

## The “Federal Strategy” to Impose Same-Sex “Marriage”: Good News for Defenders of Marriage?

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Briefs

It is well-known by now that the effort to overturn California’s Proposition 8 lost at the California Supreme Court. Proposition 8 is the citizens’ initiative which overturned that same court’s prior decision ‘finding’ a right to same-sex “marriage” within the California Constitution. Gay rights’ reaction to the latest court ruling has included calls for another citizen vote on the subject in 2010. Leading same-sex marriage proponents have not tended to support the alternative strategy of bringing their cause before a U.S. federal court. The U.S. Constitution gives the federal courts jurisdiction to hear claims that state action violates federal constitutional guarantees. In the case of same-sex marriage, plaintiffs would argue before a federal court that state laws reserving marriage for opposite-sex couples violates both the Due Process and Equal Protection clauses of the 14th Amendment of the U.S. Constitution.

A new group, however, has decided to take the federal court route. They call themselves the American Foundation for Equal Rights, and this lawsuit is, according to their website, their “first project.” (See <http://www.equalrightsfoundation.org/about.html>). The suit has made news as much because of the celebrity attorneys pursuing it, as it has for the controversy it has provoked regarding whether or not now is the “right time” to aim to persuade the U.S. Supreme Court (for of course, those 9 justices are the real target audience of the plaintiffs and their lawyers) of the constitutional imperative to permit same-sex marriage. The media call the lawyers pursuing the suit an “unlikely partnership,” and “super-lawyers.” They are Ted Olsen and David Boies, and they represented opposite sides in the *Bush v. Gore* nastiness. (Michael Lindenberger, Olsen’s Gay Marriage Gambit: Powerful Symbol, but a Risk, Time Magazine, June 4, 2009, available at <http://www.time.com/time/nation/article/0,8599,1902556,00.html>) The media particularly likes to play up that Ted Olsen is a former lawyer for the Bush and Reagan administrations and a “mainstream Republican Insider.” (*Ibid.*) News of this lawsuit is often placed side by side with former Vice-President Dick Cheney’s recent public endorsement of same-sex marriage. Argued Cheney, in the very favorite libertarian rhetoric of the gay-rights’ movement : “I think that freedom means freedom for everyone. ... I think people ought to be free to enter into any kind of union they wish. Any kind of arrangement they wish.” ([http://www.huffingtonpost.com/2009/06/01/cheney-offers-his-support\\_n\\_209869.html](http://www.huffingtonpost.com/2009/06/01/cheney-offers-his-support_n_209869.html)) The intended take-home message of this pairing? Same-sex marriage is inevitable when even hard-bitten Republicans are embracing it.

Several powerful pro-same-sex marriage institutions are deeply distressed at the Boies/Olsen move, specifically on the ground that they do not believe that the U.S. Supreme Court is “ready” to pronounce in their favor on the question of a constitutional mandate to permit same sex marriage. Why should we, or anyone



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interested in the health of marriage pay attention to the internecine warfare between same-sex “marriage” boosters over a state versus federal resolution of the same-sex marriage question? There are several reasons.

First, because if Olsen/Boies are wrong, and they lose at the U.S. Supreme Court, the cause of same-sex marriage likely will be set back, even at the state level. Same-sex “marriage” will seem very little like the kind of inherent American “right” its proponents are making it out to be. Olsen is attempting to make a powerful media case that this “right” is a no-brainer and a fundamental moral imperative all at the same time. He says that it’s a matter of “human decency, human rights, individual rights, fairness, due process and equal rights — for God’s sake, these are not liberal or conservative issues ... This issue is not something that should be tearing us apart. It should be bringing us together.” (Olsen’s Gay Marriage Gambit: Powerful Symbol, but a Risk, *Time Magazine*, June 4, 2009, available at <http://www.time.com/time/nation/article/0,8599,1902556,00.html>) But if Olsen/Boies are right, and the time is ripe for the Supreme Court to “find” this right in the Constitution, then no state can stand against it. It’s *Roe* all over again, only this time with the Supreme Court wiping out dozens of states’ hard-won protections for marriage instead of unborn human beings.

A second reason for the importance of the current contest. The Olsen/Boies Complaint, filed in a federal district court (the lowest of the three levels of federal courts), and their public argument showcase what they believe to be the very, very most persuasive case for a constitutional right to same-sex marriage. (The Complaint:

[http://www.equalrightsfoundation.org/images/Preliminary\\_Injunction\\_5-27.pdf](http://www.equalrightsfoundation.org/images/Preliminary_Injunction_5-27.pdf)).

