

The Conscience of a Conservative

The lifelong Republican who argued *Bush v. Gore* before the Supreme Court—and won—goes to court this week to overturn California's ban on gay marriage. Huh?

By Eve Conant | NEWSWEEK

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Ted Olson would seem the unlikeliest champion of gay marriage. Now 69 years old, he is one of the more prominent Republicans in Washington, and among the most formidable conservative lawyers in the country. As head of the Office of Legal Counsel under Ronald Reagan, he argued for ending racial preferences in schools and hiring, which he saw—and still sees—as a violation of the Constitution's guarantee of equal protection under the law. Years later, he advised Republicans in their efforts to impeach President Clinton. In 2000 he took the "Bush" side in *Bush v. Gore*, out-arguing his adversary (and friend) David Boies before the Supreme Court and ushering George W. Bush into the White House. As solicitor general under Bush, he defended the president's claims of expanded wartime powers. (Olson's wife at the time, Barbara, died on American Airlines Flight 77, which was crashed into the Pentagon on September 11, 2001.) Olson has won three quarters of the 56 cases he has argued before the high court. Feather quills commemorating each case, and signed thank-you photos from presidents, cover the walls of his Washington office.

Now once again in private practice, Olson has the time to take on causes that matter most to him. One of them has surprised, dismayed, and outraged many of his conservative friends and colleagues. This week, after months of preparation, he will argue on behalf of two gay couples in *Perry v. Schwarzenegger*, a federal case challenging Proposition 8, the California ballot initiative that outlawed same-sex marriage in the state.

Olson's brief against Prop 8 is straightforward: laws banning gay marriage not only make no sense, they are unconstitutional. As a conservative, he says he believes in individual liberty and freedom from government interference in the private lives of citizens. Discriminating against people because of sexual orientation is a violation of both. "This case could change the way people think about one another," says Olson. "We are forever putting people into this box or that box, instead of just seeing each other as human beings."

He took on the case last fall, after he received a call from Chad Griffin, a gay activist in California who was part of a team looking for a lawyer to challenge Prop 8. A former in-law of Olson's suggested they reach out to Olson. Griffin was skeptical. "He was the conservative enemy," he recalls thinking. Griffin was surprised to find that Olson was anything but hostile. The two men talked for hours. Olson spent the next several weeks consulting with friends, fellow lawyers, and family, starting with his wife and political

sparring partner, Lady Booth Olson, herself an attorney and a Democrat. He put the same question to all of them: why shouldn't gay people have the right to marry? "I asked them to give me their best argument. They had all sorts of intangible instincts and feelings about what's 'right,'" he says. "But I didn't hear any persuasive response."

Still, Olson knew he would need help in preparing a sturdy case. Even if he prevails, defendant intervenors will almost certainly appeal; ultimately the case may wind up before the Supreme Court—a possibility Olson clearly relishes. He had no doubt whom he wanted beside him at the plaintiff's table: Boies, his old liberal courtroom adversary and biking buddy. A fearsome litigator, Boies didn't hesitate to take on such a high-profile case. "The current administration has been decidedly halfway on this issue," he says, "and I think the specter of having George Bush's lawyer out in front of a Democratic president is something that, shall we say, might stimulate people to rethink their positions."

It has done that already, not all of it favorable to Olson. Some conservatives have accused him of apostasy, and of trying to bend the Constitution to fit clandestine liberal views. Ed Whelan, a lawyer who worked with Olson in the Bush administration, says his first reaction was "surprise, followed by disgust that Ted would abandon the legal principles he's purported to stand for, like originalism and judicial restraint." But Whelan also knows that Olson—who arrives at work each morning by 6:30 and reads centuries-old law texts in his spare time—is a formidable adversary. "There's a definite chance he'll win. That's what makes it all the more outrageous that he's pushing this."

Many gay activists weren't any happier at first, believing an incremental approach was safer than betting everything on one big case. They feared a loss would be a massive setback. "Racial segregation, for example, didn't take just one case; there were a series of strategic steps," says Molly McKay of Marriage Equality USA. Others sensed conspiracy, speculating that Olson took the case only to throw it. He has since convinced them he is genuine in his conviction that gay marriage is a civil-rights issue.

In fact, Olson is surprisingly emotional about the case, and his eyes mist up repeatedly when he talks about the hundreds of letters—positive and negative—that he's received. "We should be welcoming our gay colleagues and friends as equals," he says. Kristin Perry, one of the plaintiffs in the case, says that whenever Ted sees her and her partner, Sandy Stier, "he tells us, 'I think about you two every day. This is the reason I've taken this case.'" Some conservatives, still trying to figure out what happened to their old friend, have asked him when he decided he was for gay marriage. Olson seems puzzled by the question. "I don't know that I was ever against it."

