

# PROP8 LIVEBLOG: THE PROPONENTS MAKE THEIR CASE



Cooper: NY Court of Appeals ruled in 2006, until very recently, only marriage between two sexes. MA “changed def of marriage as inherited from common law.” CA: From beginning of statehood, marriage between man and women. Why has marriage been defined as exclusively opposite sex. Makes marriage fundamental to very existence of human race. Court record makes it clear that marriage to channel potentially procreative sex into marriage to ensure that any offspring brought into family.

Walker: DO people get married to benefit the community?

[titters]

Walker: When one enters into marriage, one doesn't say, oh boy, I'm going to benefit society. I'm going to get a life partner. All sorts of things come out of marriage. Is the purpose of marriage to benefit society?

Walker: Why does state enforce marriage?

Cooper: Bc fundamental to survival of race.

Walker: Why isn't it just about enforcing a contract?

Cooper: Why is it that every state does regulate this relationship? Because it's crucial to the public interest. The procreative sexual relations, enormous benefit to society. A very real threat to society's interest.

Walker: A threat?

Cooper: To whatever extent children born into this world w/o this union, by both parents that brought them into this world, a host of very important and very negative social consequences

arise. The purpose of marriage is to provide societal approval to that marriage and to the children. Marriage is a license to cohabit and produce legitimate children.

Walker: State does not withhold license of marriage from people who cannot produce children of their own. Are you suggesting state should?

Cooper: it is by no means a necessary requirement to fulfilling state's interest in naturally procreating relationships.

Walker: Then the state must have an interest apart from procreation.

Cooper: It rationally extends state's interest to channel into marriage all potentially procreative relationships, as well as all male-female relationships. It furthers the state's interest. Isn't a requirement that state insist that people who get married be able to have children. Case after case has agreed that all states haven't required procreation in no way eliminates procreative purpose. To enforce that, would have to be some kind of fertility test, some kind of pledge, some kind of post-marriage enforcement.

[Afghanistan has that...]

Cooper: how could you enforce pledge to have children, and then allow people who weren't having children, would have to be some kind of marital annulment. That's Orwellian.

Walker: It is Orwellian. Isn't that the logic that flows from premise that marriage is about procreation.

Walker: If purpose is procreation, there are far more tailored ways to enforce sexual conduct. There are support obligations and a whole host of other obligations that has nothing to do with sexual conduct of the parties.

Walker: Parental responsibilities extend to people not involved in procreation.

Cooper: WRT adoptive children. State does make

arrangements. Does create in law a relationship that is in all respects, virtually all respects, identical to natural and biological relationship.

Walker [interrupting]: ISn't the state indifferent wrt how the child was conceived? Once child exists as a human being state has some interest wholly apart from the way the child was conceived.

Cooper: That's entirely the point. State cannot ignore child's well-being. If child raised in any other but relationship between man and woman who conceived, state still has an interest in that child. State must step forward, often times and take responsibility itself for the upbringing for the support of that child.

bmaz:

Okay, I am trying to be fair, but Cooper is just bad.

Even his procreative argument is a circle of alligators chasing each others tails. Walker is probing him with questions: it is a one sided dance.

Cooper: For a millenia, every state has had an interest in well-being of child.

Walker: Let's move from the millenia to the three weeks in January when we had a trial.

Cooper: Overwhelming evidence shows it was about the interest of children.

Walker: What was the evidence and who was the witness who entered that witness?

Cooper: Blackstone. Marriage and children. Justice Stevens, dissent in Bowers, marriage is license to cohabit and produce legitimate children. This understanding is before you from eminent authority to eminent authority.

Walker: Blackstone didn't testify, Kingsley didn't testify.

Cooper: Mr. Blankenhorn brought forward these authorities. You don't have to have evidence from these authorities. The cases.

Walker: I don't have to have evidence?

Cooper: You don't have to have evidence if one court after another has recognized. Let me turn to the CA cases on this. CA SC said procreation shortly after statehood. CA Court said institution of marriage channels biological drives that otherwise might become socially destructive.

bmaz:

Am sitting behind the Plaintiff's media lead. Am informed Olson will also do rebuttal for Ps and Boies is just here for the show.

