

David Cole, *Engines of Liberty: How Citizen Movements Succeed*. New York: Basic Books, 2016.

David Cole, legal director of the American Civil Liberties Union, and professor of law at Georgetown University, begins this book by quoting Margaret Mead: “Never underestimate the power of a small group of committed people to change the world. In fact, it is the only thing that ever has.”

For activists who think that there is no hope that they can succeed in changing the current oppressive situation in society, Cole offers words of hope in his opening dedication of the book: “The struggle for justice is always worthwhile, even and especially where it appears most hopeless.” Though he is realistic that change is difficult, and practically hopeless, he closes his dedication with the acknowledgment that “occasionally, justice prevails over hopelessness.”

This is a book that offers hope, by analyzing successful social change movements to understand what they did right, what mistakes they made, and what lessons can be learned from their example. This book offers a blueprint to help activists succeed in producing change. Though he is a lawyer, Cole emphasizes that the law changes from the bottom up, by citizen action and public opinion changes, more than from the top down, by Supreme Court decisions. The law follows, not precedes, public opinion. It is citizens pushing for equal rights, not judges, who are the ultimate decision makers on both public opinion and the law.

In the Introduction, Cole says that Americans’ most fundamental values include “freedom to live our life the way we decide, equality, human dignity, fair process, and privacy.” [p.2] Appealing to these values is what activists must do. Activists must organize protests, recruit allies (including unlikely allies), file lawsuits, write reports, lobby legislators, leak documents that are embarrassing to the government and that reveal unpopular or illegal activities, and broadly condemn governmental actions whenever they violate constitutional rights and human rights.

The book is full of suggestions: Try to get investigative journalists and pro bono lawyers enlisted in the cause. Use grassroots efforts to adopt local referenda condemning present laws and abuses of power. Use the Freedom of Information Act to dislodge documents detailing abusive programs, and then disseminate the information to the wider public. Use both academic publications and the popular press to get the message across. [p.3]

“The ultimate protection of liberty is not the independent judiciary, the separation of powers, or federalism. It is the citizenry.” [p.5] An example of citizen action is a guide to political resistance, titled “Indivisible,” which was written by former congressional staffers and downloaded from the internet in 2017 in reaction to President Donald Trump. [p.6] When Trump announced his ban on immigrants from Muslim nations, activists flew into action. The ACLU organized

a national protest with a Yale Law School clinic, and encouraged thousands of people to do sit-down protests at airports. Presidents of many leading universities and scientific organizations condemned this limitation on international students and scientists. Even former leaders of the CIA and the National Security Administration wrote letters of condemnation. This is an example of looking for unlikely allies to support. [p.6] “There is a direct link between the kind of public advocacy that greeted Trump’s anti-Muslim executive orders and the reactions of the formal branches of government, including the courts.” [p.7]

“It is more critical than ever that we all take on the responsibility of defending liberty in the forums accessible to us. Citizen engagement is where our liberty lies.” [p.8] One of the book’s main examples of an effective activist is Evan Wolfson. When he was a student at Harvard Law School in the 1980s, he attended a speech by two lawyers from the gay Lambda Legal Defense. This inspired him to devote himself to gay rights legal action. Being strongly committed to the idea of legalizing marriage for same sex couples, Wolfson decided to write his legal thesis on the subject. He could not find even one professor in constitutional law to agree to be his supervisor. At last he persuaded another professor to oversee his project. In 1983 he wrote a 141-page manifesto, “Same-sex Marriage and Morality: The Human Rights Vision of the Constitution,” arguing that same-sex marriage should be constitutionally guaranteed. [p.8] This seemed to be a hopeless cause. “At the time, a handful of brave gay and lesbian couples across the nation had filed quixotic lawsuits claiming the right to marry, but all the suits had been dismissed, in some cases with outright derision.” In one case, a state supreme court cited the Bible in its decision unanimously rejecting the claim. [p.8]

After finishing law school, Evan Wolfson was not deterred. He started volunteering for Lambda Legal Defense, and was later hired as a staff person. He gradually convinced Lambda Legal attorneys to allow him to take on marriage cases. There was great resistance by gay movement leaders, who felt that marriage was a side issue that would deflect from their larger effort to pass anti-discrimination laws. But Wolfson persevered, and eventually founded a separate advocacy group, Freedom to Marry. [p.9]

