

Marriage Equality and Some Lessons for the Scary Work of Winning*

Evan Wolfson†

I.	AMERICA IN A CIVIL RIGHTS MOMENT.....	135
II.	THE HUMAN RIGHTS BATTLEFIELD OF MARRIAGE	137
III.	THE CLASSIC CIVIL RIGHTS PATTERN OF PATCHWORK.....	138
IV.	THE UNION: A HOUSE DIVIDED	139
V.	BASIC LESSONS TO REMIND US WHAT WINNING FEELS LIKE	141
	A. <i>Wins Trump Losses</i>	141
	B. <i>Losing Forward</i>	141
	C. <i>Tell the Truths</i>	142
	1. Truth One.....	143
	2. Truth Two.....	144
	D. <i>Generational Momentum</i>	145
VI.	THE STAKES	145

I. AMERICA IN A CIVIL RIGHTS MOMENT

One of the good things about my job is I have plenty of time on planes and trains in which to read.

* Keynote speech given at the National Lesbian and Gay Law Association's (NLGLA) Lavender Law 2004 Conference on September 30, 2004. Lavender Law® is NLGLA's annual gathering of attorneys, legal academics, and law students to discuss legal and political issues affecting lesbian, gay, bisexual, transsexual, and intersexed (LGBTI) individuals and the community.

† Evan Wolfson is Executive Director of Freedom to Marry, the gay and nongay partnership working to win marriage equality nationwide. Before founding Freedom to Marry, Evan served as marriage project director for Lambda Legal Defense and Education Fund, was cocounsel in the historic Hawaii marriage case, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), and participated in numerous gay rights and HIV/AIDS cases. Evan previously served as Associate Counsel to Lawrence Walsh in the Iran/Contra investigation and as an Assistant District Attorney in Brooklyn, New York. Between Yale College and Harvard Law School, Evan spent two years with the Peace Corps in West Africa. Citing his national leadership on marriage equality and his appearance before the United States Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the NATIONAL LAW JOURNAL in 2000 named Evan one of "the 100 most influential lawyers in America." In 2004, Evan was named one of the "Time 100," TIME MAGAZINE's list of "the 100 most influential people in the world." Evan Wolfson's first book, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY, was published by Simon & Schuster in July 2004.

Right now I am reading the Library of America's anthology, *Reporting Civil Rights*.¹ In two volumes, they have collected the journalism of the 1940s, '50s, '60s, and '70s, describing the blow-by-blow, the day-to-day, of what the struggles of those years felt and looked like—before those living through that moment knew how it was going to turn out.

To read it is to capture the exhilaration, the empowerment, the being appalled, and the just plain being scared.

That is what a civil rights moment feels like when you are living through it—when it is uncertain and not yet wrapped in mythology or triumphant inevitability.

This year our nation celebrated the fiftieth anniversary of *Brown v. Board of Education*.²

But what followed *Brown* was not the sincere and insincere embrace it gets today, but—in the words of the time—legislators in a swath of states declaring “massive resistance,” billboards saying “Impeach Earl Warren,” members of Congress signing resolutions denouncing “activist judges” (sound familiar?), and, of course, the marches, Freedom Rides, organizing summers, engagement, hard work, violence, legislation, transformations—pretty much everything we today think of as the Civil Rights Movement—all *after Brown*.

America is again in a civil rights moment, as same-sex couples, their loved ones, and nongay allies struggle to end discrimination in marriage. A robust debate and numberless conversations are helping our nation (in Lincoln's words) “think anew” about how we are treating a group of families and fellow citizens among us. Today it is we: lesbians, gays, bisexuals, same-sex couples, and transgendered (LGBT) individuals and our loved ones and nongay allies who are contesting second-class citizenship, fighting for our loved ones and our country, seeking inclusion and equality—and it is scary, as well as thrilling, to see the changes and feel the movement.

How can we get through this moment of peril and secure the promise?

There are lessons we can learn from those who went before us—for we are not the first to have to fight for equality and inclusion. In fact, we are not the first to have to challenge discrimination even in *marriage*.