The Conservative Case for Gay Marriage

Why same-sex marriage in an American value.

By Theodore B. Olsen | NEWSWEEK

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Together with my good friend and occasional courtroom adversary David Boies, I am attempting to persuade a federal court to invalidate California's Proposition 8—the voter-approved measure that overturned California's constitutional right to marry a person of the same sex.

My involvement in this case has generated a certain degree of consternation among conservatives. How could a politically active, lifelong Republican, a veteran of the Ronald Reagan and George W. Bush administrations, challenge the "traditional" definition of marriage and press for an "activist" interpretation of the Constitution to create another "new" constitutional right?

My answer to this seeming conundrum rests on a lifetime of exposure to persons of different backgrounds, histories, viewpoints, and intrinsic characteristics, and on my rejection of what I see as superficially appealing but ultimately false perceptions about our Constitution and its protection of equality and fundamental rights.

Many of my fellow conservatives have an almost knee-jerk hostility toward gay marriage. This does not make sense, because same-sex unions promote the values conservatives prize. Marriage is one of the basic building blocks of our neighborhoods and our nation. At its best, it is a stable bond between two individuals who work to create a loving household and a social and economic partnership. We encourage couples to marry because the commitments they make to one another provide benefits not only to themselves but also to their families and communities. Marriage requires thinking beyond one's own needs. It transforms two individuals into a union based on shared aspirations, and in doing so establishes a formal investment in the well-being of society. The fact that individuals who happen to be gay want to share in this vital social institution is evidence that conservative ideals enjoy widespread acceptance. Conservatives should celebrate this, rather than lament it.

Legalizing same-sex marriage would also be a recognition of basic American principles, and would represent the culmination of our nation's commitment to equal rights. It is, some have said, the last major civil-rights milestone yet to be surpassed in our two-century struggle to attain the goals we set for this nation at its formation.

This bedrock American principle of equality is central to the political and legal convictions of Republicans, Democrats, liberals, and conservatives alike. The dream that became America began with the revolutionary concept expressed in the Declaration of

Independence in words that are among the most noble and elegant ever written: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Sadly, our nation has taken a long time to live up to the promise of equality. In 1857, the Supreme Court held that an African-American could not be a citizen. During the ensuing Civil War, Abraham Lincoln eloquently reminded the nation of its found-ing principle: "our fathers brought forth on this continent, a new nation, conceived in liberty and dedicated to the proposition that all men are created equal."

At the end of the Civil War, to make the elusive promise of equality a reality, the 14th Amendment to the Constitution added the command that "no State É shall deprive any person of life, liberty or property, without due process of law; nor deny to any person É the equal protection of the laws."

Subsequent laws and court decisions have made clear that equality under the law extends to persons of all races, religions, and places of origin. What better way to make this national aspiration complete than to apply the same protection to men and women who differ from others only on the basis of their sexual orientation? I cannot think of a single reason—and have not heard one since I undertook this venture—for continued discrimination against decent, hardworking members of our society on that basis.

Various federal and state laws have accorded certain rights and privileges to gay and lesbian couples, but these protections vary dramatically at the state level, and nearly universally deny true equality to gays and lesbians who wish to marry. The very idea of marriage is basic to recognition as equals in our society; any status short of that is inferior, unjust, and unconstitutional.

The United States Supreme Court has repeatedly held that marriage is one of the most fundamental rights that we have as Americans under our Constitution. It is an expression of our desire to create a social partnership, to live and share life's joys and burdens with the person we love, and to form a lasting bond and a social identity. The Supreme Court has said that marriage is a part of the Constitution's protections of liberty, privacy, freedom of association, and spiritual identification. In short, the right to marry helps us to define ourselves and our place in a community. Without it, there can be no true equality under the law.

It is true that marriage in this nation traditionally has been regarded as a relationship exclusively between a man and a woman, and many of our nation's multiple religions define marriage in precisely those terms. But while the Supreme Court has always previously considered marriage in that context, the underlying rights and liberties that marriage embodies are not in any way confined to heterosexuals.

Marriage is a civil bond in this country as well as, in some (but hardly all) cases, a religious sacrament. It is a relationship recognized by governments as providing a

privileged and respected status, entitled to the state's support and benefits. The California Supreme Court described marriage as a "union unreservedly approved and favored by the community." Where the state has accorded official sanction to a relationship and provided special benefits to those who enter into that relationship, our courts have insisted that withholding that status requires powerful justifications and may not be arbitrarily denied.