Successful activists like Wolfson shared a deep-seated commitment to a cause, and a willingness to work for many years to accomplish it. They worked with groups that focus on particular rights, through multiple forms of advocacy within and outside the courts.... In turn, the work of each of these groups was supported by many others.... They include organizations dedicated to protecting the rights of the press, religious freedom, privacy, property, the freedom of contract, criminal defendants’ rights, immigrants’ rights, equality, rights of sexual freedom and intimacy, among many others.”[p.11].... These robust groups in the USA are “stronger than anywhere else in the world.” [p.12]

Groups committed to the protection of rights must “ultimately turn to the federal courts.... But the vast majority of the work necessary to transform law took place outside the federal courts altogether. There is a simple reason for this. When existing federal law does not reflect your views, you cannot simply file a lawsuit to change it; the most likely result will be a prompt dismissal. Instead, you must look for other, more sympathetic forums.... state legislatures, state courts, the media, the academy, the public at large, Congress, the executive branch, and even foreign opinion..... They helped to change public opinion and the views of legal experts through work outside the federal courts.... Often, groups won constitutional victories without any formal judicial intervention at all.... Sustained advocacy by multiple groups of citizens, usually over many years and in a wide array of venues.” [p.12] Made up of “politically engaged citizens united by their devotion to a particular vision.... to safeguard and advance foundational values.... They carry the torch of constitutionalism,” [p.13]

The most important factor in “the defense of liberty depends as much or more on citizens engaging collectively to fight for the values they believe in than it does on the courts and the lawyers.” [p.13] People must “develop liberty in our own image, so that it reflects OUR deepest commitments, not just those of a privileged elite.” [p.14]

The reason why “members are so responsive to the organization’s requests for political action [is] you’ve got to have a threat... that inspires them to act.... It requires commitment over the long haul. It also requires organization and coordination. That’s why the right of association is so critical to preserving all our constitutional freedoms.” [p.14] [Thus, when ex-prisoners are prohibited from associating with other ex-prisoners, this is a fundamental violation of the constitutional protection of freedom of association.]

In the 1950s and 1960s, progress on gay rights seemed an impossibility. Churches taught that homosexuality was a grievous sin, worthy of eternal damnation. Sodomy laws made intimate relations between persons of the same sex illegal. “Psychiatrists labeled homosexuality a mental illness. Admitting publicly that one was gay or lesbian could result in ridicule, harassment, assault, isolation from one’s family, the loss of a job, or worse. Most gays and lesbians understandably chose to keep their sexual orientation hidden. The invisibility of the closet made mobilizing for lesbian and gay rights all but impossible. Thus, the first strategic step toward achieving equality was a ‘politics of protection.’ The aim was to create space for gays and lesbians to come together without fear of official harassment. Gay and lesbian community centers, bars, and bathhouses all served this function.... [p.18]. The next step was to make it safe—or at least, less costly—to come out by publicly identifying as lesbian or gay. Gay rights groups [p.19] fought for legal protections that would make it more likely that they might

feel sufficiently comfortable to identify themselves publicly. The ACLU Lesbian and Gay Rights Project, for example, invoked the First Amendment to protect the rights of students to form gay and lesbian student associations, first in colleges and later in high schools..... In the 1980s, prompted by the AIDS crisis, growing numbers of gays and lesbians proclaimed their sexual orientation publicly, joined political associations, and engaged in collective action to demand acceptance” [p,19]

“The press ran many stories about the obstacles gays faced as they navigated life decisions..... Employees approached their employers about benefits for their partners. “Over time the concept of same-sex domestic partnerships took hold in a wide variety of private and public settings.[p.19].... The image of gays was changed from mindless promiscuity to devoted loving partnerships, which “became familiar to many straight Americans. As discrimination on the basis of sexual orientation was more widely prohibited, gay men and lesbians were more free to come out. It became increasingly common for straight people to learn that a family member, friend, colleague, or acquaintance was gay or lesbian—and deeply human and vulnerable. That knowledge in turn made it less likely that straight people would demonize, and more likely that they would empathize with, gay men and lesbians. Some of the most important gay rights advocacy focused not on legal and political change but on cultural transformation.” [p.20]

Activists founded Gay and Lesbian Alliance Against Defamation (GLAAD), to promote positive portrayals of gay men and lesbians in the news and entertainment media. They persuaded CBS to suspend a commentator for homophobic remarks he made on air, and they prevented a homophobic radio commentator from starting her own TV show. GLAAD also encouraged stars like Ellen DeGeneres (and her very supportive mother) to come out. “All this persuaded the media to shift their terminology from ‘sexual preference’ to ‘sexual orientation.” [p.20] [This progress in LGBT rights makes it easier for other sexual minorities to build on those successes, by likewise influencing the mass media to reconceptualize their sexuality as an ‘orientation’ rather than as a perversion and a danger to society. All sexual minorities need to be out of the closet about themselves, to demonstrate that they are responsible persons who hold their job, care for their relatives and friends, and want only the best for others. Individual examples, either in person or as actors representing real persons, have an enormous influence.]