1. C. CARSON ET AL., *REPORTING CIVIL RIGHTS* (1st ed. 2003).

2. 349 U.S. 294 (1955).

II. THE HUMAN RIGHTS BATTLEFIELD OF MARRIAGE

In fact, marriage has always been a human rights battleground on which our nation has grappled with larger questions about what kind of country we are going to be. As a nation, we have wrestled on the terrain of marriage with questions about the proper boundary between the individual and the government. Marriage has been a battlefield on which our nation has struggled with questions about the equality of men and women. It has been a battlefield on which our nation has wrestled with questions about the separation of church and state and questions about *who* gets to make important personal choices of life, liberty, and the pursuit of happiness.

As a nation, we have made changes in the institution of marriage and, in at least four major struggles in the past few decades, fought over these questions of whether America is committed to both equality and freedom.

On the human rights battlefield of marriage, we ended the rules whereby the government, not couples, decided whether they should remain together after their marriages had failed or become abusive. Divorce transformed the so-called “traditional” definition of marriage from a union based on compulsion to what most of us think of as marriage today—a union based on love, commitment, and the choice to be together and care for one another.

On that battlefield of marriage, we ended race restrictions on who could marry whom, based on the traditional “definition” of marriage, defended as part of God’s plan, seemingly an intractable part of the social order of how things had to be.

We ended the interference of the government in important personal decisions such as whether or not to procreate, whether or not to have sex without risking a pregnancy, whether or not to use contraceptives—even within marriage.

And on that battlefield we ended the legal subordination of women in marriage—and thereby, transformed the institution of marriage from a union based on domination and dynastic arrangement to what most of us think of it as today—a committed partnership of equals.

Yes, our nation has struggled with important questions on the human rights battlefield of marriage, and we are met on that battlefield once again.

III. THE CLASSIC CIVIL RIGHTS PATTERN OF PATCHWORK

As in any period of civil rights struggle, transformation will not come overnight. Rather, the classic American pattern of civil rights history is that our nation goes through a period of what I call in my book, *Why Marriage Matters*, a “patchwork.”³

During such patchwork periods, we see some states move toward equality faster, while others resist and even regress, stampeded by pressure groups and pandering politicians into adding additional layers of discrimination before—eventually—buyer’s remorse sets in and a national resolution comes.

So here we are in this civil rights patchwork. On the one hand, as the recent powerful and articulate rulings by courts in Washington and New York states demonstrated in the past few weeks, several states *are* advancing toward marriage equality, soon to join Massachusetts in ending discrimination and showing nongay Americans the reality of families helped and no one hurt.

Meanwhile, on the other hand, as many as a dozen states targeted by opponents of equality as part of their own ideological campaign and for their political purposes could enact further *discriminatory* measures this year, compounding the second-class citizenship gay Americans already endure.

These opponents—opponents who are antimarriage equality, *yes*, but also, antigay, antiwomen’s equality, anticivil rights, antichoice, and antiseperation of church and state—are throwing everything they have into this attack campaign because they know that if fair-minded people had a chance to hear the stories of real families and think it through, they would move toward fairness, as young people already have in their overwhelming support for marriage equality.

Most importantly, as Americans see the faces and hear the voices, for example, of couples in San Francisco, as Americans witness the families helped and no one hurt in Massachusetts and digest the reassuring way in which marriage equality is already finding acceptance there after just a few months, as Americans engage in conversations in every state, and many families chat with people like us and nongay allies, wrestling hearts and minds are opening. And people are getting ready to accept, if not necessarily fully support, an end to discrimination in marriage.

3. EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY*, 154-156 (2004).

IV. THE UNION: A HOUSE DIVIDED

In past chapters of civil rights history unfolding on the battlefield of marriage, this conversation and this patchwork of legal and political struggles would have proceeded in the first instance—and over quite some time—in the *states*, without federal interference or immediate national resolution.

