They didn't know when there would be a better Supreme Court. One of them told my partner in Los Angeles, Ted Mootres (phonetic) who helped us with this. And he asked, when do you think it will be a better Supreme Court? And they said 8 to 10 years. But no one knows who's going to appoint the next justice, who's going to leave, what their dynamics are going to be. And someone in California -- there is -- you may find this surprising, but there are lawyers all over California.

(Laughter)

MR. OLSON: That is the number one thing to do in California. So some lawyer was going to bring this case. And we felt very strongly that if it was done in the right way, it would go to the United States Supreme Court, that case was important that we do it right.

And we felt that reading Justice Kennedy's opinions and reading the opinions of the other justices that we could win this case. But to also answer your question we also felt that we needed to do it right, we needed to have the right plaintiffs, we needed to have the right legal foundation, we needed to have the right legal teams. David's firm and my firm working together, we put

all of our resources into this as if it was the most important case that we'd ever handled for any of our most important high paying clients. David's firm, I don't know how many hours they put in, but my firm put in before this was over 32,000 hours of legal work. And we felt that we could win this case, but we also felt that we wanted to do it right and we wanted to shape public opinion along the way.

So, David wrote articles in the Wall Street Journal, I wrote articles about the conservative case for gay marriage, we appeared on television, we did everything we could to reach out to as many people as we possibly could. If we could send the message and talk about the issues, it would help.

MR. KATYAL: So this ultimately does become a court case. And it's a little artificial here. David is known a bit more for his trial work, but he's argued a bunch of Supreme Court cases and Ted's obviously known as a Supreme Court litigator, but he's done a lot of work in trial court as well. Here, as I understand that you guys did pair equally at all stages of this, but maybe I'll just start with you. You're starting this trial out in California. Really, it's the only full record I think of this issue. Tell us a little bit about the trial. How do you develop a record on something like is gay marriage harmful to society.

MR. BOIES: Well, one of the things we did as Ted said is we prepared a justice we would have a case for our most important corporate clients which is we go around the world, we find right witnesses, we find the right expert witnesses, we brought in witnesses on economics, on sociology, on psychology, on history, on religion, we brought in factual witnesses that testified about what this meant, these bans on marriage equality meant, individuals, we had the most extensive research on the issue that's ever been compiled or presented.

We had a three week trial, we brought in all of these experts, subjected them to cross-examination and we built a record that really demonstrated three things, one, that depriving gay and lesbian couples or the right to

marry the person they loved seriously harmed them. And second, that that seriously harmed the children that they were raising and third, there was no valid justification, there was no societal benefit, there was no benefit to heterosexual marriages, to preventing gay and lesbian citizens from marrying. And the places where you had had marriage equality, the sky didn't fall, nothing happened, except more people were happy.

MR. KATYAL: And what did the state say in their record? What did they -- what did Chuck Cooper have as his record?

MR. BOIES: He had a very difficult time. Chuck Cooper is a good lawyer. And he had a really tough time because he couldn't really think of anything to say.

(Laughter)

MR. BOIES: And one other things that he was confronted with and one of the reasons that we thought we would -- we'd win is a noted legal scholar, Justice Scalia had said in his dissent in Lawrence in 2003, this is the end. He said, after this decision, there is no constitutional justification for preventing same-sex marriage. He said, what are you going to argue? You're going to argue that you need it for procreation, that's silly. And of course, that is exactly what they tried to argue first. And then it was obvious that you didn't -- first of all, this didn't stop procreation -- letting heterosexual couples. Second --

MR. OLSON: Not so far.

MR. BOIES: So far anyway.

(Laughter)

MR. BOIES: And hard to imagine. And second that we've never made the ability to procreate a condition of marriage as Justice Scalia himself emphasized. So there really wasn't anything he had to say.

And at one point, it finally came down to the

idea that somehow, allowing marriage equality was somehow going to interfere with co-traditional marriage. And early on, the judge asked Cooper, well what is that harm? Where is that harm going to come from? And Cooper like a good lawyer, without an answer, tried to dance around the question, avoid it. Finally he said, I need an answer. And Cooper paused and said, I don't know, I don't know. And that was their case. They didn't have anything that they could point to.