In the law, “the crucial constitutional points are: free choice, intimate values, absence of harm, no legitimate state interest in regulation, and finally, the inadmissability of government promotion of morality.” [p.23] [Other sexual minorities should make the same arguments, and cite evidence and research to show that these characteristics apply. This can be the basis for legal decisions.]

“The most important principle in the constitutional recognition of rights is that majority distaste or discomfort is no basis for the abridgment of protected human rights. Many laws have been founded on such moral disapproval, so rejection of that interest as an insufficient justification for differential treatment was a critical step.” [p.23] The fact that the majority has traditionally viewed a particular practice as immoral is not a sufficient reason for a law. This principle was articulated by Justice Anthony Kennedy in the majority U.S. Supreme Court decision *Lawrence v. Texas* (2003).

Evan Wolfson was hired by Lambda Legal Defense in 1989, after he had volunteered there for several years. In that year the group’s legal director, Tom Stoddard, made a public stand in favor of pushing for same-sex marriage. But he was opposed by lawyer Paula Ettelbrick, who argued that marriage is a flawed patriarchal institution, central both to women’s subordinate status and to the treatment of heterosexuality as compulsory. She criticized the marriage effort as assimilationist, writing, “I do not want to give the state the power to regulate my primary relationship.” [p.25] In 1991, when the National Gay and Lesbian Task Force polled its members, asking for their opinion about which topics should be their primary issues, they did not even list marriage as an option.

Besides those who were opposed to marriage on ideological grounds, the majority of gay rights leaders felt there were other issues that were more pressing. They wanted to push for anti-discrimination laws, repeal of sodomy laws, and efforts to reduce anti-gay violence and police harassment. Marriage seemed a long way down the list of priorities. [p.25] For this reason, when three couples in 1991 from Hawaii asked Lambda Legal to represent them in a state court challenge to the state’s refusal to grant marriage licenses to same-sex couples, Lambda Legal turned down Wolfson’s request to take the case. The ACLU also refused to get involved, deeming the case premature and not winnable.

Though Wolfson was bitterly disappointed, he was happy to learn that Dan Foley, a prominent civil liberties attorney in Honolulu, accepted the case. Foley was heterosexual, but he had a gay uncle who he adored, and as a Buddhist he did not share the antipathy toward homosexuality that many Christians promoted. Foley decided to pursue a strict line of argument that had nothing to do with federal law and nothing to do with gay rights. Though the case was based on two lesbian couples and one gay male couple, Foley argued that the case was very simple. The Hawaiian state constitution stated that “there shall be no discrimination on the basis of sex.” Since the couples were denied marriage licenses solely because their intended spouse was of the same sex, that denial was “discrimination on the basis of sex.” Foley did not want opponents to be able to appeal a decision in federal courts, because at that time the U.S. Supreme Court was still hostile to gay rights cases, so he directed his argument solely to the state

supreme court. In 1991, no state in the U.S.A. allowed same-sex marriage, and no nation in the world allowed it. Hawai'i would be the first. [p.26-27]

Though Lambda Legal was not officially involved, Wolfson worked secretly behind the scenes in support of Dan Foley. When the state attorney general argued that marriage has always been solely between a man and a woman, Foley brought in testimony by anthropologist Walter Williams that traditional Hawaiian culture allowed persons of the same sex to marry, and treated their relationships the same as other-sex couples. Foley brought in testimony by leading feminists that any kind of discrimination on the basis of sex is detrimental to women. But, most simply, the denial of marriage licenses is clearly a violation of the Hawaiian state constitution.

