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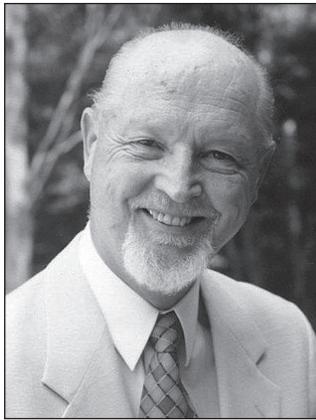
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Boie and Olson's *Redeeming the Dream: The Case for Marriage Equality*: A Review Essay



by Jack Van Der Slik

David Boies and Theodore B. Olson, *Redeeming the Dream: The Case for Marriage Equality*. New York: Viking, 2014. \$28.95, 310 pp. ISBN 978-0-670-01596-2. Reviewed by Jack R. Van Der Slik, Professor Emeritus, Political Studies and Public Affairs, University of Illinois Springfield.

The subject of this review is a controversial one. Same-sex marriage is but a single piece in the larger context of controversy about the behavior and rights of homosexuals in American society. This case for homosexual marriage is forged out of a series of American court proceedings and is described by the lawyers who led it, David Boies and Theodore Olson. *Redeeming the Dream* is a smoothly written

record of a major judicial action which renders understandable the current legal stream of cases that are creating protections for homosexuals in American society. Some of the legal details are abstruse, but the authors do well explaining the procedural details clearly for lay readers. They provide generous insight into their views while not ignoring the arguments from their rival attorneys. The book withstands scrutiny on its merits even from its opponents. But its aim is to move public opinion toward legal equality for homosexuals.

With many readers, however, I am mindful of an understanding about the sanctity of marriage as a holy bond. My wife and I were joined together using the form from the Centennial Edition of the (blue) *Psalter Hymnal*. Recall these lines: "The holy bond of marriage was instituted by God Himself at the very dawn of history.... God said: *It is not good that man should be alone; I will make him a help meet for him.* Thereupon God created woman of man's own substance and brought her unto the man. *Therefore shall a man leave his father and his mother, and shall cleave to his wife; and they shall be one flesh....* The purpose of marriage is the propagation of the human race, the furtherance of the kingdom of God, and the enrichment of the lives of those entering this state.... Marriage, then, is a divine ordinance intended to be a source of happiness to man, an institution of the highest significance to the human race, and a symbol of the union of

Christ and His Church.”

Likewise, I reverence Paul’s tough words in Romans, Chapter 1 (NIV) about the wrath of God “against all the godlessness and wickedness of men who suppress the truth by their wickedness.... God gave them over in the sinful desires of their hearts to sexual impurity.... [W]omen exchanged natural relations for unnatural ones.... Men committed indecent acts with other men.” Of course, Paul spoke of many other sins of “a depraved mind,” and he judged the people who “approved of those who practice” these various forms of evil-doing. Scripture makes quite clear what, indeed, is the godly intent for marriage.

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That said, let me sketch, from the orderly account by Boies and Olson, how traditional marriage was subjected to what Paul refers to as “a depraved mind.” In 2004 the mayor of San Francisco directed the city clerk’s office to issue marriage licenses to couples of the same sex. Hundreds of such couples lined up for such licenses and married. The California legislature enacted a statute restricting civil marriage to opposite-sex couples. In 2008 the California Supreme Court decided that denying homosexual marriage violated the California constitution’s guarantee of equal protection. Soon 18,000 same-sex couples married legally in California. Opponents of same-sex marriage petitioned for a constitutional amendment to overrule the court’s decision. Called Proposition 8, the constitutional amendment defined marriage as a union of a man and a woman. In November 2008 the referendum passed by a 52 to 48 percent vote.

Boies and Olson took up the case for same-sex couples to legally marry, filing a suit in federal court challenging Proposition 8 under the U.S. Constitution’s 14th Amendment. The federal district court allowed proponents of the initiative to defend Propo-

sition 8. The case, eventually called *Hollingsworth v. Perry*, began as a bench trial before a federal judge in January 2010. The chief lawyer for the defense was Charles Cooper, financially supported by the Alliance Defense Fund, a coalition of mostly church people—evangelicals, Catholics, Mormons and others—who opposed same-sex marriage.