One of the things I've said is that, what -- I pride myself on being able to figure out the best arguments that my opponent can make, because that allows me to get ready to defend against them. This was the first case I've had or I couldn't figure out an argument for the other side. They didn't have an argument. They had bumper sticker marriage between a man and women, but that wasn't an argument, that wasn't an analysis, that wasn't a precedent, that was an assumed conclusion. They didn't have anything to justify what they were doing.

And the great thing about a trial is you get people's attention, you make people sit there and listen, reporters come in, they don't have anything else to do, they've got to write about what you're putting on. And you bring to the American people ideas in a way that's very hard to do in other context.

And I think the trial was one of the great accomplishments that we had. Because we built this record, a record that everybody could rely on afterwards. A record that allowed the district judge to write a great opinion and a record that everybody could use and look at, reporters could look at and they could understand that this was damaging, it was harmful, it was hateful and it didn't serve any purpose.

MR. OLSON: I want to say -- can I? The trial was three weeks long. We brought experts on history of marriage that showed how marriage had changed, how marriage was a discriminatory institutions against women, slaves could not be married, you could not marry someone who's Chinese in California without losing your citizenship. So marriage was -- how is the same thing, it

didn't change.

We had experts who talked about the stigma, the damage that stigma is done to people who are prevented from announcing who they are or been who they are. We had experts from -- we went us as far as Cambridge, Harvard, Stanford every -- the finest places in the United States, talked about raising children, the impact of marriage between same-sex individuals on heterosexual individuals, we had the finest experts in the world. And the other side cross-examined them for hours at a time and did not budge those witnesses, because they knew what they believed and they testified as to what they believe.

The other side had the same opportunity. They listed 10 to 12 expert witnesses in various places from the world on all these various issues. David and some of my colleagues from my firm took their depositions, usually on video tape and systematically demolished those witnesses. So that by the time of trial, all of those witnesses, except for two decided they had other things to do that January.

(Laughter)

(Applause)

MR. OLSON: One of them actually testified that he did not want to be in a court room live with David Boies.

(Laughter)

MR. OLSON: The two witnesses that did show up, David systematically took them apart. The lead expert who had been studying marriage and written books and given all his testimony and watching David cross-examine witnesses is something that everyone should have the chance to see because it is a -- it's a work of art and its intellect --

(Applause)

MR. OLSON: Its intellect, its patience, its talent and you cannot completely prepare for this,

although, he's extraordinarily prepared. So their number one expert on marriage, testified and David's cross-examination at the end of the trial that America would be more true towards ideals, the day we recognize the right of same sex-person.

(Applause)

MR. OLSON: That was their leading expert, that was their -- that was their case. We felt sitting there in this trial that we were all receiving a fantastic education about ourselves, our country and our ideals. So that trial was a fabulous lesson in American history, in American constitutional law.

MR. KATYAL: So you have this amazing trial, but then there's this procedural problem. And the case is going to the Supreme Court and there's a problem with that that may make it sort of the Supreme doesn't decide the issue. How do you navigate that? What's your expectation walking into the US Supreme Court in 2012?

MR. OLSON: What we said -- I'm not going to just spent too much time unless you want to. But the procedural problem is that the state of California finally decided, they gave up. They were not going to defend Proposition 8 anymore. The Jerry Brown (phonetic) was the attorney general then became the governor and someone else was the attorney general, I can't remember, but they decided they weren't going to defend Proposition 8 anymore, but they were pressed not to trial. So we had what the lawyers called standing. There was opposition, they were enforcing Proposition 8. When the judge came down with his decision, state of California abandoned the case and they would not appeal.

So the proponents of Proposition 8 were the ones who took the appeal and we made the point, they don't have any stake in this. They're not being heard. They want the law to be such and such, but they're not actually hurt by allowing same-sex persons to get married in California to make a long story short.

Ultimately, the Supreme Court of the United

States says, they did not have the right to appeal that case. And we have made that argument all the way to the end. So the outcome in the Supreme Court, which is why there was another -- the necessity of another decision the one that came down this Friday is that the Supreme Court struck down the appeal and upheld our district court decision that struck down Proposition 8.

We sort of -- we wanted to have the whole world -- and lawyers all want everything, you know the whole change, the whole planet, but we were set out to overturn Proposition 8. So when the Supreme Court upheld the district court decision through that procedural aspect of the case, that was like a Wednesday. On Friday, the Ninth Circuit Court of Appeals lifted its stay and the people that we represented went to the City Hall in San Francisco and City Hall in Los Angeles and those two couples were the first two couples to get married in California since Proposition 8 was passed. And everybody in the world could see that on television and could see the joy, and so we felt awfully good.