After losing at the district court level, Foley persevered and filed an appeal to the Hawaiian Supreme Court. In 1993 that court issued its verdict, saying that a refusal to issue marriage licenses on the basis of the sex of the partners was indeed unconstitutional. This decision made headlines in newspapers around the world. Wolfson was overjoyed, saying the decision was “a tidal wave out of Hawaii that will reach every corner of the country and affect every gay issue.”[p.28]

The state supreme court sent the case back to the lower court, which held hearings to determine if there was any compelling interest not to grant marriage licenses to same-sex couples. The attorney general argued that marriage was for procreation, and that children are best raised by men and women. Foley refuted both claims, showing that many heterosexual couples (including those who are infertile) marry for other reasons than procreation. Since many women past age fifty get married, when they cannot get pregnant, Foley pointed out, the procreation claim is ridiculous. Foley brought in sociologists and psychologists to testify that children raised by gay or lesbian parents are just as well adjusted as those raised by heterosexual parents. After hearing all the testimony, the judge ruled that the state did not prove any compelling interest for restricting marriage, and that licenses should be issued to couples without regard to their sex. [pp.28-29]

These court decisions sparked a huge backlash from the Catholic Church and the Latter Day Saints (the Mormon Church). Utah passed a law stating that only male-female couples are allowed to marry, and money from Utah Mormons flooded into Hawai'i in opposition to the decision. With their major media campaign blanketing television, radio, and ads in Hawaiian newspapers, gay rights supporters were overwhelmed with negative publicity. The state legislature, with even liberal legislators intimidated by the churches' pressure, passed a bill condemning the court's decision.

Within the next four years, 22 state legislatures passed similar laws prohibiting same-sex marriage. This opposition campaign reached its height when Congress passed the Defense of Marriage Act (DOMA) in 1996, which declared that

marriage is solely between a man and a woman. Democratic President Bill Clinton (who had gotten elected with strong support from the gay community) signed the act into law, weakly buckling to conservative pressure and betraying his LGBT supporters.

Meanwhile, in Hawai'i conservatives sponsored an amendment to the state constitution, specifically prohibiting same-sex marriage. Once this amendment was passed, the state supreme court was forced to rescind its decision, and no lesbian or gay marriages were recognized. A similar amendment was passed to the Alaska state constitution, disappointing LGBT activists there. It was a bitter defeat after so much hope was engendered by the courts' decisions. [p.29]

The Hawaiian and Alaskan examples showed that winning court decisions was not enough to insure acceptance. It looked like the entire legal effort was a failure, because all it seemed to accomplish was to promote adverse legislation. In shock at this defeat, Evan Wolfson resigned from his job at Lambda Legal. But he did not give up. This time, though, he decided to lead a very different effort.

After taking a break, in 2003 Wolfson founded Freedom to Marry, an organization devoted solely to marriage equality. But instead of lawsuits "it concentrated on all the other work that it believed necessary to achieve its goal. It offered templates for ballot initiative campaigns in liberal states, social media strategies in more conservative states, and targeted fundraising. And it worked with local gay rights groups. It engaged the media to mold public opinion in its favor, educating the public, recruiting and training volunteers, managing websites, consulting on referendum campaigns, and lobbying legislators—in short, laying the ground for change and working to defend gains from those who would reverse them. Wolfson abandoned legal briefs in favor of writing articles and a book directed to the general public, and strategy papers aimed at activists about how to make progress and respond to defeats." [p/30]

Wolfson knew from prior examples that court decisions take a long time. Though California allowed interracial marriages in 1948, it was not until 1967 that the U.S. Supreme Court declared prohibitions of interracial marriages to be unconstitutional. The Supreme Court did not act until 34 states already permitted interracial marriages. The states led the way. A similar strategy was used in the effort for women suffrage. The 19th Amendment, giving women the vote nationally in 1920, was not passed until a majority of the states had already approved women voting. Rights for workers likewise were passed first on the state level in the first two decades of the 20th century, and were extended to the federal level only in the 1930s by the New Deal. [p.31]

The negative reactions to the Hawaiian court case made it clear that the battle for marriage equality would have to be fought on multiple fronts. Local activists in

Vermont and Massachusetts took advantage of lessons learned from Hawai'i, using the court lawsuits as only a small part of an overall effort. [p.31]

In Vermont, some lesbian couples who were inspired by the news of the Hawaiian cases, appealed to some lawyers to gain them the right to marry. Vermont's state constitution stated that all benefits of government should be instituted "for the common benefit of the people... and not for the particular emolument or advantage of any single person, family, or set of persons." [p.34] This was a strong legal basis, to bring a suit on the basis that heterosexual couples were a "set of persons" who gained benefits of legal marriage, to the detriment of same-sex couples who were denied those same benefits. However, the lawyers told the couples that they must build local popular and political support in the state before bringing a lawsuit. Gay and lesbian Vermonters were divided over the marriage issue, but many met with their state assembly members, wrote letters to officials, and testified at multiple public hearings. [p.34]