Cooper: at least 2/3 of all the judges who have looked at issue before you now have upheld—or would have, some are in dissenting opinions—on this rationale. Majority of Congress enacted DOMA on this rationale. Plaintiffs say there is no way to understand why anyone would support Prop 8 to support traditional definition of marriage, except through animus. That is not just a slur on 7 million CAs, who supported Prop 8, it's a slur on 70 of 8 judges, who upheld as rational decision of voters to preserve traditional definition of marriage. Denies good judgment of Congress, state legislature after state legislature.

Walker: If so, why in this case did you present but one witness? AND I think it's safe to say his testimony was equivocal.

Cooper: We didn't need his testimony.

Walker: I guess that goes back to the premise that you don't need evidence.

bmaz

*Cooper is getting his ass kicked with half of it his*

*own cowpies he is stepping in. Most animated he has been was citing the effectively stone age Blackstone on law. Walker wants to know when at trial Blackstone testified. No kidding!*

bmaz

*Jeebus this is bleak. Cooper admits his only fucking witness was 'unnecessary' after Walker tells him Blankenhorn was equivocal at best. Unbelievable. Not sure I have ever seen anything like this. I would hari kari on the spot if I were Cooper.*

Cooper: If you look in any book it'll define marriage like this. Unless it was written by one of their witnesses or in the last 30 years.

Walker; WHat should I conclude from that?

Cooper: Has always been about enduring unions so children of that union will be brought up by those men and women.

Walker: What has changed in the last 30 years that has so dramatically altered landscape you just described.

Cooper: ummmm. I think my point is that the changes in last 30 years have not eliminated that purpose of marriage.

Walker: You pointed out that there is body of opinion that now views marriage as option for homosexuals. That is something that developed in last 30 years. What is it that the evidence shows had prompted that change? WHy is it now debatable?

Cooper: It has become a claim, and an understandable claim. We respect that view.

Walker: If this is taking place, doesn't it reflect changed perception? Doesn't that change appropriate regulation of institution?

Cooper: View would make procreative purpose no longer legitimate. Are those competing considerations that it is no longer legitimate for people of CA and court after court to conclude that there is a legitimate purpose of marriage that does bring forward distinguishing characteristic. There is a core distinguishing purpose that explains preference by legislators or by voters for maintaining traditional definition of marriage.

Walker: You heard Olson recount background of Loving. UP to that time numerous states prohibited interracial marriage. At some point came that change that you just described wrt interracial marriage. At some point came to a finding that that violated fundamental right. Why are we not at that same tipping point here, wrt same sex marriage.

bmaz

Walker using Loving decision to box Cooper into the corner of religious bigotry. Cooper now trying to soft shoe his way into a way out by distinguishing race based animus from sex based. Ain't doing real good either.

Cooper: Procreative purpose was frustrated with overriding ubiquitous core purpose of marriage, bc it required interracial couples.

Walker: You recall a number of the decisions which upheld those laws, rationale used was that mixing of races was going to be destructive, would have corrosive effects on society.

Cooper: Those racist sentiments had no foundation in historic purpose of marriage. Racial restrictions on marriage were not a part of common law. Opposite sex of marriage is

itself definitional. This is fundamental to existence and survival of human race. Opposite sex of marriage has always been definitional. Your honor, they made people have illegitimate children. The purpose of marriage, as Justice Stevens says, was to have legitimate children.

Walker: Why isn't limitation on marriage for gay couples and lesbian couples similarly at war w/their desires to raise their own children in context in marriage partnership.

Cooper: um. This is the distinction that 8th circuit recognized. Distinguishing characteristics relevant to interest state is pursuing. As 8th Circuit said. Only opposite sex couples can procreate naturally. Therefore only opposite sex couples that uniquely address this purpose, and that present, the treat to society's interest that marriage designed to minimize, the threat of irresponsible procreative activity.

[Proponents earlier argued that promiscuity was dangerous all around, problem with his argument here.]