MR. KATYAL: So it's 2012 you've won this big victory. And the communities won another victory, they struck down the defense of Marriage Act which barred federal benefits for same-sex couples just as Scalia's dissent says, goes over the top and says, well, this is just basically legalizing same-sex marriage, and that's the next step. And that leads both of you to take another case, not in California, you've won in California, California is done. But now you take another case, Virginia.

MR. BOIES: It was in Virginia and we picked Virginia for a variety of reasons. It was symbolic like a state it was the heart of the confederacy, it was a state that had generated Loving against Virginia, which was the case that overruled the right of states to bar interracial marriage. It had one of the most restrictive prohibitions on gay relationships in the country, not only prevented gay marriage, you couldn't have civil unions, you couldn't even have a contract that had some of the attributes of marriage.

So Ted and I thought that that was a great place to continue it. And we again took it to the district court, we won there, we won on appeal. And the other side sought CERT (phonetic) but the Supreme Court denied it.

Now, while this was happening, courts all over the country were striking down marriage bans. So by the time this -- the current case got to the Supreme Court, 36 states had marriage equality. You now had fewer states banning same-sex marriage than you had states that banned interracial marriage at the time of Loving against Virginia. So one of the things that had happened just in that two years, there had been a seismic shift, not only in the courts, but in the court of public opinion. And I think that was one of the things that gave all of us so much confidence going into Friday.

MR. KATYAL: So the court doesn't take the Virginia case, but they do take this case Obergefell out of Ohio. And they take Tennessee, a case at Tennessee and out of Michigan as well, paired them all together.

MR. OLSON: Don't forget to mention Kentucky because my wife is here in the --

MR. KATYAL: Kentucky, absolutely, and Kentucky.

(Laughter)

MR. KATYAL: And they paired these together and you have this momentous decision on Friday in the case. Now Ted, if David's point is right, 36 states already have this. So how important is this ruling, it seems like the trend was already going in that direction, what -- why is this ruling so important, why are people calling it momentous?

MR. OLSON: Well, in the first place and that's a very good question, it was discussed by the justices on both sides of the case. The dissenters said, my goodness, you're winning these 11 states including New York, including Maryland and including Washington and so forth, had decided the vote by either the people or the legislature to recognize the rights of individuals to

marry the person that they loved of the same-sex. But there were 14 -- there were several of those states of the 36, those were court decisions, so that wasn't over until the Supreme Court decided this case, that's one reason.

Another reason is that -- and Justice Kennedy talks about this in his majority opinion, what about the children in those cases, what about the people that could marry in California and moved to Tennessee, what about the people -- this Jim Obergefell, he -- his -- the person that he loved had ALS, Lou Gehrig's disease, he became and he took care of him day and night 24 hours a day and they wanted to get married, they could not get married in Ohio. They went to Maryland in a medevac helicopter, he couldn't move, so they had someone come to the aircraft and perform the wedding. And then they went back to Ohio and this -- his now spouse died and Ohio would not allow Jim to be listed as the surviving spouse on the death certificate, how awful is that.

In Michigan the women who were bringing the case had adopted four developmentally disabled children that other people couldn't or wouldn't adopt in Michigan. And the states wouldn't recognize the adoption of both parents, of both the women. And that deprived those children of benefits, how awful is that. That's the kind of cases that the Supreme Court was dealing with.

And so when Justice Kennedy talked about this and he talked about the fact that when Brown versus Board of Education was decided, there were lots of schools that were segregated. When Loving versus Virginia was decided, there were 16 states that prevented people from getting married to someone of a different race, the President's mother and father if they traveled to Virginia, would have been guilty of a felony.

So we can't have in this country laws that take away individual rights and say, well, wait till the American people are willing to vote to rectify that injustice, that is not acceptable. That is why as David has said this more eloquently than I have, that is why we have a constitution, that's why we have a Bill of Rights, that's why we have a judiciary, because when individual

rights are being taken away even if popular sentiment is moving in the right direction, you can't wait for that. Martin Luther King talked about this in his letter from a Birmingham jail which is probably one of the most finest documents of our constitutional history. When people say, wait, they mean never and that's what the court decided.

MR. BOIES: I think it is -- one of the thing I'd like to add and I think Ted is exactly right that we have one country, one constitution and you can't say just because you're winning in 36 states, you're going to deprive people of their rights in other states.