That is because historically, domestic relations, including legal marriage, have, under the American system of federalism, been understood as principally (and almost entirely) the domain of the states.⁴

States worked out their discrepancies about who could marry whom under the general legal principles of comity, reflecting the value of national unity. The common-sense reality that it makes more sense to honor marriages than to destabilize them was embodied in the relevant specific legal principle, generally followed in all states—indeed, almost all jurisdictions around the world—that a marriage valid where celebrated will be respected elsewhere, even in places that would not have performed that marriage.

States got to this logical result not primarily through legal compulsion, but through common sense—addressing the needs of the families and institutions (banks, businesses, employers, schools, etc.) before them. Eventually a national resolution came, grounded, again, in common sense, actual lived-experience, and the nation's commitment to equality, constitutional guarantees, and expanding the circle of those included in the American dream.

But when it comes to constitutional principles such as equal protection—and, it now appears, even basic American safeguards such as checks and balances, the courts, and even federalism—antigay forces believe there should be a “gay exception” to the constitutions, to fairness, and to respect for families. Inserting the federal government into marriage for the first time in U.S. history, *our opponents* federalized the question of marriage, prompting the passage of the absurdly named, radical, unconstitutional, so-called “Defense of Marriage Act” (DOMA) back in 1996.⁵

4. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (“Insofar as marriage is within temporal control, the States lay on the guiding hand.”); see also *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (“The scope of a federal right is, of course, a federal question, but that does not mean its content is not to be determined by state, rather than federal law. This is especially true when a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.”).

5. See Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)). This federal antimarriage law creates an un-American caste system of first- and second-class marriages. If the federal government likes whom you marry, you get a vast

Now when this radical law was first proposed, some of us spoke up immediately saying it was unconstitutional—a violation of equal protection, a violation of the fundamental right to marry, a violation even of what they themselves used to proclaim they supported—federalist guarantees such as the Full Faith and Credit Clause and leaving to the states what properly belonged to the states—a violation of limits on Congress's power. Ignoring our objections, our opponents pressed forward with their election-year attack.

Today, these same opponents of equality concede the unconstitutionality of the law they stampeded through just eight years ago and are seeking an even more radical means of assuring gay people's second-class citizenship—this time through an assault on the United States Constitution itself, as well as the constitutions of several states.⁶

Because they do not trust the next generation, because they know they have no good arguments, no good reason for the harsh exclusion of same-sex couples from marriage, our opponents are desperate to tie the hands of all future generations, and as many states as possible, now.

This patchwork period—and especially the next few weeks and months—will be difficult, painful, even ugly, and we will take hits. Indeed, we stand to take several hits in the states where our opponents

array of legal and economic protections and recognition—ranging from Social Security and access to health care, to veterans' benefits and immigration rights, to taxation and inheritance, and a myriad of others. See DAYNA SHAH, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT, GAO-04-353R, at 1 (Jan. 23, 2004) (identifying 1138 ways in which marriage implicates federal law). Under so-called DOMA, if the federal government does not like whom you married, these typically automatic federal recognitions and protections are withdrawn in all circumstances, no matter what the need.

The federal antimarriage law also purported to authorize states not to honor the lawful marriages from other states (provided those marriages were of same-sex couples)—in defiance of more than 200 years of history in which, as I said, the states had largely worked out discrepancies in marriage laws among themselves under principles of comity and common sense, as well as the constitutional commitment to full faith and credit.

6. See *Scherrer v. Scherrer*, 334 U.S. 343, 364 n.13 (1948) (Frankfurter, J., dissenting) (noting the first constitutional amendment to allow Congress to have authority over domestic relations was proposed and rejected in 1884). Through 1948, seventy similar federal constitutional amendments were proposed, prompted by a national debate (analogous to today's) over whether to allow civil divorce. All such proposals failed, and the states and Americans were properly given an opportunity to work out questions of marriage and interstate respect, while the federal government honored the lawful marriages (and divorces). See *id.*; see also Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, ISSUES IN LEGAL SCHOLARSHIP 1 (2004), at <http://www.bepress.com/i/s/isss/art1> (examining the 133 proposed constitutional amendments regarding marriage). And after a period of conversation and experience, and generational shifts as the institution of marriage evolved, the United States Supreme Court clarified that lawful determinations as to marital status, through divorce, must be respected throughout the country. See *Cook v. Cook*, 342 U.S. 126, 128 (1951) (upholding Florida divorce decree valid in Vermont under the rule that facially valid judgments are presumed valid in sister states).