Walker: What about couples who have to use some kind of technology to conceive. How is that different?

Cooper: Interests in allowing all opposite sex couples to marry. W/o intrusive questions about desire to have children. Society's interest are also furthered whenever opposite sex couples are married in order to engage in procreation, strengthens social norms that perform this channeling function.

bmaz

*'Only opposite based couples can procreate normally'. Don't think Walker liked that statement (it came off with cement thud in the room).*

[This is as honest as Cooper has gotten, gotta

have social norms of boy + girl = baby.]

Cooper: State's main concern is channeling naturally procreative conduct is to minimize what I would call irresponsible procreation. It's not a good term, but I can't think of a more serviceable one. That is procreation that isn't bound by kinds of obligations kinds of social norms and obligations that marriage relationship is, that often leads to children being raised by one parent or another, or sometimes on neither parent. It is not a phenomenon that the state has to be concerned about wrt same sex couples. For a same sex couple to procreate, it by definition HAS to be responsible.

Walker: My point is that there are some opposite sex couples who ALSO cannot naturally procreate. What's the threat to society of people choosing to medical assistance in order to have children.

bmaz

Here we go. Walker sticking fact that some hetero couples need in vitro etc to procreate down Cooper's throat. Cooper regurgitating nonsensical bullshit.

Cooper: it's irresponsible procreation, the opposite sex couple when one is infertile, can't unintentionally procreate. WRT issues we said earlier, allowing opposite sex couples to marry, in certain respects it advances the interest, it would not be realistic for the state to try to implement its policy on more narrow or fitted basis. You ask a question on this in your written questions. Even WRT opposite sex couples where one is infertile, encouraging that couple to get married furthers procreative purposes underlying traditional definition of marriage. If that couple gets married, all of the social norms that encourage marriage and to be faithful to each other, operate to society's benefit, in respect that fertile member will be less likely to engage in extramarital sex with another.

Walker: Why not same values apply to lesbian and



gay couples? Coming together, taking care of one another, providing love comfort and support. Why don't those apply just as much to the plaintiffs as much as to John and Jane Doe, to use names Reverend Tam used.

Cooper: We haven't suggested there's a distinction wrt those considerations. There is distinction wrt fundamental procreative purpose.

Walker: What is evidence in record that voters took into consideration the procreative purpose?

Cooper: Protects marriage as fundamental institution of society. Central thrust of responsible procreation was put forward in voter education guide. IT is not accurate to say that there was no discussion of this. Because there were advocacy pieces after advocacy pieces. One was a video ad which said

Walker: Is this in the record?

bmaz

Walker wants to know what evidence there is in the record that voters acted on procreation based thought. Cooper maybe making a minute bit of headway here by citing the voter pamphlet (plaintiffs exhibit 27 I think).

Cooper: Yes your honor. There were a number of those things from Protect Marriage campaign. This was a frequent theme w/in religious community. Quite active in debate. And the campaign wasn't just by any stretch what protect marriage. com had to say. Was a cacophony of debate. There has not been any case that applied rational classification. With the exception of four cases. Supporting the cases on rational basis is NOTHING, and they're asking you to sail into judicial tsunami. If we are right and rational basis applies, we don't have to submit evidence to the court in support of claims to purpose and justification. The plaintiffs have to negate every conceivable basis. They have to

negative every conceivable state of facts. Even if you conclude that IN FACT by a preponderance of the evidence they are right, you still must rule for the state, unless you conclude that the state's reasons could not reasonably be believed to be true. It's not who's right and who's wrong, it's that no rational person could conclude.

bmaz

*Uh oh. Now Cooper falling back on what people say 'around watercoolers' . Must those special separate but not equal religiosity bigot watercoolers I guess.*

Walker: Standard of review was in Romer?

Silence

Cooper: Concluded that there was not any rationale for sweeping statute. The only conclusion that could be arrived at was that it flowed from animus. That was the only thing that could explain sweeping statute, made gays and lesbians strangers to the law.

bmaz

Trying to argue ninth circuit Heller case mandates only rational basis review. Is the most coherent argument he has made in over an hour, but that is not even determinative even if you buy it, which is shaky.