An anti-gay representative introduced a bill to take away second parent adoption rights. This led people to become active in opposing that bill. They wrote letters and met with him and others. Eventually, they even persuaded the sponsor to change his mind and withdraw the bill. This effort led LGBT Vermonters to begin a campaign for marriage rights. They were influenced by an influential 1994 article by Kees Waaldijk, a Dutch scholar. He showed that gay rights successes followed "a standard sequence" in Scandinavia and other parts of Europe. First, they repealed sodomy laws criminalizing the behavior. Second, they added sexual orientation to anti-discrimination and hate crimes laws. Third, they extended domestic partner benefits and parents' rights to foster, adopt, and raise children. Only after these measures paved the way did marriage rights stand a chance. [pp.35-36. Cite Kees Waaldijk, "Standard Sequences in the Legal Recognition of Homosexuality" *Australian Gay & Lesbian Law Journal* 4 (1994): 50-52. Robert Wintemute and Mads Andenas, eds. *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (2001).

Activists formed the Vermont Freedom to Marry Task Force, which consisted only of twelve people. They promoted a message "that same-sex couples were just like other couples in their desires for stable, committed, and loving relationships. It trained advocates in how to talk about marriage, and developed a set of speaking points. It taught gay and lesbian couples how to tell their own stories effectively." After seeing opposition videos stereotyping LGBT as licentious, they made a video showing ordinary Vermonters, gay, lesbian, and straight, explaining why acceptance of same sex marriage was important to them. It was plain and simple, with testimonies which showed people who looked like ordinary Vermonters. [p.37]

Activists lobbied their state representatives. But instead of asking them to enact a marriage law, they asked only that the representative not interfere with a judicial process, and pledge not to support a constitutional amendment that would negate a judicial victory. “Many legislators were visibly relieved when they learned that they were being asked only to play defense.... When they got a majority of legislators to commit not to challenge a court decision, only then did they file a lawsuit. A Vermont lawyer argued the case of three carefully selected couples, who looked conservative and had raised children. Her presentation was broadcast on Vermont public television in 1998. In 1999 the Vermont Supreme Court ruled unanimously that denying same-sex couples the legal benefits of marriage violated the state constitution’s “common benefits” clause. [p.39]

Rather than impose marriage, however, the court directed the state legislature to “provide all the legal benefits of marriage to same-sex couples.” This directive allowed the legislature to set up civil unions as an alternative to full marriage. But even this was a hard sell. Polls showed a majority of Vermonters opposed even to civil unions, with marriage being supported only by a third of the people. Activists carefully identified witnesses and prepared them, then held public hearings and gave interviews to the mass media. It was especially important for legislators to hear the stories of ordinary Vermonters. The strategy worked, and the legislature voted to establish civil unions, the first time same-sex couples gained all the rights and benefits of marriage. Activists accepted this result, but emphasized that civil unions were only a step toward their ultimate goal of marriage equality. [p.40]

In the 2000 elections, conservatives targeted pro-gay legislators for defeat. LGBT activists campaigned strongly for those same legislators. Some won, but some lost. In 2007 the state senate set up a commission to study how the civil unions law was working. Activists prepared witnesses and did media outreach, to argue that civil unions were not truly equal to marriage. In 2009 activists pressed for full marriage. It passed the legislature, only to be vetoed by the governor. A bill to override the veto finally passed in the legislature, by only one vote. Thus, after fifteen years of activism, Vermont became the first state to grant full marriage equality by vote of its legislature. [p.41]

The Vermont case shows how long it may take to accomplish the goal, and that “patient incrementalism” works best. Also, having civil unions as a halfway alternative allowed activists in more conservative states to move forward, while allowing conservatives to keep “traditional marriage” for themselves. Some conservatives even came out in support of civil unions, as a better alternative to full marriage, which they would likely never have done if the marriage campaigns had not been done. [p.43] Some activists worried that civil unions would entrench LGBT couples in a “second class status. In hindsight, however, it’s clear that civil unions were more a temporary way station than a final destination. Both Vermont

and Hawai'i ultimately adopted marriage equality in 2013. Civil unions were important stepping stones along the path to marriage equality." [p.43]