Boies and Olson argued that Proposition 8 discriminated against homosexuals on the basis of an “identity–sexuality–that, like race, is immutable.” This harmful discrimination prompted a hateful public campaign for Proposition 8, depicting homosexuals as sinful, evil, dangerous, unnatural and threatening.

Defender Cooper argued that marriage promotes procreation in stable, enduring man-and-wife unions. Change to the traditional definition of marriage was an experiment with unknown consequences. Moreover, this court should leave discretion over divisive social issues to the legislature. In August 2010 the court ruled with sweeping support for the plaintiffs.

To no one’s surprise, the case was promptly appealed to the federal Ninth Circuit Court of Appeals. A three-judge panel heard arguments in December 2011. In February 2012 the appellate court ruled against Proposition 8, saying that “the people of California violated the Equal Protection clause” (212-213). However, it was the loser’s right to appeal to the U.S. Supreme Court, and Charles Cooper did so in July 2012.

Cooper asked the U.S. Supreme Court to correct the errors of the lower courts regarding “the ancient and vital institution of marriage” and any inclusion of homosexual couples to that institution. Proposition 8 was not discrimination; it simply protected the sanctity of heterosexual marriage. Boies and Olson argued that (1) marriage is a fundamental right; (2) depriving same-sex citizens the right to marry harmed them; (3) allowing same-sex marriage did not harm the institution of marriage or anyone else. Oral arguments before the Supreme Court took place on March 26, 2013.

There was drama in the presentations of each side; and, as typical, sharp questions came from the nine-member Supreme Court. Cooper argued that Proposition 8 could be changed by the California voters by referendum if they wished to do so. Un-

til then the California constitution, as amended by Proposition 8, should remain in force. On the other side, Olson argued that “the history of our Constitution is the story of the extension of constitutional rights to people once ignored or excluded” (258).

On June 26, 2013, four and a half years after Proposition 8 passed, the Supreme Court, divided 5 to 4, gave a rather technical ruling. Despite having heard the arguments from the supporters of Proposition 8, the Supreme Court denied them legal standing to defend the amendment. Therefore its decision supported the earlier rulings against the federal constitutionality of the amendment. Thus the Court ruled against the legitimacy of Proposition 8. The important result was that in California no longer was there any legal bar against same-sex marriage. It was a clear though restricted victory for Boies and Olson and those they represented.

Let me comment more broadly about what can be inferred from the courts and then from and about the politics of the case. Boies and Olson chose to fight their battle with the intent to legitimize same-sex marriage, not only in California but in principle and across all of American society and even beyond. In atypical fashion these two co-authors begin their book with an articulation of their separate individual reasons for taking the sides as they did. Olson began from his judgment that Proposition 8 deserved challenge: “I did not think the right to marriage should or could constitutionally be withheld from homosexuals” (25). Reputed as a political conservative, he asserted, “Marriage is a coming together of two loving individuals to create a family, to seek stability, to work together, to share hopes and dreams, to build an economic unit, to provide mutual support, to help form a community. What can be more conservative than that?” (26). Boies jumped at Olson’s invitation to join the challenge, believing “we would win,” believing the case would “advance the cause of equality,” and believing that he and Olson had the resources and experience to “prepare, try, and appeal the case as well as, and probably better than, any alternative team” (45–46).

The Olson and Boies alliance to defeat Proposition 8 was conspicuous in much of the public reporting about the case. Both were widely known and respected attorneys, Olson as a Republican and Boies as a Democrat. In the aftermath of the 2000

presidential election, they were the lead and opposing attorneys battling for Bush (Olson) and Gore (Boies) regarding the contested electoral vote count in Florida—Bush and Olson prevailing. Now, united in advocating for the right of homosexuals to marry, the odd coupling of these two advocates was frequently noted in journalistic reports about the case. Commentators found a certain charm in the notion that these two partisan antagonists could come together regarding same-sex marriage. Should there not be a larger consensus?

The Supreme Court decision in *Hollingsworth v. Perry* did not immediately legitimize homosexual marriage everywhere, just in California. But it did cut the ground from under legal defenses for laws in other states limiting marriage to “opposite-sex only” couples. As reported on July 29, 2014, in *USA Today*, a recent U.S. Court of Appeals decision asserted the right of homosexuals to marry in Virginia. Appellate courts have spoken in Utah and Oklahoma. There are challenges to bans on homosexual marriage coming in Idaho, Indiana, Kentucky, Michigan, Nevada, Ohio, and Tennessee. Appeals are pending in Arkansas, Texas, and Colorado.

