

# PROP8 LIVEBLOG: TED OLSON BRINGS US HOME



[About 20 minutes w/ Cooper and then Olson's rebuttal]

Walker: Mr. Cooper, carry on.

Cooper: Appreciate Court's indulgence.

Walker: Well, that's a good idea.

Cooper: want to take up CA SC's ruling on the marriages. This is something on which I agreed with Mr. Olson. I don't believe that that would make a difference, I don't believe that fact that CA SC rendered its ruling and then was effectively overturned by will of the people should make a difference in this case. Court asked Mr. Olson what kind of regime if constitutionality o CA law prescribing traditional def of marriage would turn on whether or not issue came to federal court before or after state court. Crawford v Board of Ed, 1982. Upheld CA Amendment reduced remedial tools avail to state courts in school desegregation. Court stated as follows, rejected contention that once state chooses to do more, may never recede, ability to experiment.

Walker: What do we make of that in this context?

Cooper: When CA SC goes beyond federal, People of state were empowered to reverse.

Cooper: I want to address, finally, issue whether or not legitimate basis to, for people of this state to be concerned that redefining marriage, redefining a traditional understanding of marriage presents any basis for concern about harm to marriage and to interests that institution of marriage has historically been designed to advance. Many people believe that such harm is threatened. Before analyzing this, have to begin two propositions. Redefining institution will change institution. If you

change definition of thing, hard to imagine how it could have no difference on the thing itself. Plaintiffs' experts and others have acknowledged that change will result. Prof Cott, one could point to earlier watersheds, but none so explicit as this turning point. Estridge, enlarging would transform it into something new. Joseph Raz, there can be no doubt that recognition of gay marriage as that form polygamist to monogamist. Marriage will ever stand for choice, cutting the relationship between sex and diapers. Plaintiffs think consequences will be good consequences. It's not something they can possibly prove. Prof Cott. Consequences of same self marriage impossible to know, no one predicts future accurately. I've heard and read this more than anything else I have spoken. I don't know. Your honor, whatever your question is, is I damn sure know.

Walker: What do you make of Blankenhorn's statement that when same sex marriage legal we'll be more American. That was your own expert.

Cooper: Blankenhorn was giving voice to a sentiment. He shares that sentiment w/many of my fellow Americans. He still believes that the threat of harm to a central and vital institution, marriage is too daunting, to run the risks of gratifying what would otherwise for Mr. Blankenhorn, the advent of same sex marriage. There are many who went into the polling place, that's my speculation, that's all it can be. There are millions of Americans who believe in equality, but who draw the line at marriage. They believe this could be profound. It could portend some social consequences that would not be good ones. That reality, the reality that I did not know, Blankenhorn agreed, there's never been anyone who knows what tomorrow will bring, but if there's a legitimate basis to be more concerned about that, it couldn't be more rational for the people of CA to say "we aren't going to run that risk." Perhaps Mr. Olson and his clients whose sentiments are powerful will be able to convince

their fellow CAs that in fact they're right.

Walker: A disability, a classification has been put on marriage, that disables people who wish to marry persons of the opposite sex. Do you not have to show a correlative benefit. The "I don't know" is that enough to impose upon some citizens a restriction that others do not suffer from?

Cooper: It is if there is a rational basis for that distinction, yes, that ends up being the bottom line for it. In looking at whatever society's purposes are, if there's no basis on which to draw a distinction between one group and another, if there is a distinguishing characteristic, distinction can stand.

Cooper: CA Court of Appeals in marriage cases, upheld traditional definition of marriage. Role of legislature. Approaching problems incrementally. That process is what is at work in this state and elsewhere in this country.

[Cooper sounds like someone who is resolved he will lose. If not today, then tomorrow.]

Cooper: There is a debate about the moral and practicalities, and the wisdom about this, which really goes to the nature of our culture. Constitution should allow that debate to go forward.

[One person applauds.]

Walker: Mr. Olson, let's pick up where Cooper left off. Danger is that you might win this case. By taking issue out of political realm is that all the forces that has plagued our politics for 30 years, isn't the same danger, here, with this issue.

