

Dreaming of Marriage Equality

Paper Tigers and Straw Men All Fall in The Case for Marriage Equality

Redeeming The Dream – The Case for Marriage Equality

Written by David Boies and

Theodore B. Olson

320 pages

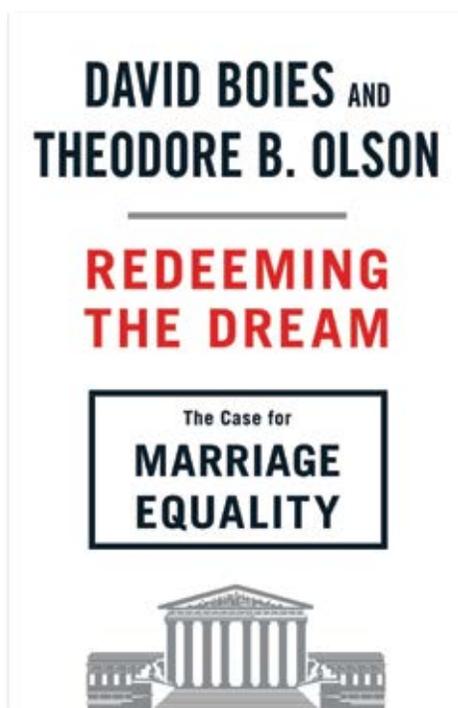
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When first together on the national stage 14 years ago, uber-lawyers David Boies and Ted Olson were on opposite sides of the “v” in *Bush v. Gore*. The “s” election of George W. Bush by the United States Supreme Court was not the only peculiar thing to come out of that debacle. This odd couple, the Dream Team of Boies and Olson, was born in that corrupt cauldron of counts, re-counts and butterfly ballots.

Olson and Boies come from different ends of the political spectrum, but are now colleagues and genuine friends, in large part due to collaboration on their successful challenge to California’s Proposition 8, the state constitutional amendment passed in 2008 (52 percent to 48 percent) preventing gay marriage in The Golden State.

Their literary joint effort about that case is an excellent and fascinating tale of a major and noble pro bono victory by generous activists and two mega law firms that helped thousands directly and millions indirectly. But, let us not forget for a moment that these two legendary litigators cut their teeth and line their pockets representing scores of corporate masters against the interests of many more millions.

Ted and David’s excellent adventure takes the reader from the birth of this important and high-profile case in the Hollywood home of liberal activists, Mr. and Mrs. Rob Reiner, to the hallowed halls of the U.S. Supreme Court more than four years later. “Meathead” from “All in the Family” and his wife, embarrassed and depressed that their



state had taken such a profound and backward step in history, led and helped finance the effort.

As a litigator, what struck this reviewer was the classic mega-firm way of litigation – “spare no expense or resource,” “if you can do it, you must do it” and “always plan for and expect massive discovery, multiple experts, trial and multiple appeals.” While questioning the strategy and tactics of any victorious counsel, much less these two legendary brothers in arms, is risky, at best, it is disturbing, yet unsurprising, that at no point do they seem to have seriously considered a much more focused attack on the heart, nay the Achilles’ Heel of their opponent’s case.

First, they really did not have an opponent. Technically, the governor, then Arnold Schwarzenegger (“The Governor”) was the defendant since the challenge was to a state constitutional amendment. Wisely,

Republican Schwarzenegger, like Democrat Obama, eventually came to support marriage equality and refused to defend. Attorney General Jerry Brown, later and now governor, likewise refused and went further formally opposing the Amendment in court.

Rather than press for default and unopposed decision on the legal merits, the Dream Team, hoping to make this a cause celebre with as much national educational as legal value, decided not even to oppose the intervention by a well-financed, though rag-tag and odd group which had proposed and advocated for the passage of Proposition 8.

District Court Chief Judge Vaughn R. Walker, a known, but not publicly gay man involved in an unmarried, long-term relationship, granted the intervenors’ motion and the battle, such as it was, was joined.

Second, the opponents faced an uphill battle on the law, the facts and the comparative resources and talents of the teams. While few cases have their Perry Mason moments where opposing counsel makes a damning concession, where key witnesses drop out of sight due to fear of looking foolish or liars, where key “expert” witnesses recant and support their opponent, or where an opponent has absolutely no evidence whatsoever to support the key point in its case, this case had them all, and then some.

Not all, but many cases have what I call one “Why in the world?” question, to which one must have a reasonable response under law supported by actual evidence in order to win. In this case, that was simply, “Why in the world would permitting gay marriage threaten or harm heterosexual marriage, children or society?”

Boies and Olson nominally praise their opposing counsel, Charles “Chuck” Cooper as a “preeminent trial and

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appellate lawyer,” but Cooper, at oral argument on his motion for summary judgment (Boies and Olsen filed none), in what they call, and rightly so, “one of the most memorable and decisive moments in the case,” when asked what harm would be caused, said, “I don’t know. I don’t know.” (p. 85-86) Wow! If plaintiffs had not filed a motion for summary judgment yet, then would have been the time to do so.