It is worthy of note that as challenges to Proposition 8 moved through the judicial process in *Hollingsworth*, none of the political executives empowered by the amendment were willing to defend it in court. Successive California governors, despite being named as defendants in the original trial (first, Schwarzenegger, Republican, and then Brown, Democrat), as well as the state attorney general and other enforcement officials, would not support Proposition 8’s state constitutional legitimacy. Its defense was left to counsel with resources from the groups that campaigned for the amendment. When the case came to the U.S. Supreme Court, the Obama administration—through Eric Holder, the U.S. Attorney General, and the Justice Department staff—weighed in against Proposition 8 with a “friend of the court” brief. At the Supreme Court, the administration’s Solicitor General spoke on the side of Olson and Boies. Political executives at the national, state, and local levels favored the homosexual-rights side in this case, from its beginning to its conclusion.

In addition to describing the judicial process, Olson and Boies candidly revealed their efforts to

affect public opinion about homosexual marriage. The plaintiffs did not select Boies and Olson to represent them and their case. Olson and Boies recruited apt couples for it. The selection was calculated. In their own description, a winsome pair of gay men was to be combined with an established couple of lesbian women as plaintiffs for this case. Having assembled financial support for a judicial challenge, Olson and Boies specified the “qualifications” according to which they would choose plaintiffs. Well into the preparations for their case the selections were made: “With Sandy, Chris, Jeff and Paul on board, the Prop 8 challenge had its plaintiffs, the real, familiar, likable, steady people Ted [Olson] had described in his first meeting...” (54). Boies placed an op-ed piece of advocacy in the *Wall Street Journal*. Olson wrote “The conservative case for gay marriage...” for *Time* magazine. The Proposition 8 opponents saw themselves as angels of light bringing progress in human rights to America. They associated their cause with hard-won, full civil rights for people of color, legal freedom for interracial marriage, and equality for women. Equality in marriage without regard to gender, they said, was an essential human right.

Let me note two significant takeaways for Reformed Christians. When at trial Olson and Boies made the case for same-sex marriage; they put into the record extensive testimony of expert witnesses—persons qualified as experts for their writings in juried journal publications (see pp. 137 ff.). In his closing argument, Olson cited the authority of psychiatrists: “Psychiatrists have changed their view about homosexuality. People no longer think it’s a disorder[,or]... that all those horrible taboos are justified in fact” (183). By contrast to the secular standard of evidence, they and the courts held that

while religious values can, and often do, influence policy debates, the same provision of the Constitution that protects the free exercise of religion prohibits “an establishment of religion.” This means that government cannot enforce or impose one’s religious tenets on others. For this reason people who campaigned against marriage equality were ordinarily careful to present their arguments in terms of ‘traditional’ values instead of conservative Christian dogma and they rarely if ever discussed

the church-connected donors who provided almost all their funding. (91-92; see also pp. 100-102)

In short, our policy preferences may, can, and should derive from Godly insights, but the political case for them must emerge in secular arguments with qualifying evidence. If the reader was ever enamored of the “America is a Christian nation” mantra, the evidence against that assertion is overwhelming.

The second takeaway has to do with political tactics by those who advocated for Proposition 8. Olson and Boies were able to put into the trial record evidence of derogatory slurs and unproven allegations against homosexuals in church-related fundraising and campaign messages. A particular illustration in the messaging for Proposition 8 was a webpage stating that homosexuals were “12 times more likely to molest children.” Another was the claim that homosexual marriage would damage heterosexual marriages. A related one suggested that homosexual marriage would harm children. Olson and Boies were able to discredit such claims and others with scholarly research and contrary findings of fact. In contrast, they could demonstrate harm to persons denied marriage on the basis of gender.

In short, our policy preferences may, can, and should derive from Godly insights, but the political case for them must emerge in secular arguments with qualifying evidence.

As a long dead Chicago machine politician was frequently quoted, “Politics ain’t beanbag.” No, it requires tough, hard, intellectually honest combat. Prevailing in behalf of moral justice is difficult and demanding work. Nevertheless, Reformed Christians are called to bear witness regarding God’s kingdom, using his Word and wisdom and reflecting his love even in the public square. We must love the sinner while battling the sin. Recall Paul’s axiom in Romans 12:21: “Do not be overcome by evil, but overcome evil with good.”