have thrown antigay measures at us in their effort to deprive our fellow-citizens of the information, the stories of gay couples, the opportunity to dispel stereotypes and refute right-wing lies. As our opponents struggle in their last ditch effort to deprive our fellow Americans of the lived-experience of the reality of marriage equality, we are going to take hits. While it is especially outrageous that the opponents of equality are using constitutions as the vehicles for this division and wave of attacks on American families, in the longer arc, their discrimination will not stand.

Here tonight, I want to come and take the opportunity to lay out what I believe are a few basic lessons we can cling to in the difficult times ahead, to help us keep our eye on the prize of the freedom to marry and full equality nationwide, a prize that shimmers within reach.

V. BASIC LESSONS TO REMIND US WHAT WINNING FEELS LIKE

A. *Wins Trump Losses*

Lesson Number One: Wins trump losses.

While we stand to lose several battles this year, we must remember that wins trump losses.

Wins trump losses because each state that ends marriage discrimination gives fair-minded Americans the opportunity to see and absorb the reality of families helped and no one hurt when the exclusion of same-sex couples from marriage ends. Nothing is more transformative, nothing moves the middle more, than making it real, making it personal—and seeing other states join Canada and Massachusetts—will be the engine of our victory. We must make sure that in the months and years ahead our nation sees a critical mass of states embracing equality.

B. *Losing Forward*

Lesson Number Two: Even where we cannot win a given battle, we can still engage and fight so as to at least *lose forward*, putting us in a better place for the inevitable next battle.

Now let me say a little more about this idea of “losing forward.” After all, as someone most famous for the cases I lost, I have built an entire career on it.

Losing forward is a way that all of us can be part of this national campaign, no matter what our state. Even the more challenged states, the states with the greater uphill climb, the states where we are most outgunned and under attack—even those of us in the so-called “red

states” still have a pivotal part in this national movement and can make a vital contribution.

In *every* state—even those where we cannot win the present battle, but fight so as to lose forward—we have the opportunity to enlist more support, build more coalitions, and make it possible for more candidates and nongay opinion leaders to move toward fairness. All this contributes to the creation of the national climate of receptivity in which some states may cross the finish line before others, but everyone can be better positioned to catch the wave that will come back to every state in this national movement.

Work on the ground in Georgia, for example, can get us, and I never thought I would be saying this, a Bob Barr speaking out against the constitutional amendment—an important voice for us. Work on the ground in Georgia or any number of other states, can make certain districts, if not the entire state, safe for African-American leaders or “surprising” voices to speak out in support of marriage equality. Work in Michigan—while perhaps not enough to win the battle of the day—can still help enlist prominent labor or corporate leaders to our cause.

And, working together, this national chorus that we create together will indeed swell, with some states further along but all participating, until all are free.

Wins trump losses. As long as we repel a federal constitutional amendment and continue to see some states move toward equality, while beating back as many attacks as possible and enlisting more diverse voices into the conversation, we will win.

C. Tell the Truths

Lesson Number Three: Tell the truths.

Now, the principal reason we are going to take hits this year and lose many, if not all, of the state attacks in November is because our opponents are cruelly cherry-picking their best targets and preemptively depriving the reachable middle of the chance to be reached. They have more of a head start, more money, and more infrastructure through their megachurches and right-wing partners—and fearmongering at a time of anxiety is easy to do. And, of course, historically, it is difficult to win civil rights *votes* at the early stage of a struggle.

But, to be honest, there is another reason, too, that we will not do well in most of these votes this year. Quite simply, *our* engagement, our campaigns in almost all of these states, is “too little, too late.” We are starting too late to have enough time to sway people to fairness—and we are giving them too little to think about to guide them there. We have to

avoid that error in the next wave of battles we face next year, which means, from California to Minnesota, from Wisconsin to Maine, to wherever that next set of battles comes, we must start now and we must do it right.

What, then, *is* the “right” way to have this conversation, to mount this campaign?