Olsen told a *Time* magazine reporter that he and Boies thought they could win by “leveraging” the “powerful arguments” used thus far in the state court opinions. In other words, this case gives us an insight into what “superlawyers” think are the most persuasive arguments in the case for same-sex “marriage.” Here’s the good news: there’s nothing new at all in their arguments. We’ve heard it all before.

Here’s the bad news: to say their arguments are individualistic, are utterly devoid of consideration for children and for society is grossly to understate the situation. The Complaint refers again and again to the rights of “individuals” respecting marriage. To wit, Olsen and Boies rely upon the “freedom to marry” language from the Supreme Court’s *Loving v. Virginia* opinion, which struck down a law banning interracial marriage. Like all same-sex marriage proponents before them, they fail to note that the interracial couple in *Loving* was of opposite-sexes. They also rely on the Supreme Court’s *Zablocki v. Redhail* opinion, which disdained a state’s attempt to make a child support debtor pay up before he could marry a woman who was not the mother of his existing children. The *Zablocki* Court did tend to speak of marriage as an important “individual” right. One side note here: nearly every prior Supreme Court opinion quoted in the Olsen/Boies Complaint actually speaks of rights to “marriage and family life,” implying that marriage and parenting go together — which they do *not*, by definition, in any same-sex union. The Olsen/Boies Complaint speaks not a word even on the question of children’s well-being. It refuses even to consider the idea that it’s wrong to further estrange the concepts of “marriage” and procreation” in U.S. society today by extending the



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label “marriage” to intrinsically barren pairings. Several state supreme court opinions refusing to recognize same-sex marriage have relied upon the link between marriage and procreation to deny extending “marriage” to same-sex couples. The Olsen/Boies argument’s failure even to acknowledge children’s interests is reprehensible, but might also doom their cause to failure at the level of the U.S. Supreme Court.

A third reason why the current federal suit is worth studying. It shines a bright light upon same-sex marriage proponents’ unshakeable conviction that the Supreme Court is some kind of unelected super-legislature. The different proponents may disagree regarding whether the Court is *ready* to rummage around in the language of the Constitution and prior cases for the words or ideas which will allow them to invent a right to same-sex “marriage.” But they do not disagree either that the Court engages in such maneuvers when it feels like it, and that they count on such maneuvers as their preferred means of foisting major legal and social changes upon an unsuspecting American citizenry. The American Civil Liberties Union, the chief opponent of the Olsen/Boies strategy, said in its press release: “The arguments in the briefs are not the only thing that influences the Court’s decisions. “The climate of receptivity and momentum in the country on these issues matter as well. There is much we can and should do together to strengthen our hand before we put a federal marriage case before the justices.”

([http://www.aclu.org/pdfs/lgbt/make\\_change\\_20090527.pdf](http://www.aclu.org/pdfs/lgbt/make_change_20090527.pdf)) In other words, they are claiming that the Supreme Court doesn’t base its opinion upon the Constitution, *per se*, but on its reading of the country’s “mood.” This, of course, is the definition of a rule by “men” and not by law. Of course, if the ACLU is right about the mood of the country, even this sorry method of lawmaking by the unelected judges of the Supreme Court could result in a victory for defenders of marriage.

A final reason why the current federal same-sex “marriage” strategy is so interesting. It reveals &ndash; out of the mouth of the ACLU no less &ndash; that despite the drumbeat of claims that America supports same-sex “marriage,” even its biggest cheerleaders aren’t really sure. To quote again from the ACLU’s recent press release: “History says the odds at the Supreme Court now are not so good” because the “U.S. Supreme Court typically does not get too far ahead of either public opinion or the law in the majority of states.” Now setting aside the patent ridiculousness of this latter conclusion (the *Roe* Court after all upended every single state’s abortion ban in one fell swoop), the ACLU’s entire statement seems to confirm the optimism often expressed by Maggie Gallagher of the Institute for Marriage and Public Policy. She has regularly reminded us that the polls are not moving as fast or as far as same-sex “marriage” proponents suggest and their record of 30 losses in the 30 states which have put same-sex marriage to a popular vote is not indicative of any kind of groundswell of popular support for same-sex unions. Remember the National Abortion Rights Action League’s “Pro-Choice America” claims, accompanied with a stunning backdrop of the Statue of Liberty? Now think about the most recent Gallup Poll’s reporting that 51% of Americans call themselves “pro-life.” Maybe we’re winning the culture argument after all, but simply don’t see this reflected in popular media.



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Should the Olsen/Boies case go all the way to the Supreme Court of the United States ( a path that could take several years), we can be sure of only one thing: the media circus that will accompany it every step of the way. But perhaps we can also be cautiously optimistic that due to some combination of good arguments about the importance of opposite-sex marriage, and some bad tendencies on the part of the Court to try to read the national mood, marriage will win in the end.

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