Hawai'i demonstrated that taking too large a step could have negative repercussions, but if that lawsuit had not been filed it is unlikely that the entire issue would have progressed as it did. Change will always be resisted, especially change that questions established traditions. But by patiently but persistently pursuing small steps, activists can reach their ultimate goals. [p.43]

In Massachusetts, sexual orientation had been added to its statewide non-discrimination law in 1989, and to its hate crimes law two years later. In 1993 state employees were given domestic partner benefits, and its state court had recognized lesbian parenting rights. By 2000, GLAD leader Mary Bonauto decided the time was right to push for marriage equality. "If gay and lesbian couples began to marry, people would see for themselves that there were no negative effects on families, and fear of the unknown would dissipate." She felt that if couples who had been living together a long time would "come out" and tell their personal stories, those accounts would change attitudes. [p.45]

When she learned that anti-gay conservatives planned to put an anti-gay ballot measure on the ballot in 2002, Bonauto thought that an affirmative suit would be better than reacting to an agenda set by their opponents. She filed a lawsuit using stable couples from across the state, to increase local media coverage, and who had personal stories that ordinary citizens could relate to, "focused on what you have in common—these are your neighbors." [p.46]

Opponents argued that the purpose of marriage is for procreation and for the benefit of children. The Supreme Court ruled in favor of LGBT couples, turning the conservatives' arguments on their head by saying that same-sex couples can procreate, while some heterosexual couples do not, and the state never required procreation as a condition for getting married. Recognizing marriage for same-sex couples would not harm their children, the Court reasoned, but on the contrary denying marriage most certainly harmed those children being raised by LGBT parents. [p.47] In 2004 Massachusetts became the first state to have full marriage equality.

To prevent the legislature from negating the ruling, MassEquality mobilized hundreds of volunteers and spent many thousands of dollars to campaign for candidates who supported equality. Legislators who supported equality all won reelection, while several who opposed it lost. By 2007 polls showed 56 percent of state residents supported marriage equality, and conservative attempts to overturn the ruling were defeated in the new pro-gay state legislature. [p.49]

While activists won in Massachusetts, the court ruling provoked a backlash in conservative states. By the end of 2006, forty-five states banned same-sex marriage either by constitutional amendment or by state statute. Gay scholar

Professor John D’Emilio pronounced the campaign for same-sex marriage “an unmitigated disaster.” [p.49] “However, these criticisms seem short-sighted.... When one seeks to establish a right that is not recognized in existing constitutional law, setbacks should be expected. Court decisions granting rights not supported by the majority will prompt negative political reactions.” [p.50] Asking legislators to pass a bill that is unlikely to command majority, or powerful interest group, support is... simply not a viable alternative. Courts cannot ignore individuals who claim to have been denied an asserted constitutional right in some tangible way. Unlike executive officials or legislatures, courts must address the merits of the argument.”[p.50]

Even when activists lose a case, the process galvanizes more people to become activist and assert their rights. “In addition, backlash can be productive. Opponents arguably gave same-sex marriage more visibility than gay rights advocates could have given it themselves. In Evan Wolfson’s view, the opposition in turn sparked a critically important counter-response, as more people lent their support, financial and otherwise, to the struggle.” [p.51] By carefully suggesting liberal states for lawsuits, leaders could gain victories that could later be replicated in other states.

In 2004, the Gill Foundation, the largest funder of marriage equality, was worried about the losses, and about division among activist leaders. Gill called activist leaders for a meeting in Denver, and asked Matt Coles, ACLU leading attorney, to draft a working plan for the future. In 2005 the group approved a 15 page plan “Winning Marriage: What We Need to Do,” that laid out a strategy for fifteen years. It called for working in the states to establish a legal norm, and accomplish either marriage, civil unions, or some partner recognition in a critical mass of states. Only after that ‘tipping point’ was reached would they pursue federal cases aimed toward the U.S. Supreme Court. The memo also called for more coordinated strategizing at the national level, with an umbrella organization to coordinate. Public education campaigns should be done at the local level. Volunteers and experts on gay rights issues should be nurtured in every state. Wolfson’s Freedom To Marry would collaborate with existing gay rights groups, to provide strategic and tactical assistance, and funding, to local groups to carry out the battles in their states. This made a more unified national struggle. [p.53]

NOTE REQUIREMENTS FOR SUCCESS: Success requires a clear vision of the end goal, a strategy how to make that vision a reality, a plan to coordinate at the national and local levels, and financial and organizational commitment for the long haul. [p.53]