What, then, are the justifications for California's decision in Proposition 8 to withdraw access to the institution of marriage for some of its citizens on the basis of their sexual orientation? The reasons I have heard are not very persuasive.

The explanation mentioned most often is tradition. But simply because something has always been done a certain way does not mean that it must always remain that way. Otherwise we would still have segregated schools and debtors' prisons. Gays and lesbians have always been among us, forming a part of our society, and they have lived as couples in our neighborhoods and communities. For a long time, they have experienced discrimination and even persecution; but we, as a society, are starting to become more tolerant, accepting, and understanding. California and many other states have allowed gays and lesbians to form domestic partnerships (or civil unions) with most of the rights of married heterosexuals. Thus, gay and lesbian individuals are now permitted to live together in state-sanctioned relationships. It therefore seems anomalous to cite "tradition" as a justification for withholding the status of marriage and thus to continue to label those relationships as less worthy, less sanctioned, or less legitimate.

The second argument I often hear is that traditional marriage furthers the state's interest in procreation—and that opening marriage to same-sex couples would dilute, diminish, and devalue this goal. But that is plainly not the case. Preventing lesbians and gays from marrying does not cause more heterosexuals to marry and conceive more children. Likewise, allowing gays and lesbians to marry someone of the same sex will not discourage heterosexuals from marrying a person of the opposite sex. How, then, would allowing same-sex marriages reduce the number of children that heterosexual couples conceive?

This procreation argument cannot be taken seriously. We do not inquire whether heterosexual couples intend to bear children, or have the capacity to have children, before we allow them to marry. We permit marriage by the elderly, by prison inmates, and by persons who have no intention of having children. What's more, it is pernicious to think marriage should be limited to heterosexuals because of the state's desire to promote procreation. We would surely not accept as constitutional a ban on marriage if a state were to decide, as China has done, to discourage procreation.

Another argument, vaguer and even less persuasive, is that gay marriage somehow does harm to heterosexual marriage. I have yet to meet anyone who can explain to me what this means. In what way would allowing same-sex partners to marry diminish the marriages of heterosexual couples? Tellingly, when the judge in our case asked our

opponent to identify the ways in which same-sex marriage would harm heterosexual marriage, to his credit he answered honestly: he could not think of any.

The simple fact is that there is no good reason why we should deny marriage to same-sex partners. On the other hand, there are many reasons why we should formally recognize these relationships and embrace the rights of gays and lesbians to marry and become full and equal members of our society.

No matter what you think of homosexuality, it is a fact that gays and lesbians are members of our families, clubs, and workplaces. They are our doctors, our teachers, our soldiers (whether we admit it or not), and our friends. They yearn for acceptance, stable relationships, and success in their lives, just like the rest of us.

Conservatives and liberals alike need to come together on principles that surely unite us. Certainly, we can agree on the value of strong families, lasting domestic relationships, and communities populated by persons with recognized and sanctioned bonds to one another. Confining some of our neighbors and friends who share these same values to an outlaw or second-class status undermines their sense of belonging and weakens their ties with the rest of us and what should be our common aspirations. Even those whose religious convictions preclude endorsement of what they may perceive as an unacceptable "lifestyle" should recognize that disapproval should not warrant stigmatization and unequal treatment.

When we refuse to accord this status to gays and lesbians, we discourage them from forming the same relationships we encourage for others. And we are also telling them, those who love them, and society as a whole that their relationships are less worthy, less legitimate, less permanent, and less valued. We demean their relationships and we demean them as individuals. I cannot imagine how we benefit as a society by doing so.

I understand, but reject, certain religious teachings that denounce homosexuality as morally wrong, illegitimate, or unnatural; and I take strong exception to those who argue that same-sex relationships should be discouraged by society and law. Science has taught us, even if history has not, that gays and lesbians do not choose to be homosexual any more than the rest of us choose to be heterosexual. To a very large extent, these characteristics are immutable, like being left-handed. And, while our Constitution guarantees the freedom to exercise our individual religious convictions, it equally prohibits us from forcing our beliefs on others. I do not believe that our society can ever live up to the promise of equality, and the fundamental rights to life, liberty, and the pursuit of happiness, until we stop invidious discrimination on the basis of sexual orientation.