Olson: I think you refer to abortion. Cases upon which we rely, in which respond to need of civil rights, relied on fundamental established constitutional law. Argument that Mr. Cooper makes essentially same argument made to Loving court, struck down 14-15 miscegenation statutes, CA had been first. It became unanimous. We sit

here today thinking how can that have been. 1967, we would have treated as felony in state of VA the President's parents' marriage. We're talking about fundamental constitutional rights. That's not breaking new ground. Allowing people the same freedom to marriage the one they love. Mr. Cooper's argument is that "we don't know, we don't have to prove, we don't have any evidence"—I know why he'd like to take back this argument. He was relying on a bunch of people who did not come into this court room and submit themselves to cross-exam by my colleague by Mr. Boies, some of them didn't come to this court room because they HAD been cross-examined by Boies. You can't say you don't have any evidence but a bunch of people who wouldn't come into the court. Cooper talks about procreation as the fundamental basis for marriage. Don't you have to prove that Prop 8 protects the channeling function. New to me today, State of CA is in business of channeling us. What he does have to prove, under lowest standard of review is legitimate interest, and object advances the legitimate issue. How does preventing same sex people from getting married. They are not a threat to us. They are not a threat to CA's efforts to channel us. IT's not the right of CA to channel those of us who live in CA into certain actions. Cooper says my definition, but it wasn't the definition of 14 SCOTUS decisions, we had expert witnesses going far back, not just 30 years, older than Bill of Rights. It's marriage. Mr. Cooper you have to accept that—first of all you have to accept my definition. Then if you have marriage between man and man or woman and woman it would change marriage. Well of course it will, bc that's how you've defined marriage. ALL of the things SCOTUS talked about in marriage, tell me how it helps rest of citizens of CA to keep them out of club. IT doesn't. Deinstitutionalization of marriage. Cooper has talked about, not so much today. Blankenhorn talked about that in trial as well. Mr. Cooper wanted to stay as an expert, and we'll accept that bc he turned out to be helpful to us.

Blankenhorn: I meant to say, for our purposes today. Heterosexuals did the deinstitutionalizing. This is not something that just cropped up a few years ago when we started discussing extending right of marriage to gay and lesbians.

Olson: AS Cott points out, this has happened across the states. No fault divorce. 50 states w/ no fault divorce. SO much for channeling function of those states. As far as raising children in stable happy environment. Last clip from Blankenhorn.

Boies: You were not meaning to imply that biological parents were any better than adoptive parents.

Blankenhorn: Two adoptive parents will do as well as two biological parents. Clarifying thing: studies show that adoptive parents, bc of rigorous screening process on some outcomes outstrip biological parents in terms of providing protective care for their children.

Olson: 37000 children in same sex families. According to Dr. Blankenhorn, they're better off. All evidence suggests they're not any worse. Some of evidence suggests those children are in happy relationships. Blankenhorn said when their parents marry they'll be better off to. If it's the state's interest in procreation. What if states change mind. Too much population growth. If CA said we don't want so many people, I don't think anyone would say they can cut off right to marriage. It's not the state's right, it's the individual's right. None of 14 SCOTUS cases say it's the state's interest in procreation. Fundamental right to marriage, in context of contraception, interracial marriage, divorce, not channeling someone into relationship, prisoners, abortion even. Including last case, Lawrence v. Texas. Mr. Cooper twice

or three times cited Stevens in *Bowers v. Hardwick*. Stevens in his dissent is quoted in majority decision in *Lawrence V. Texas*, same authority that Cooper relies on, his dissent is placed on the record. Individ decisions protected by due process, extends to intimate decisions by unmarried as well as married people. Expert witnesses. It isn't, that is not the definition of institution of marriage. correction restriction based on sex and sexual orientation. Why have things changed? Several witnesses talked about history of discrimination, has ameliorated. It's not longer against the law to work in federal govt, to walk into a bar. Breakdown of these has changed attitudes, if that's the case, psychiatrists have changed view. We've begun to understand differences between various members of society.

