Written by **Jack Kenny** on March 25, 2013

Obama Seeks "Extreme Makeover" of Marriage Laws

Liberal fans of the ABC reality drama *Extreme Makeover* will be in "hog heaven" if they watch proceedings at the U.S. Supreme Court this week. For what the plaintiffs in the suit against California's "Proposition 8" are trying to do is achieve something Barack Obama promised in the final days of the 2008 presidential campaign. Five days before that year's election, the junior senator from Illinois told the nation and the world that we were just "five days away from fundamentally transforming the United States of America."

It may be that not everyone who voted for Barack Obama that November was in favor of "fundamentally transforming" America. Some no doubt were just tired of that grumpy old white guy, John McCain, the senior Senator Forever from Arizona. But if the high court rules California's law unconstitutional, the legal status of marriage in America will be very much on the rocks. And what could be more fundamental in the life of a community, state, or nation than its definition of marriage?

The court will be hearing two cases on Tuesday and Wednesday affecting the status of marriage. One will be a suit to overturn the Defense of Marriage Act, passed by Congress and signed into law by President Bill Clinton in 1996. While not overturning any state law to the contrary, DOMA said that as far as the federal government is concerned, marriage is a union between man and woman, male and female, period.

That affects a whole range of issues involving such things as inheritance rights, estate settlements, federal taxes on inheritance, and other issues that have an impact, in some cases significant, on same-sex couples who are legally married in one of the half a dozen or so states that include same-sex unions under the umbrella of marriage law. The case against DOMA is, from a civil rights perspective, that it unfairly and unconstitutionally discriminates against same-sex couples who are denied by the federal government what the 14th Amendment to the U.S. Constitution requires of the states: "equal protection of the laws."

The other issue has to do with the aforementioned Proposition 8 in California, adopted by the voters of the Golden State in November of 2008, only days after Barack Obama promised that his election would result in "fundamentally transforming" the nation. Obama carried California and the nation, but California voters voiced a resounding "No" to fundamentally transforming marriage. For once, the "kooky" idea was coming from the East Coast, from places such as Massachusetts, in a 2003 state Supreme Court decision that might have startled the Lowells and the Cabots, and in states as different as neighbors, such as New Hampshire and Vermont, which live side by side but ignore each other as much as possible. And it was California that was defending the old order that had proved so congenial to the Lowells and the Cabots.

In fact, state referenda on the issue had shown a score of 33-0 for the traditionalists before the transformational teams won three victories in November 2012. How an overturn of the California law

would affect marriage laws in other states is uncertain, but logic would seem to dictate that if the California law defining marriage as a strictly heterosexual institution is found in violation of the "equal protection" clause, then other states so defining marriage would be equally in violation.

But not all states have spoken as emphatically as California did in 2008. The question was put on the ballot in California, and there was long and heated debate on the subject. Millions were spent for ads making arguments on both sides of the issue. Clearly, voters knew what they were voting on and what their votes meant. And a clear majority, including large majorities of blacks, Hispanics, and others who voted in large numbers for Obama, said they preferred to keep the venerable old institution of marriage the way it has been defined for centuries and millennia.

In fact, President Obama said he opposed same-sex marriage until he announced his change of mind less than a year ago. So did former Senator and Secretary of State Hillary Clinton and nearly every other major public figure. Even when he made his breakthrough announcement last spring, Obama said the reason he instructed his Department of Justice to stop defending the Defense of Marriage Act against lawsuits challenging its constitutionality was because DOMA "tried to federalize what has historically been state law." Yet President Obama and that same Justice Department have weighed in with friend-of-the-court briefs on the side of overturning California's law, which could, depending on how the decision is written, result in federalizing marriage laws.

Indeed, most of the transformational decisions affecting social and political life in America over the past 60 years have been made by the Supreme Court and not by the people's elected representatives at either the state or national level. *Brown v. Board of Education*, mandating desegregation of public schools, transformed life in our Southern states. While segregation is rightly viewed as a moral stain on justice in America, the decision was in fact more an exercise in sociology than in constitutional law. The school busing fiascos that followed were judge-made mandates based on what the Constitution allegedly required, though the Constitution says nothing about either schools or race relations.

The apportionment of legislative districts in the 1962 *Baker v. Carr* decision was another transformational act by the U.S. Supreme Court. Much of our criminal justice law has been written by the judges. And of course, the *Roe v. Wade* decision, declaring abortion a constitutional right, opened up a new frontier in the battle over the right to life versus the claims of "reproductive freedom" in an era of sensitivity toward "women's issues" and "women's rights."

The level of legislation by the judicial branch has been nothing less than breathtaking. Even the liberal Justice Ruth Bader Ginsburg, appointed by "pro-choice" President Bill Clinton, has said she believes the court moved too far too quickly in micromanaging the abortion laws of all the states. The justices should have struck down the Texas law that was being challenged, she said, and left the laws of the other states alone.

But that, in fact, would have been effectively a distinction without a difference. For whenever a more restrictive law than what the high court declared permissible would have been challenged in other states, the appeal to the Supreme Court would have been based on the decision in the Texas case and would have been upheld as a result. The laws of the other states would have fallen, one by one.

It would appear that the same will be true if the court strikes down the California law, telling the voters of that state and the 33 others where voters have rejected same-sex marriage that their voices and votes of the people in our largest state don't count. What "we the people" ordain and establish matters not at all when "they the judges" rule otherwise.