We once tolerated laws throughout this nation that prohibited marriage between persons of different races. California's Supreme Court was the first to find that discrimination unconstitutional. The U.S. Supreme Court unanimously agreed 20 years later, in 1967, in a case called *Loving v. Virginia*. It seems inconceivable today that only 40 years ago there were places in this country where a black woman could not legally marry a white

man. And it was only 50 years ago that 17 states mandated segregated public education—until the Supreme Court unanimously struck down that practice in *Brown v. Board of Education*. Most Americans are proud of these decisions and the fact that the discriminatory state laws that spawned them have been discredited. I am convinced that Americans will be equally proud when we no longer discriminate against gays and lesbians and welcome them into our society.

Reactions to our lawsuit have reinforced for me these essential truths. I have certainly heard anger, resentment, and hostility, and words like "betrayal" and other pointedly graphic criticism. But mostly I have been overwhelmed by expressions of gratitude and good will from persons in all walks of life, including, I might add, from many conservatives and libertarians whose names might surprise. I have been particularly moved by many personal renditions of how lonely and personally destructive it is to be treated as an outcast and how meaningful it will be to be respected by our laws and civil institutions as an American, entitled to equality and dignity. I have no doubt that we are on the right side of this battle, the right side of the law, and the right side of history.

Some have suggested that we have brought this case too soon, and that neither the country nor the courts are "ready" to tackle this issue and remove this stigma. We disagree. We represent real clients—two wonderful couples in California who have longtime relationships. Our lesbian clients are raising four fine children who could not ask for better parents. Our clients wish to be married. They believe that they have that constitutional right. They wish to be represented in court to seek vindication of that right by mounting a challenge under the United States Constitution to the validity of Proposition 8 under the equal-protection and due-process clauses of the 14th Amendment. In fact, the California attorney general has conceded the unconstitutionality of Proposition 8, and the city of San Francisco has joined our case to defend the rights of gays and lesbians to be married. We do not tell persons who have a legitimate claim to wait until the time is "right" and the populace is "ready" to recognize their equality and equal dignity under the law.

Citizens who have been denied equality are invariably told to "wait their turn" and to "be patient." Yet veterans of past civil-rights battles found that it was the act of insisting on equal rights that ultimately sped acceptance of those rights. As to whether the courts are "ready" for this case, just a few years ago, in *Romer v. Evans*, the United States Supreme Court struck down a popularly adopted Colorado constitutional amendment that withdrew the rights of gays and lesbians in that state to the protection of anti-discrimination laws. And seven years ago, in *Lawrence v. Texas*, the Supreme Court struck down, as lacking any rational basis, Texas laws prohibiting private, intimate sexual practices between persons of the same sex, overruling a contrary decision just 20 years earlier.

These decisions have generated controversy, of course, but they are decisions of the nation's highest court on which our clients are entitled to rely. If all citizens have a constitutional right to marry, if state laws that withdraw legal protections of gays and lesbians as a class are unconstitutional, and if private, intimate sexual conduct between persons of the same sex is protected by the Constitution, there is very little left on which

opponents of same-sex marriage can rely. As Justice Antonin Scalia, who dissented in the Lawrence case, pointed out, "[W]hat [remaining] justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'?" He is right, of course. One might agree or not with these decisions, but even Justice Scalia has acknowledged that they lead in only one direction.

California's Proposition 8 is particularly vulnerable to constitutional challenge, because that state has now enacted a crazy-quilt of marriage regulation that makes no sense to anyone. California recognizes marriage between men and women, including persons on death row, child abusers, and wife beaters. At the same time, California prohibits marriage by loving, caring, stable partners of the same sex, but tries to make up for it by giving them the alternative of "domestic partnerships" with virtually all of the rights of married persons except the official, state-approved status of marriage. Finally, California recognizes 18,000 same-sex marriages that took place in the months between the state Supreme Court's ruling that upheld gay-marriage rights and the decision of California's citizens to withdraw those rights by enacting Proposition 8.

So there are now three classes of Californians: heterosexual couples who can get married, divorced, and remarried, if they wish; same-sex couples who cannot get married but can live together in domestic partnerships; and same-sex couples who are now married but who, if they divorce, cannot remarry. This is an irrational system, it is discriminatory, and it cannot stand.

Americans who believe in the words of the Declaration of Independence, in Lincoln's Gettysburg Address, in the 14th Amendment, and in the Constitution's guarantees of equal protection and equal dignity before the law cannot sit by while this wrong continues. This is not a conservative or liberal issue; it is an American one, and it is time that we, as Americans, embraced it.