Walker: Mr. Olson contends that Prop 8 makes gays and lesbians strangers to law of marriage in CA. Let me direct you to Cloverleaf. Where there was evidence reasonably supporting classification, litigants may not procure merely by tendering evidence. Where was evidence about natural procreative couples as opposed to the non-natural procreative ability of same sex couples? That is the evidence that was before the voters here? That is the evidence you are

relying upon here.

Cooper: Not sure I follow.

Walker: I'm sure it was not stated very well. Point Brennan was making, there was evidence before legislature, not simply pulled out of thin air, to warrant classification. Paperboard milk cartons and plastic milk cartons. Evidence here is the natural procreative ability of same sex couples that distinguishes them from same sex couples.

Cooper: That's a premise.

Walker: Let me ask you while we have a pause about one of the answers. The last question. If Court finds Prop 8 to be unconstitutional. What would yield constitutional expression of intent of people of CA?

Walker: Remedy that would yield to constitutional expression is by sustaining Prop 8 is to give it retrospective effect. Do I understand that I am to rule against 18000 same sex marriages.

Cooper: No only if irreconcilable conflict.

Walker: that's what these words say.

bmaz

*Walker is hammering on whether upholding prop 8 requires invalidating the 18,000 or so gay marriages that occurred during the effective period? Cooper says no but is obfuscating.*

bmaz

*Walker does seem more concerned about the differentiation of the group who did get married than all*

*others than he really has to.  
I think it is for show.  
Probably disconcerting if you  
are one of the 18,000 though.*

Cooper: We say irreconcilable conflict.  
Plaintiff's argument, crazy quilt.

Cooper: if the 18000 marriages and the judgment  
cannot be reconciled, the overwhelming judgment  
of people is not what should be invalidated.

Cooper: We think these things can lie down  
comfortably together.

[He was speaking of the passage of Prop 8 and  
the 18,000 marriages, he of course doesn't think  
same sex couples can lie down comfortably  
together.]

Cooper: The standard here is whether or not  
evidence put forth by plaintiffs whether opinion  
or non-debatable scientific facts. Couldn't be  
said wrt common sense belief that many many many  
people hold and many people hold that optimal  
child rearing structure is traditional intact  
family.

Cooper: Want to move to an area that plaintiffs  
have emphasized. Underscore religious beliefs of  
many people who campaigned for prop 8. [huh. I  
don't remember that part] Hardly remarkable that  
religious people involved in political process.  
There are issues, many of them, that confront  
the legislatures that are bound up inextricably  
with moral values and moral judgments. From  
death penalty, gambling, assisted suicide. When  
a Court is considering making new rights, must  
make sure it is deeply rooted in the country's  
history.

Walker: You've conceded there are times courts  
need to weigh in. What are the criteria ?

Cooper: Right claimed must be deeply rooted in  
history and practices.

Walker: And in this case marriage is a deeply

rooted fundamental right. IT's a right that extends to all persons, whether they are capable of reproducing, whether they are incarcerated, whether they are behind on child support payments. Just gender.

Cooper: That gender is definitional feature. Reason marriage is fundamental, is because it is fundamental to survival of human right.

Walker: It is a gender specific right.

Cooper: Right to marriage is bound up with fundamental nature.

Walker: Let's go to another answer. You say WRT sexual orientation. As a socially constructed category, nothing real about sexual orientation. Not surprising social constructionists reject biological factors. What that leads me to ask you, aren't these distinctions, sexual orientation distinctions, from a legal point of view, are they not all, socially constructed.

Cooper: No your honor, fundamental difference.

[Cooper's making a choking noise.]

Cooper: We took this, and notion of social construction to go to what we think are very difficult issues surrounding sexual orientation and its amorphous indefinable, at least consistently. It is not immutable. Sexual orientation is not an immutable trait.

[Hey, anyone seen George Rekers lately?]

Cooper: it is not an accident of birth?

Walker: Accident of birth? It can be changed before birth but not after?

Cooper: As that term has been used by Supreme Court.