But even if we could have won legislatively in every state, it was important for the Supreme Court to say as a matter of constitutional law, everyone is equal, it was important as a matter of constitutional law for the Supreme Court to say everybody is entitled to the dignity that comes from being able to marry the person that you love. If the legislature gives you something, the legislature can take it away, it's only when you recognize that this is a constitutional right that cannot be taken away, that people can really feel secure.

I think one of the reasons that you saw this enormous outpouring of emotion from people gay and straight across the country was because they recognized that we were doing something as a country that validated people, it spoke about relationships that lifted people up. And you don't do that just by granting somebody something legislation can be taken away, you do that by recognizing as your country and the way we do this is through the Supreme Court that everybody is equal, that everybody is normal.

MR. KATYAL: But what -- I mean, that sounds beautiful.

(Applause)

MR. KATYAL: What do both of you say however to the criticism that the chief justice said, which is go and celebrate this decision, it's an emotional one and so on, but it's not a constitutional decision, that in our

constitution people decide these things, momentous things, we have a text, the constitution doesn't have a right to same-sex marriage, it has general words like due process and equal protection.

There's a very prominent legal scholar who criticized quote, "judges for taking some of these social decisions off the policy table, taking them away from the people by constitutionalizing these issues" and he said that the president should appoint judges who quote, "will interpret the law not create new rights that weren't there in the constitution." I'm speaking of course of Ted Olson, Wall Street Journal, 2007.

MR. BOIES: Right. But this will --

MR. OLSON: I will let the answer to that come from David Boies.

(Laughter)

MR. BOIES: This is not a new right, okay. This is the right to marry that's been recognized by the Supreme Court as Ted has pointed out more eloquently than I can, 14 separate times. There is no right in the constitution written in there that says, you have a right to marry somebody of a different race. There's nothing that's written in the Constitution that says, you have a right to go to school with any -- with people of different races, there's nothing in the constitution that says you have a right to marry somebody of the same-sex.

But what there is written in the constitution is the right to equal protection of laws. It is written in there, that's written in there, you don't have to look very far to find it, it's capitalized and it is part of our constitution. And it says that you cannot say to somebody because they are or white or green or straight or gay or Catholic or Jewish or atheist that you don't get the same rights that everybody else does. And that's part of our culture. It's part of our constitution. And you don't look for something in the constitution that says, you don't discriminate against women, you don't discriminate against blacks, you don't discriminate

against gays. It's not a tax code, it's a set of principles. And one of the most basic principles is the principle of equal protection.

MR. KATYAL: And if you --

(Applause)

MR. KATYAL: Beautiful. And I'll just play with the other side for just one more second. If we take that view though, what -- I mean, that there's a right to marry. Is there then a right to marry two people, three people?

MR. BOIES: If --

MR. OLSON: One at a time, one at a time.

MR. BOIES: Yeah, one at a time. Yeah, only one at a time. If you grant to straight people the right to marry more than one, you've got to grant that right to gay people. If you grant the white people the right to marry more than one you've got to grant that right to people of different races.

What you have to do is you have to treat people equally. If you treat everybody equally, you say to everybody you can have one spouse, there isn't any equal protection problem there. What arises in the problem, the constitution is when you begin to treat people differently. And that's the equal protection argument.

There is also a due process argument in favor of it. But the idea that this has anything to do with polygamy or any of the other things that people like to talk about is silly. It doesn't have anything to do with it.

MR. OLSON: Yeah. People like to say sky is going to fall. People -- we are asked -- we practice these things and people were asking us during our moot courts, what if I want to marry my cat, you know.

(Laughter)

MR. OLSON: This is ridiculous. The discrimination -- the discrimination was on the basis of sexual orientation. So was the right to marry, which was association and liberty and privacy and being a part of an institution that is extraordinarily important in this country and the denial of that right to people because of their sexual orientation. You don't choose to be gay or straight. You will not be -- you can be told, you have a right to marry someone of the opposite sex. That is an empty, empty promise to people who are gay.

So we're talk -- and polygamy is a totally different thing. It's a choice. It is not something that is an immutable characteristic based upon sexual orientation. I could go on and on. But I'm glad you teed that up because it came up in the decisions and the chief justice mentioned that. I don't think that was worthy of the chief justice. It is a red herring, it is one of those things, where you can imagine the terrible things that are going to happen. If you allow these people who have been in love for 40 years, who've raised a family and a home and been a part of our neighborhood, if they should get married, oh my god, you know, "After them, the deluge shows" to quote Louis XIV or whatever.