The country right now is divided roughly in thirds. One third supports equality for gay people, including the freedom to marry. Another third is not just adamantly against marriage for same-sex couples, but, indeed, opposes gay people and homosexuality, period. They think we are immoral. They think we are sick. This group is against any measure of protection or recognition for lesbians and gay men, for bisexuals and transgendered people, whether it be marriage or anything else. They are not our primary target audience today.

But then there is the “middle” third—the people I speak to in my book, the ones I think of as the reachable-but-not-yet-reached middle. These Americans are genuinely wrestling with this civil rights question and have divided impulses and feelings to sort through. They are uncomfortable hearing about gay lives, do not necessarily know they know gay people, are anxious about change—but also want to be fair. They are not haters, and they know that sometimes the country must change.

How they frame the question for themselves brings them to different outcomes; their thinking is evolving as they grapple with the need for change to end discrimination in America and their own discomfort with gay people and change.

What moves that middle?

To appeal to the better angels of their nature, we owe it to these friends, neighbors, and fellow citizens to help them understand the question of marriage equality, this question of gay people’s inclusion in America through two truths.

1. Truth One

Truth Number One: Ending marriage discrimination is, first and foremost, about couples in love who have made a personal commitment to each other, who are doing the hard work of marriage in their lives, caring for one another, caring for elderly parents, caring for their kids. (Think of couples like Del Martin and Phyllis Lyon who had been together more than fifty years before they became the first couple

married this year in San Francisco—and who can forget that image?)⁷ Now these people, these couples, having in truth made a personal commitment to each other, want and deserve a legal commitment. And that reality and realness make Truth Number One one that we must share convincingly with the middle.

Once the discussion has a human story, face, and voice, fair-minded people are ready to see through a second frame and that is Truth Number Two.

2. Truth Two

Truth Number Two: The exclusion of same-sex couples from marriage is discrimination: it is wrong, it is unfair, it is harsh, it is un-American. It is cruel to deny these couples and families marriage and its important tangible and intangible protections and responsibilities. America, Truth Number Two reminds the middle, has had to make changes before to end discrimination and unfair treatment, and government should not be denying any American equality under the law.

When we see lopsided margins in these votes, as we saw in Missouri and Louisiana earlier this year, it means that under the gun in the first wave of electoral attacks, we have not yet reached this middle. We cannot be surprised *not* to win when in so many campaigns, and over so many opportunities to date (electoral campaigns and just month-to-month conversations), *we* have failed to give this middle third what they need to come out right.

When, in the name of “practicality” or advice from pollsters or political operatives, we decline to put forward compelling stories and explain the realities of what marriage equality does and does not mean, it costs us the one chance we have to do the heavy lifting that moves people. *We wind up not just not winning, but not even losing forward.*

By contrast, consider how we lost forward in California. In 2000, we took a hit when the right-wing pushed the so-called Knight Initiative and forced an early vote on marriage.⁸ We lost the vote, but because

7. See Jia-Rui Chong, *Lifelong Partners, Activists Wed at Last*, L.A. TIMES, Feb. 13, 2004, at A29. Del Martin, eighty-three years old, and Phyllis Lyon, seventy-nine years old, were the first same-sex couple in the United States to be married in a civil ceremony held in San Francisco City Hall on February 12, 2004. See *id.*

8. See CAL. FAM. CODE § 308.5 (Deering Supp. 2004) (effective Mar. 8, 2000). The Knight Initiative, a product of California Republican Senator William Knight, is often referred to as Proposition 22 or the California Defense of Marriage Act. Approved by voters in the year 2000, the Knight Initiative defined marriage as an institution solely between a man and a woman. Opponents of same-sex marriage used the Knight Initiative to prove the invalidity of same-sex

there had been some, though not enough, education about our families and the wrongs and costs of discrimination, polls showed that support for marriage equality actually rose after the election. And the very next year, activists pressed the legislature to enact a partnership law far broader than had been on the table in California before then. Our engagement over marriage continued, and within a couple of years, legislators voted again, this time in support of an “all but marriage” bill, which takes effect this coming January. And California organizations and the national legal groups continue to engage for what we fully deserve—pursuing litigation in the California courts and legislation that would end marriage discrimination. If we do our work right, making room for luck, we may see marriage in California, our largest state, as soon as next year.