The balance of the book (212 pages) is anticlimactic as the authors foreshadow, “In the end, neither he nor his trial witnesses nor his colleagues knew of any harm that would result from allowing same-sex couples to have the same right to marry that opposite-sex

couples enjoyed.”

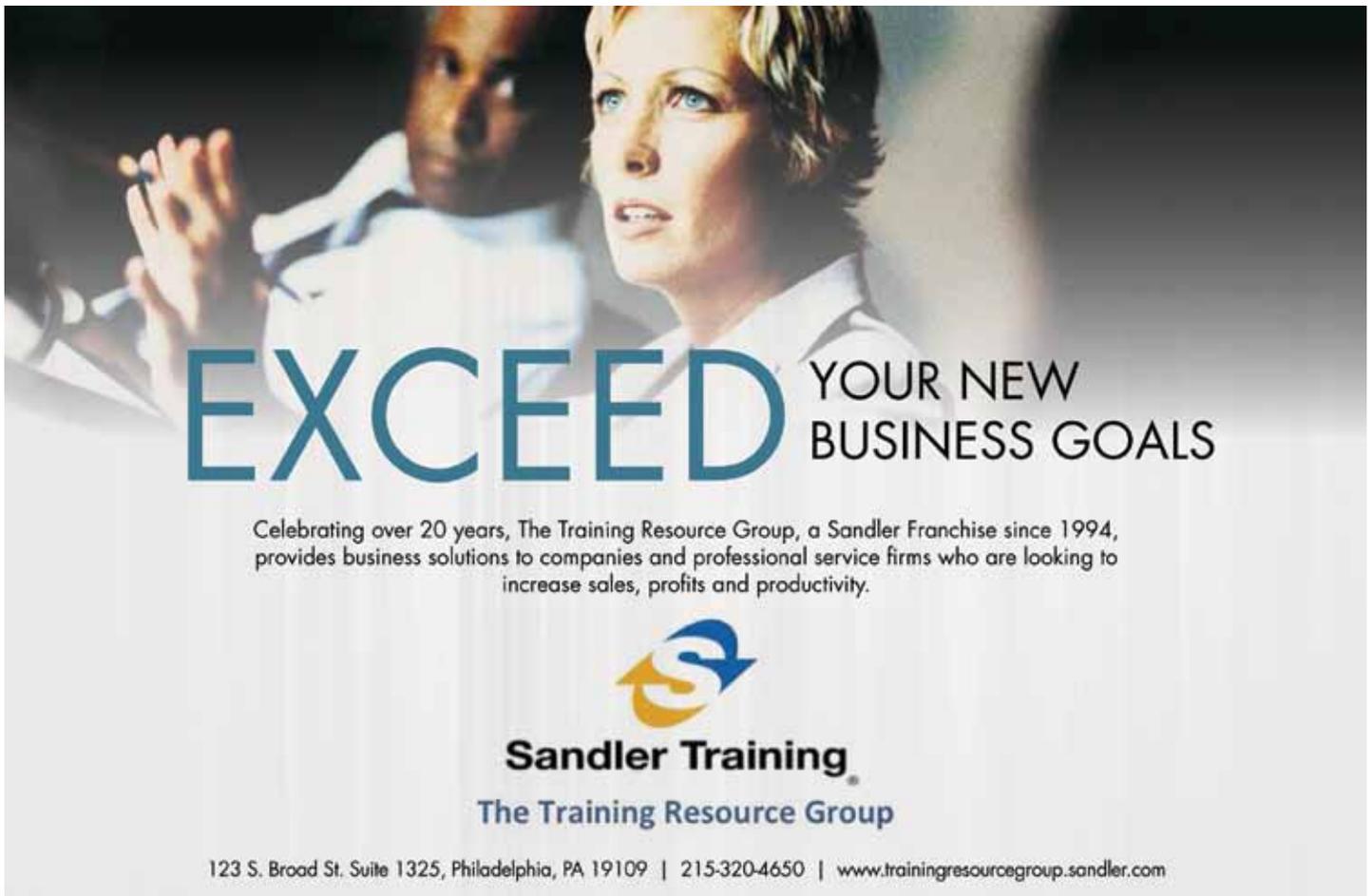
The opponents were not exactly Paper Tigers and the result was not preordained, but these straw men eventually fell at every level, including the U.S. Supreme Court. The ultimate irony was that the court let stand the lower court’s ruling that the Proposition 8 Amendment was unconstitutional because the intervenors did not have standing. Proof positive that a procedural ruling on standing can be used to do the right thing, 157 years after the court used the same device to do an awful thing in *Dred Scott*.

Lastly, the touching stories of the carefully selected same-sex couple plaintiffs and their desire to marry will bring a tear to the eye of all but the most

hardhearted. Though they represented the interests of some 18,000 California same-sex couples who had married before Proposition 8 passed, and thousands of others who wished to do so, their individual, personal love stories speak so much more than the thousands of pages of legal briefs and transcripts.

No one, however, seems to have made the comedian’s point that since opponents of gay marriage are really against gay sex, they would more likely get the results they wanted by letting gay couples get married. ■

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