So, you know, I was disappointed in that kind of an argument. But I'm glad you brought it up.

MR. KATYAL: Well, thank you.

(Laughter)

MR. KATYAL: I'm now going to return to my duties, as the -- as my best and (inaudible) which is to pour wine from these two while you ask them some questions. So, I don't know if we have a microphone. Do we have a microphone? If not, then just please, we've got one right there and if you will, to this gentleman right here and then to this person over here. Will you say who you are and stand up so that people can see you?

MR. BLOCK: Hi, my name is Gary Block (phonetic), I'm from Washington D.C. First of, I want to

thank both of you for coming to the festival. And it's just an honor to be here with both of you. Okay, my question is the states that weren't parties to the suit, Ted Cruise (phonetic), for example, since they're not bound by the law. So, what's your thought on that?

And, I know you're not -- your lawyers are not (inaudible) but how do you think that will affect the -- this ruling now the law of the land, how it will affect the 2016 presidential election and especially the republican nominee?

MR. OLSON: Okay. So, you said the word, republican so David was pointing at me.

(Laughter)

MR. OLSON: So, this has happened before in our history, when individuals have said the Supreme Court has decided that case. We're not bound by it. We're going to do what we think is right. I think that's terribly unfortunate. I think it's terribly unfortunate to hear those words from someone running for president. We had that from Orval Faubus. I was in my first year of high school -- I mean, college when that sort of thing was taking place. It's happened earlier this year in Alabama. It happened in Alabama by the chief justice who didn't want to obey the Supreme Court decisions about the 10 Commandments, in the United States Supreme Court, we have a Federal Constitution. It will be respected.

There will be these sorts of things which are, I think diminishing the people who do them. But -- and to make these statement. But the Supreme Court has said there is a constitutional right not to be discriminated against with respect to the fundamental right to marry and the equal protection clause, the protection of equal laws. That is and will be the law for the entire United States as far as the Republican Party is concerned.

Now, there's -- I may talk about this later in the conference about the number of people running for president on the Republican Party. But I think that the sooner -- as a Republican my whole life, the sooner

Republicans respect and recognize the rights of individuals and to remember if they say we are the party of Lincoln we better behave like the party of Lincoln. So, I think we will get there and I will keep trying.

(Applause)

MR. LUVELL: Nate Luvell (phonetic). Thank you gentleman. Question is strategically from the long term standpoint of this right that's now national, were there any disadvantages or potential unintended consequences of it having been put forth by the Supreme Court as opposed legislatively either by the U.S. Congress or by States?

MR. KATYAL: And let me just add to that. The Chief Justice says, this is actually bad for the gay rights community because up until now they have been winning in the legislatures persuading the hearts and minds of Americans. Now, you've used judicial fiat to get this.

MR. OLSON: I want to say something after he does, but I sure we're going to say the same thing.

MR. BOIES: I don't think the chief justice, with all due respect, is the best guide for what's best for the gay and lesbian communities.

(Laughter)

MR. BOIES: I think they know better than he does what's good for them. Other than that, I will just say what I averted to before, which is that if we'd waited for to be legislated we'd wait a long time in some of the states. If we waited to desegregate the schools until that could be done in the state legislatures we would wait a very long time. You don't deprive people the constitutional rights. As Ted says, that's why we have a written constitution because there are certain rights that we're going to enforce for people regardless of what the legislature does.

And the only thing also I would say is what I said before which is I think, even if you could have

wanted legislatively, it was important to have the court stake this ground out, stake out the ground that this is a matter of equality of dignity and a fairness for everybody.

MR. OLSON: And I'll just say one more thing because I mentioned Martin Luther King's letter from a Birmingham Jail. He was under a lot of pressure from ministers, people of faith saying you've got to slow down. You're going to cause a backlash. Your strategy should be to be patient, we're making progress. Please let that progress take place.

It is an eloquent, beautiful document when he rejects the idea of patience and waiting. And he says the time has come where we have to fight for our rights and fight for the accomplishment of our rights. Minorities lose when you put them to popular vote. It might -- they might win tomorrow, but they might lose the next day. And that is why we have a constitution and a Bill of Rights and an equal protection clause. And if you start thinking about the civil war and people tell you well, things would have come out okay, it would not have come out okay.

