



February 22, 2013
 What Marriage is For
 Posted by Margaret Talbot



On Thursday, Theodore Olson and David Boies, the Odd Couple of lawyers who have brought the constitutionality of same-sex-marriage bans before the Supreme Court, filed a brief that previews the arguments they will present to the Justices on March 26th. The most powerful rhetorical move they make in it—and it’s about time—is to flip the main argument against same-sex marriage on its head. Opponents, including the lawyers for California’s 2008 ban on gay marriage, Proposition 8, contend that allowing gays and lesbians to marry redefines marriage. But Olson and Boies argue that by rooting the meaning of marriage so firmly in procreation it’s in fact their opponents who are doing the redefining: they who have proposed “a cramped definition of marriage as a utilitarian incentive devised by and put into service by the state—society’s way of channeling heterosexual potential parents into ‘responsible procreation.’”

—For most Americans, it doesn’t

offer data for this, it rings true—marriage is about throwing your lot in with someone you love and building a publically acknowledged family, with or without children. It has less to do with the state’s interests in promoting childbearing—a touchstone to which the Prop. 8 defenders return again and again—than it does with individual lives and the pursuit of happiness.

There has always been a big stumbling block to the argument that because marriage is mainly for procreation, gays and lesbians don’t need or deserve access to it. That obstacle emerged as far back as a pre-trial hearing in 2009, when Judge Vaughn Walker, the federal district-court judge, questioned Charles Cooper, one of the lawyers defending Proposition 8:

Walker: The last marriage that I performed, Mr. Cooper, involved a groom who was ninety-five, and the bride was eighty-three. I did not demand that they prove that they intended to engage in procreative activity. Now, was I missing something?

Cooper: No, your Honor, you weren’t. Of course, you didn’t.

Walker: And I might say it was a very happy relationship.

Cooper: I rejoice to hear that.

Virtually no one objects to people past reproductive age marrying, let alone infertile people or those who simply choose not to have children. Indeed, as Olson and Boies point out, the Supreme Court has upheld the right of married couples not to procreate—in *Griswold v. Connecticut*, the 1965 decision that found a “right to marital privacy” included access to birth control. The Court has upheld the right of incarcerated people to marry even when they would not be allowed conjugal visits, explicitly endorsing uses and virtues of marriage beyond the reproductive. These are hard precedents to get around if you are basing much of your argument, as the proponents of Prop. 8 seem to be doing, on the definition of marriage as a child-producing institution for heterosexual couples.

It’s not exactly a legal argument, but one of the best points Olson and Boies make about the lawyers on the other side is this one: “In their 65-page brief about marriage in California, Proponents do not once mention the word ‘love.’ love’s not all you need in a definition of marriage, but it’s got to be in there somewhere.

” Maybe

Read more: <http://www.newyorker.com/online/blogs/newsdesk/2013/02/what-marriage-is-for.html#ixzz2LpieFaoM>