DAILY NEWS

The high court's marriage jitters

By: Walter Olson – March 26, 2013

"Can I filter out the gay marriage tweets?" wrote one Hartford lawyer on Twitter. "Coz like it's already legal here so I don't care."

I think he was kidding. But even if you live in a state like New York or Connecticut where gays can already get married, this is no time to check out of the debate — not with things really heating up at the U.S. Supreme Court.

Tuesday, at oral argument on the California Proposition 8 case, there was little sign that the court's liberal wing was itching for any so-called "50-state solution," a sweeping ruling decreeing gay marriage lawful nationwide on equal protection grounds.

Associate Justice Ruth Bader Ginsburg approvingly brought up the obscure 1964 case of McLaughlin vs. Florida, in which the court unanimously struck down a law against interracial cohabitation, but dodged the opportunity to overturn laws against interracial marriage. Three years later — after much intervening advancement in public opinion — it got around to doing that in the much more famous case of Loving vs. Virginia.

Instead, Associate Justices Ginsburg, Elena Kagan, Sonia Sotomayor and Stephen Breyer concentrated on arguments that would knock out the Proposition 8 proponents' standing to be in court on the ground that they are unelected private citizens with no particular stake in the case's outcome. If they find a fifth justice to agree on this point, California would go back to having gay marriage — which a new KPIX-TV poll finds its citizens would welcome, by a whopping 67% to 30% — but the other 49 states wouldn't see any change.

There's an irony in standing having become a tool for possible liberal victories at the court.

Not long ago, conservative judges like Associate Justices Antonin Scalia and Samuel Alito were the ones known for using tough standing rules to throw out cases, while liberals were more broad-minded.

These days, standing doctrines have become more like castle drawbridges, raised or lowered depending on whether foe or friend is at the gate.

The liberals' strategy ran into one serious difficulty Tuesday: Associate Justice Anthony Kennedy, whom both sides expect to be the swing vote, appeared sympathetic toward granting standing to the Proposition 8 defenders. That would mean, at least potentially, progressing to the merits.

So what did Kennedy think of the merits? Whether purposely or not, he made his sympathies not entirely easy to discern. At one point, in language likely to send hopes soaring among gay-marriage advocates, he called on the "voice of these children,"

namely some 40,000 children in California living with same-sex parents, who "want their parents to have full recognition and full status. The voice of these children is important in this case, don't you think?"

Hearing that, you might think it's all over: If that's how the court's swing vote feels, the gay-marriage side wins.

But it's not as simple as that. Only moments earlier, Kennedy seemed to agree that the sociological study of families headed by gay couples was too new and recent to get a lot of weight as a reason to strike Proposition 8 down. "We have five years of information to weigh against 2,000 years of history or more," he said, in language that might have come verbatim from conservatives Scalia or Alito.

A couple of months ago, the smart money was on a narrow decision in the Proposition 8 case, and despite all the excitement and public-figure endorsements of recent weeks, that's exactly where we may be back to.

If not a dismissal on standing, what kind of narrow decision might that be? Well, there's the narrow, California-only grounds devised by 9th Circuit Judge Stephen Reinhardt in the lower court opinion that's under appeal. But Tuesday, few justices had a good word to say for Reinhardt's rationale, and Kennedy in particular called it "odd." (This never bodes well.)

Nor did the justices show any enthusiasm for the Obama administration's argument that states with civil unions should be required to step up to marriage, while other states should be left alone for now. Led by Breyer, the liberals shredded this idea as one that would punish states for being relatively progressive. In the end, it was a too-clever-by-half argument that seemed more geared to solve the administration's political problems than to persuade the court.

At least one lawyer left the court chanting under his breath "D.I.G." — shorthand for Dismissed as Improvidently Granted, the court's last-resort way of ridding its docket of a case it regrets having taken. After Tuesday, the chances of a D.I.G. resolution — and wedding bells for gay couples in California, but ending at the state line — seemed higher.