MR. KAPADIA: Hi, my name is Gaurav Kapadia. And I have a statement and a question. My statement, as I just posted on social media, is I consider the two of you, true American heroes. And thank you so much for your service and what you've done.

(Applause)

MR. KAPADIA: My question, I would love to ask both of you specifically to respond to Justice Scalia's dissent, mainly, because he views himself as so pure in reading of the law. But as I read it as a layman, I'm not an attorney, I see deep prejudice, and I would love for both of you to opine.

MR. OLSON: Well, I've known Justice Scalia for a long, long time. I do not believe in my heart that he is prejudiced or bigoted. I believe that he believes very, very strongly in the people's ability and willingness and constitutional right to change things

under the constitution.

MR. KATYAL: Except for Citizens United or --

MR. OLSON: We'll talk about Citizens United tomorrow.

MR. KATYAL: Or the voting rights act --

MR. OLSON: You know, if you --

MR. KATYAL: -- or the guns around schools.

(Applause)

MR. KATYAL: Neil, I think you've slipped out of your role as a moderator.

(Laughter)

MR. OLSON: And if you want to come --

MR. KATYAL: That's why I'm not good at this moderating thing.

MR. OLSON: If you want to come to the program tomorrow morning on Citizens United we'll take care of that then.

But he believes that you interpret the constitution and you interpret legislation based upon the words in the legislation or the words in the constitution.

Now, the problem for Justice Scalia is he's been saying since a case that came out of Colorado called Romer versus Colorado I guess it was and the Lawrence versus Texas case and the Windsor case involving the defense of Marriage Act he's been saying that the logic and words of the majority in those cases mean that marriage will be respected under the equal protection due process clauses of the constitution, the Supreme Court's already decided that. He hasn't quite given up.

And I think the language of the decision is

unfortunate, and I think this country will continue to change. The language of Justice Scalia's opinions have changed. This was rather a harsh opinion. It was a harsh -- in the Obamacare case too but it was less harsh than some of the earlier opinions.

So I mean I think that it is what it is with respect to the justices. They bring their own ideas, they bring their own background to the Supreme Court and you'll have these five/four decisions. But we've had those throughout our history. Our country has continued to grow. I'm an optimist and I believe that our country will accept this decision and it will be, when we talk about the Loving versus Virginia case that was 1967, 16 states still made it a felony to further to be interracial marriages. If you talk to people today people will say, well that was never the law in these states of the United States.

And if you talk to young people today about marriage equality, 70 to 80 percent of people in their 30 think that it's not an issue, what are you talking about. So I think this country is evolving and it has continued to evolve. We had a -- we've had a terrible past with slavery, with incarceration of Japanese-American citizens, discrimination against women, but the one thing that's good -- that's really good about this country is that we are -- we believe -- most of us believe in those ideals. David and I called our book 'Redeeming the Dream,' because it's the dream of equality and we believe that we're making progress towards that goal and that objective and that aspiration.

MR. COKE: Hi, my name is David Coke (phonetic) and the Marriage Equality Act is such a powerful issue. I'm wondering what the laws are in Europe, throughout all European countries regarding the marriage equality. Are there certain countries in Europe that approve of marriage equality and there are others that are not?

MR. BOIES: There are -- the vast majority of the countries in Europe have marriage equality. In fact, one of the things that we argued was that countries as Catholic as Spain as different from the United States and

South Africa, all had marriage equality before we did.

But there are differences. And I think that what you're seeing around the western world is an increasing movement -- and Mexico City adopted marriage equality. You're seeing across the country in North and South America and in Europe, I think a strong trend towards marriage equality. You're not seeing that in the Middle East. You're not seeing that in Asia and you're not seeing that in general in Africa.

So, what you're -- I think what you're seeing is a very divided planet in which the Western societies, generally speaking, you know, are moving in one direction and the rest of the world is not moving there nearly as fast. I think one of the things that we have to do is somehow bring this message to the rest of the world.

MR. OLSON: And Ireland just two weeks ago.

MR. BOIES: Ireland just voted.

MR. OLSON: It was 62 percent of the people in Ireland. That's the first country in the world by popular vote recognized marriage equality. And so, we've seen, since David and I've been studying this and we don't know everything by any stretch of the imagination, but we've seen enormous change in Spain, in France, in Mexico, in countries in South America, very, very Catholic countries that have changed. Ireland, my goodness, you know, so the change has occurred.