Walker: REligion is a prohibited category. That is not immutable.

Cooper: Heightened scrutiny springs from First amendment. We believe that areas that SCOTUS at least thus far has identified as qualifying for

heightened scrutiny, race, 14th amendment, Loving, the central concern of 14th Amendment was to eliminate all discrimination on race. 9th circuit, sexual orientation not an immutable characteristic. We submit that as plainly right. We are aware of no case that has held heightened scrutiny. Every case holds to the contrary. Specifically on immutability. Record before you is quite overwhelming, characteristics simply do not apply. Not only is it difficult to define, as almost all plaintiffs expert. Behavioral, attraction, identity. Depending on which one you use, wide variety w/in that case. Not only definitional, plaintiff's witnesses quite candid that sexual orientation does change. Apparently changes especially in women. Testimony from Peplau about plasticity of sexual orientation in women. Many women experience change of SO several times over lifetime. Most vivid evidence APA, 10 year period, women who identified as homosexuals some 2/3 had changed their sexual orientation at least once. A third, more than once.

Walker: National origin one of those? On St Patrick's day, everyone is Irish.

Cooper: Does the group have the ability to attract the attention of the decision-makers, of the legislators? 20 years ago court said gays and lesbians not politically powerless. That was 20 years ago. Since that time, there's been extraordinary evolution.

bmaz

*Crikey other than a joke Walker just cracked about St. Patrick's Day festivities, not squat has occurred for almost twenty minutes. Ramping back up through as Cooper staggers to the end of his ill fated adventure in argument. Walker bringing it*

*all back to discriminatory animus and necessary standard of review. Cooper blatherine again. Saying he 'will stipulate' gays have been historically discriminated against substantially. He just doesn't think continuing that discrimination is, you know, discriminatory. What a "fucking retarded" argument as Rahm Emanuel would say.*

bmaz

Jeebus now Cooper is arguing Blankenhorn is qualified as an expert. If I were Olson, I might literally just stipulate to it; but that would take away the fun of Walker pointing out Blankenhorn's work is not even peer reviewed.

Walker raises women, majority of voters, and blacks, who have accrued power, still get strict scrutiny.

Cooper: We don't dispute that gays and lesbians have been victims of shameful history of discrimination. Situation in 2010 snot what it was in 1990. It isn't adequate, fact of history of discrimination, is not by itself sufficient to warrant heightened scrutiny. Discrimination and political powerlessness. 20 years ago it was very different. But 9th even then believed that gays and lesbians could attract attention. If that was true, it follows undebatably that it's still true.

Walker: Mr. Blankenhorn. Why should his testimony be admitted. Does he meet Daubert standards?

Cooper: I submit to you that he does. I didn't understand your earlier ruling accepting him to

be provisional. The court has, in your rulings, clarified that. I don't have anything to add to submission we made when motion in limine or voir dire. I would say under 9th circuit for qualification of expert, amply qualified. Professional life has been devoted to study of one subject. Subject of marriage.

Cooper: he's written 2 books. They've been accepted my many scholars, including Lamb [not true]

Walker: Am I correct that only peer reviewed paper he's written was not on subject of this litigation.

Cooper: Your honor, I can't answer that. 9th Circuit don't insist that an experts publications have been peer reviewed. I didn't come here to reargue that, transcript provides all that I have to say.

Walker: If in the cool light of morning, you want to submit further, I'll be happy to give you oppty.

Cooper: Would the Court entertain...

Walker: A break? Resume 10 after hour.

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

Cooper ate some spinach or had a Borg regeneration or something during the break. Much more energetic now. Same crap arguments though. Shocking!

I have moved over in my pew enough to have a clear view of the courtroom sketch artist I befriended this morning. She has shifted from pencil to some kind of color palatte. Amazing work and fast!

Crikey I think Cooper just said things are so much more critical now because there are so many more gays than there used to be. Well that is sure a winner or, you know, not so much.

Walker asking Coop if he shouldn't have to show material harm in order to



constructively 'disable' the gay. Again  
squat for answer other than, for some  
unstated reason, it isn't his burden.