To go from a defeat in 2000 to partnership and “all but marriage” in 2004 with the possibility of marriage itself in 2005—that is called *winning*.

D. Generational Momentum

Lesson Number Four: Remember, we have a secret weapon—death.

Or if you prefer, we can put it more positively, we on the side of justice have generational momentum. Younger people overwhelmingly support ending this discrimination. They have seen and heard these truths.

Americans are seeing more and more families like the Cheneys, and realizing, with increasing comfort, that we are part of the American family. The power of the marriage debate moves the center toward us, and as young people come into ascendancy, even the voting will change.

This is our opponents’ last-ditch chance to pile up as many barricades as possible, but, again, as long as we build that critical mass for equality and move the middle, we win.

VI. THE STAKES

Why is it so important that we *now* all redouble our outreach, our voices, our conversations in the vocabulary of marriage equality? In part, because victory is within reach. In part, because we can and must move that middle now to make room for that generational momentum and rise to fairness. In part, because America is listening and allies are increasing. In part, it is because *this* is our moment of greatest peril. And, in part, it is because the stakes are so great.

marriages, which occurred in San Francisco earlier this year. See Shawn Hubler, *Encircled by Their Feelings*, L.A. TIMES, Mar. 10, 2004, at E1.

What is at stake in this civil rights and human rights moment?

If this struggle for same-sex couples' freedom to marry were "just" about gay people, it would still be important—for gay men and lesbians, like bisexuals, transgendered people, and our nongay brothers and sisters are human beings who share the aspirations for love, companionship, participation, equality, mutual caring and responsibility, protections for loved ones, and choice.

Yes, if this struggle were "just" about gay people, it would be important, but it is not "just" about gay people.

If this struggle were "just" about marriage, it would be important, for marriage is the gateway to a vast and otherwise largely inaccessible array of tangible and intangible protections and responsibilities. Marriage is the vocabulary in which nongay people talk about love, clarity, security, respect, family, intimacy, dedication, self-sacrifice, and equality. And the debate over marriage is the engine of other advances and the *inescapable* context in which we will be addressing all LGBT needs, the *inescapable* context in which we will be claiming our birthright of equality and enlarging possibilities for ourselves and others.

Yes, if this struggle were "just" about marriage, it would be important, but it is not "just" about marriage.

What is at stake in this struggle is what kind of country we are going to be. Is America indeed to be a nation where we *all*, minorities as well as majorities, popular as well as unpopular, get to make important choices in our lives, not the government—or is America to be a land of liberty and justice only for some? Is America indeed to be a nation that respects the separation of church and state, where government does not take sides on religious differences, but rather respects religious freedom while assuring equality under the law—or a land governed by one religious ideology imposed on all? Is America to be a nation where two women who build a life together, maybe raise kids or tend to elderly parents, pay taxes, contribute to the community, care for one another, deal with life's ups and downs, and even fight over who takes out the garbage—or is America going to be a nation where those two women are told by their government that they are somehow lesser or incomplete or not whole because they do not have a man in their lives?

All of us, gay and nongay, who share the vision of America as a nation that believes that all people have the right to be both different and equal, and that without real and sufficient justification, government may not compel people to give up their difference in order to be treated equally—all of us committed to holding America to that promise have a stake in this civil rights/human rights struggle for the freedom to marry.

And if we see every state, every methodology, every battle, every victory, and even every defeat as part of a *campaign*—and if we continue to enlist nongay allies and voices in this campaign, transforming it into a truly organic *movement* for equality in the grand American civil rights tradition, we will move the middle, we will lose forward where necessary, we will empower the supportive, and we will win.

We *are* winning. Now is the time. Now is the time to do it better. Now is the time for each of us to do our part and together do it right.

There is no marriage without engagement.

Let us vote and make sure others vote in November, and then let us get back to the scary, empowering, noble, and transformative work of winning.