Now, it is still important to recognize that there are countries in Africa, there are countries in the Middle East where you can be put to death if you are gay or if you even manifest characteristics that appear to be gay. It's a death penalty. It's not just prison. It is a death penalty and people were rounded up and executed.

So, it's a long, long, ways to go in this world, but it's so gratifying that the American -- that the people of the United States have made this step that we made through -- because of the Supreme Court last Friday, people watch what happens in the United States. And so,

it's so important to the rest of the world and gay citizens throughout the world who have been persecuted and subject to extreme cruelty for a long, long time. Things are changing.

(Applause)

MR. KATYAL: So, we're going to be kicked out pretty soon. But with people with better voices but before doing that I do want to just ask you all one final question. I mean, this place has a tradition of encores. And the encore here is, I mean, doing good is like this kind of good changing the world is really addictive. And doing it on a bipartition basis across (inaudible), you know, David had done on the criminal justices areas also really a powerful thing. What's your encore? What are you guys going to do?

MR. BOIES: We were asked that question by Gaven Newsom in San Francisco about a year ago. And one of the things that we said was that there were lots of things we're interested in. One of the most important for me and I know for Ted and for Ted Boutrous who worked very closely with us from Gibson, Dunn as well is in the area of education.

Education, we think, is a basic civil right. Indeed, it's a civil right that without it, it makes all other civil rights hard to exercise.

(Applause)

MR. BOIES: I mean, if you want to vote, if you want to have a job, if you want to exercise all of the rights and freedoms that as Americans, we have, if you don't have an education it's hard to do that. And we have a very unequal educational system in this country. We have a very unfair, a very inefficient educational system.

And I think that it's -- in some respect, it's a much more difficult issue than marriage equality because you could win marriage equality in one court decision. You can't win educational quality in one court decision. But I think it's certainly one of the things that we want

to work on.

MR. OLSON: I totally agree with David. I should not even say a word.

(Laughter)

MR. OLSON: But we've done with one of the case that we handled in California has demonstrated to us that the victims of our -- some of the flaws on our education system are visited on the people in the inner cities, the people that are less advantaged, racial minorities. We are failing to educate the people who we most need to educate for them and for ourselves and for our economy and for our ideals. So we've got to fix some things in the educational system. And I won't go into the details, but we are both very much interested in that.

And we believe -- David and I believe that we can come together on some of these things and to bring about some changes. I think one of the -- people kept calling us an odd couple and things like that and strange -- well, no, I won't say it.

(Laughter)

MR. OLSON: But we had -- we were lucky enough because of some successes in our earlier career to be able -- to command an audience. And so --

MR. KATYAL: Successes and failures.

MR. OLSON: Successes and failures. I've forgotten about those, Neal.

(Laughter)

MR. OLSON: We were able to command an audience because we're willing to talk about things that we agree upon and we hope that other people will agree upon. And I think we both feel that it's a challenge for us and an opportunity for us for -- to do some things together.

We're on the opposite sides, a whole bunch of

cases by the way. And we -- Dave win some and I win some. But we do feel that we have the opportunity maybe to think about things that we can do together and education is one.

MR. BOIES: And also I think it's important I think to send the message that people who do disagree on a lot of things can agree and find common ground.

(Applause)

MR. BOIES: One of the great things about this case was working with Ted. But one of the other great things was in seeing people from every spectrum come together. I mean this was something that was supported by liberal institutions and was also supported by the Cato Institute. What you found was the ability to bring people together; conservatives, liberals, republicans, democrats where you can find common ground.

MR. OLSON: And I have one more sentence because David has talked about us working together. Our wives, Mary Boies is an accomplished extremely successful lawyer and my wife Lady Booth is an extremely accomplished successful lawyer. They were with us right from the beginning. We should've mentioned them right at the outcome, outset. This was a team of lots of people and it was important for the message, it was important for the case, it was important for the strategy that we were -- a lot of people making a part of a team. And I think it's really important for us to mention them too.

(Applause)

MR. KATYAL: Well, with that, I think the gentleman Gaurav said it best in the back, "You two are true American heroes." Ideas, is lucky to have you, and Aspen is luck to have you, but most of all, our country is luck to have you. So thank you, both.

\* \* \* \* \*