In California, activists had been working for years, in an incremental approach. In 1984 Berkeley became the first city to recognize domestic partnerships. In 1996, San Francisco did so. In 1999, California legislature passed a statewide measure, and in following years made it more inclusive. Couples gained the right to adopt, and to have inheritance rights. But in 2004 San Francisco Mayor Gavin Newsom ordered San Francisco's city register to issue marriage licenses to same-sex couples. By doing this, he was going directly against state law. Four thousand longtime couples made their way to City Hall within a month, stood in long lines patiently waiting their turn, many celebrating with their parents and children, and declared their love for one another in a more dramatic way than any paid advertising campaign or gay rights spokesperson could ever get across. [pp.56-57]

Newsom's bold stroke prompted anti-gay conservatives to bring suit in California Supreme Court. Newsom maintained that denial of marriage violated the California constitution, but the Court ordered him to cease issuing licenses, on the basis that he did not have the authority to issue marriages on his own. But the Court also made clear that it welcomed a lawsuit on same-sex marriage. The next day, gay rights advocates filed such a lawsuit. Previously they had decided not to take such a route, in fear that anti-gay forces would lead a repeal effort. But Newsom's actions forced them to act. [p.57]

Four years later, the California Supreme Court issued a decision stating that the state constitution's guarantee of equal protection of the laws required equal access to marriage. It reasoned that the right to marry was fundamental, and treating same-sex couples differently was unconstitutional, and that the state had no compelling justification for differential treatment.[p.58] But after this decision ensued the most hard-fought, expensive marriage ballot campaign in American history. Opponents of marriage equality gathered enough signatures (mostly in churches) supporting an amendment to the constitution that would limit marriage to one man and one woman. Each side raised and spent about \$40 million, with the largest contributors supporting the amendment coming from the Catholic Church and the Latter Day Saints (LDS Mormons). Supporters paid for TV ads which played on fears that parents would lose control of the values their children were taught in school. [p.58]

When the amendment passed by a 52 to 48 percent margin, this was the biggest loss for the entire marriage equality movement.... At the same time, however, the loss was the catalyst that pushed marriage equality down the road to what seemed like inevitable success. ... It motivated activists to commit even more time and effort to the cause." It triggered massive popular protests that threw both the Catholic Church and the LDS Church on the defensive. And it prompted LGBT activists to develop a new united advocacy strategy, and redouble their efforts. [p59]

The defeat prompted Hollywood film director Rob Reiner to finance a new organization, the American Foundation for Equal Rights (AFER), and hired two of the nation's top lawyers David Boies and Ted Olson (who was former solicitor general to President George W. Bush). Many gay rights advocates who had been working for years warned the new group that the nation was not yet ready to challenge marriage laws on the federal level. When the Supreme Court declared sodomy laws unconstitutional, in *Lawrence v. Texas* in 2003, only four states still singled out homosexual sex as a crime. In 2009, however, only four states recognized same-sex marriage or civil unions, but over forty states had explicit laws against them. The activists predicted the Supreme Court would be unlikely to make a ruling until a majority of states had approved marriage equality, and they feared a defeat would set back the movement for years. Lambda Legal, Wolfson, Bonauto, Coles, and others had been persuading lawyers and couples not to file lawsuits, in fear of defeat. [p.60]

But they could not persuade Boies and Olson, who rejected the activists' advice. The two prominent lawyers thought the activists were being too cautious. [Perhaps the two lawyers did not mind taking a chance, since they were not gay and did not have a personal stake in the case. Or maybe they just knew that their prominence would itself give them a better chance at success, in a legal system that is rigged in favor of the establishment (of which they were a part),]

In an extraordinary development, when Boies and Olson filed their lawsuit against the Proposition which prohibited same-sex marriages, California's attorney general Jerry Brown (a longtime gay rights supporter) refused to defend the Proposition. This gave the federal court of appeals the excuse that no one was measurably harmed by same-sex marriage, and so the Proposition was overturned. The tortured reasoning of the court shows the arbitrariness of the legal field, but at least now LGBT couples could marry in California. However, this victory did not apply to other states, so the right to marry still was not established law. [pp.62-63]