Olson: Loving. 41 states, it wasn't just a southern thing, had a prohibition. They said it's going to change marriage. It was about 14-15 in '1967. It had been at one point 41 states. CA broke the barrier.

Walker: 20-some states removed restriction. There was already a tide running. A political tide running wrt interracial marriage. SCOTUS took notice. DO we have political tide that will carry SCOTUS.

Olson: I believe there is a political tide. That does not justify a judge in a court to say, I really need the polls to be just a few points higher. I need someone to go out and take temperature of public. If they change it here in next election, we still have UT, MT. Some judge is going to have to decide case that we've asked you to decide. There will never be a case with such a wildly crazy case. There will never be a case against background that SCOTUS really made that step in *Lawrence*. They broke the barrier by saying conduct between indivs is protected by Constitution. Privacy same right we're talking about in marriage. I don't think that's justification. Most compelling thing on that subject, arguments to MLK, people aren't ready.

Birmingham jail, could not wait to pres for civil rights of his fellow citizens.

Olson: Cooper came up with something I hadn't heard about until closing argument. Threat of irresponsible procreation. I tried to figure out what that means. The clients I represent don't represent a threat of irresponsible procreation. Mr. Cooper acknowledged they're not a threat. Hetero couples who practice sex out of marriage are a big threat.

Olson: The one thing we do know, unless you believe that, you'll have all these heterosexual people will run out and engage in irresponsible conduct. We had a three week trial. Was procreation the goal of voters. Cooper cited three examples. We looked at those exhibits, they do have to do w/men and women. They don't mention procreation. As far as ballot pamphlet is concerned. Exhibit 1. About six paragraphs of arguments about why Prop 8 was adopted. Couldn't find procreation. Activist judges. Words I founds the most were protect our children. From learning that gay marriage is okay, that is to say that gay people are okay. Motivation for adoption is argument put before every voter. Kind of discriminatory animus. When you're projecting on a group of people, when you don't want your children to think they're normal.

Olson: The trial. We relied on def of marriage supported by 14 SCOTUS decisions. Cooper mentioning Appellate decisions. Hundred some year history of SCOTUS outweighs that. Plaintiffs. Powerful. THEN experts, best experts we could find, immutability, I don't know how my opponent can say it's a matter of choice. Some people may change. But it is a sexual identity most people have or don't have, experts testified it was immutable. That was all the evidence in this case. SCOTUS, Testimony by people affected, best experts in the world, and then there was Mr. Blankenhorn, who sort of came over to our side. If you discount Blankenhorn, all the evidence on our side. High tech gaze case, 1990, relied on Bowers, which SCOTUS

reversed. Superseded by Hernandez, 1999, on page 1093, Sexual orientation are immutable. They are so fundamental to a person's identity, if we're going to have a 9th circuit precedent that would be the standard.

Olson: What is happening here. If it's a fundamental right to marriage it's strict scrutiny. Have to have a reason, not post hoc justification, not based on hypothetical, we don't have that here. We have decision that takes a group of people who have been victims of discrimination, identifiable characteristics, We want to foreclose them from participating in most fundamental relationship in life. You're discriminating against a group of people, you have to have a good reason for that. I submit, "I don't know, and I don't have to put evidence"—to Mr. COoper does not cut it when you're taking away basic human rights and human dignity, when you don't know why they're a threat to your institution.

Beer thirty! Everyone root for Ted Olson!

*[Editor's Note: more from bmaz via egregious:]*

Olson now on final rebuttal. Is naming and framing judges like Ginsburg for what they are going to be reviewing. Is nicely embarrassing Cooper over the fact he said he doesn't know the harm. Using it to argue 'no legitimate (i.e., rational) basis

Olson really at full steam now. Exciting! Uh oh just like I said, Olson effectively just stipulated to Blankenhorn because Blank 'helps US so much'. OUCH! Now playing clip of Boies dissecting Blank and Blank making case adoptive parent better. Gallery literally laughing and banging palm on foreheads. Just brutally killer argument by Olson.

Olson wrapping up with the existent state of the evidentiary record (or in the DL's case non-existence). Smart



because the verdict has to be supported  
by the record and there is only one  
party that has it.