



Welcome Back, Ted

Will the Federalist Society embrace activism on gay marriage?

By John Murdock
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This Thursday, for the first time since he argued before the Supreme Court in 2013 for a constitutional right to same-sex marriage, Theodore Olson will be back in the Federalist Society limelight. The former Solicitor General of the United States under President George W. Bush—for whom he successfully argued *Bush v. Gore*—will be talking not gay marriage but class actions and the BP oil spill settlement. A few years ago, that would have amounted to business as usual. Olson, a gifted communicator, would regularly serve as a Federalist Society speaker, even acting as their reviewer in chief after the Supreme Court wrapped up its session each June. However, when he rather publicly began calling for the court creation of “equal protection” rights utterly unfathomable to our nation’s founders, those duties generally ceased.

The National Press Club event will mark the latest in the complicated dance of distance and embrace between the nation’s premier conservative legal organization and a man who professionally benefited from his association with the group but then used his considerable cachet to further a cause opposed by many of its members. True, the Federalist Society includes under its tent those with a variety of policy preferences regarding “marriage equality,” from social conservatives shaking their heads to libertarians clapping their hands. Yet there has been a general degree of agreement about the process that should be employed. Rather than discovering a new right in the Constitution to override standing law, the words of the Constitution should actually matter and democracy should be respected.

Olson, though, had strong personal feelings on the topic, a desire to make a difference, and the ego to believe he could. After enlisting his liberal lawyer friend David Boies, who had represented Al Gore in their most famous tussle, the pair could have supported politicians or ballot initiatives with their financial resources, oratory skills, and press-drawing odd couple celebrity. Instead, they set their sights on a court fight with Proposition 8, whereby a majority of voting Californians had amended their state constitution to undo a judicial decision that had found a never before seen right to gay marriage. The even bigger goal was a United States Supreme Court decision that would

do for America what the state supreme court had tried, against the wishes of the people, to do for California.

Olson strikes a chord similar to Ken Mehlman, Bush's 2004 campaign manager whose effort was greatly assisted by traditional marriage ballot initiatives in key states like Ohio but who has since come out of the closet to favor the nullification of those results. At a Cato Institute gathering where the libertarian crowd was upbeat following the 2013 oral arguments, I asked Mehlman how he responded to volunteers like me who worked to elect President Bush precisely because he stood *against* legislating from the bench. Mehlman blithely informed me that it was different this time because these were "fundamental rights." I must have missed that asterisk in the stump speech.

Olson also invoked "fundamental rights" and was queried by Justice Scalia as to just exactly *when* it became unconstitutional to exclude homosexual couples from marriage: 1791 with the Bill of Rights, 1868 with the 14th Amendment, or some other date, perhaps after the Court declined in 1971 to review a Minnesota Supreme Court decision upholding opposite-sex marriage requirements? Olson replied, in classic "living Constitution" fashion by saying this happened "when we as a culture determined that sexual orientation is a characteristic of individuals that they cannot control." Pushed further for a date on that occurrence, Olson said, "There's no specific date in time. This is an evolutionary cycle."

I recognize that the Federalist Society's leadership is in a difficult spot—Olson's personal roots with them run deep and his late wife Barbara Olson is the namesake for an annual lecture. But sweeping the issue under the rug is not a real solution. Olson's lengthy Federalist Society biography makes no direct mention of the work for which he is now best known and closes with a disclaimer disavowing any organizational endorsement of its expert's views. Yet, just letting Good Ol' Ted slide back into his familiar seat sends the message that what he has been up to the past few years is really no big deal. It is a big deal.

Olson returns to his conservative home not as a repentant prodigal son, but as one telling his father's farmhands' bawdy tales. Olson is in the midst of a victory lap with the release of a new book about his heroic gay marriage battle. That celebration is a bit premature—though as Justice Scalia feared in his dissent from the Court's invalidation of the Defense of Marriage Act's definition of marriage, the second shoe may indeed drop shortly. That wasn't even Olson's case, but with assists from a federal district court judge who came out as being in a same-sex relationship only after ruling and retiring, and elected officials who chose to forgo their traditional duty to vigorously defend state law, Olson and Boies did succeed in disenfranchising millions of Californians on a procedural technicality.

The Federalist Society has a long history of bringing together gifted advocates from across the intellectual spectrum to debate the issues of the day. Rather than sharing the room with a large elephant while he discusses whether BP is overpaying for its spill, I would like to see Olson first defend the mess he made of democracy in California while

sharing the stage with conservative luminaries who have yet to embrace judicial activism.

Coincidentally or providentially, my Federalist Society membership is scheduled to expire on September 5th, the day after Olson's presentation. The back of my membership card is emblazoned with the following from Federalist No. 78:

The courts must declare the sense of the law, and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would be the substitution of their pleasure to that of the legislative body.

That it is still a quote worth talking about.