The next battleground was in Maine. A year after California voters approved the Proposition defining marriage as solely between a man and a woman, Maine voters did the same. Gay activists now began the effort to overturn that vote. By studying what went wrong in California, they changed the approach. Rather than argue for equal rights and tangible benefits, now they focused on marriage as an expression of love and commitment. They used straight people in advertisements. In door-to-door conversations, they used open ended questions to engage and persuade voters. After several losses, in 2012 Maine voters approved of legalizing same-sex marriage. This was the first time gay rights won in a statewide ballot initiative. On the same election day, gay rights advocates won in Maryland, Washington, and Minnesota as well. Public opinion was clearly changing, as voters became more familiar with the issues, and LGBT persons were no longer

being perceived as a threat to society. It was only by long sustained efforts that this change occurred. While the multiple losses before a final win show that the effort for change is difficult, the trend shows that eventually the change will be accepted by mainstream people. [pp.64-67]

Activists won by campaigning for pro-gay state legislators, by identifying supportive voters and making sure they voted, by public advocacy that appealed to the heart, not the head. They established a religious coalition of churches in support of marriage equality, to counter religious arguments, and making sure the effort would not be seen as an attack on religion. [p.68]

After the anti-gay Proposition was passed in California, Dave Fleischer, political analyst at the Los Angeles LGBT Center, sent out volunteers to ask people why they had voted against same-sex marriage. From this survey Fleischer proposed that instead of going door to door seeking supporters, volunteers should try to engage opponents and persuade them to change their minds. The canvasser asked open-ended questions designed to invite voters to share their experiences. Canvassers engaged people's concerns directly, and tried to change their views through extended discussion. Activists encouraged LGBT people to discuss marriage equality with their relatives, co-workers, and friends. [p.69] Volunteers had over two hundred thousand extended conversations with voters.

Activists hired pollsters to learn why voters in California supported the anti-gay Proposition. In roundtable discussions with those who voted for the Proposition, a pollster concluded: "You have to pay attention to what is going on emotionally. You are unlikely to change anyone's mind with a purely rational argument. You need to understand what triggers their concerns." [p.71] Many felt LGBT was contrary to their Christian convictions. But Pollsters found that many people were not merely undecided, but conflicted. They had strong impulses in both directions. On the one hand, they wanted to be open-minded and fair to others. But they worried that same-sex marriage might upset the status quo in unpredictable ways. They had anxieties about the pace of social change. Some felt that supporting same-sex marriage would raise their taxes, or bring an economic meltdown. Those worries need to be addressed empathically, helping them get through their emotions, rather than dismissing them as bigots. "Activists wanted voters to not just allow same-sex marriage but to celebrate it. They wanted people to go from zero to sixty. But human beings aren't wired that way; they can't go that far that fast. This is a step-by-step process, and we only need people to go so far as to win the election." [p.72]

In the pollsters' view, the goal should be ONLY to get people to ALLOW same-sex marriage, not necessarily to APPROVE it. Instead of getting some people to vote against LGBT issues, the best that can be hoped for is that they stay home and not vote at all. One of the strongest factors in moral decision making is

loyalty to one's own group. If they see LGBT as foreign and alien to their group, then they might be in opposition. But if they have a LGBT relative or friend, then they will see them within their group and be supportive. This is why it is so important for sexual minorities of all kinds to come out to their families and friends, to put a familiar human face on them as individuals, rather than a foreign threat. [p73]

Messages need to show a relative or friend being discriminated against, or harmed in specific ways, to appeal to this emotion of supporting someone within your own group. Appealing in the form of "rights" is not effective. "People do not think of marriage as a bundle of rights. They think of it as an expression of love and commitment. It is better to stress the importance of expressing and solemnizing one's commitment to another than to treat marriage as a bundle of rights. People need to hear that LGBT people want to get married for the same reasons that they do: to make a lifetime commitment to the person you love. The theme should be "love and commitment." [p73]

Evan Wolfson's *Why Marriage Matters* 2004 book says, "Marriage is the vocabulary to talk of love, family, dedication, self-sacrifice, equality, and inclusion." [p.73] But this was drowned out by talk of equal rights, benefits, and protections. Love and commitment is a more effective emphasis, because it appeals to the emotions of someone who values those qualities. For example, one ad has a World War II veteran saying "I fought in WW II, but it takes as much guts as my lesbian granddaughter and her partner have to get through this." His wife said, "I really want in my lifetime to see my granddaughter married to the person she loves." He then says, "This isn't about politics. It's about family and how we as people treat one another." Another ad was the straight son talking about the love he feels for his two lesbian moms. Another a straight minister talking about his inclusiveness of all members of his congregation, and a squad of volunteer firemen being supportive of their gay male colleague. Those who were married spoke about what they valued in their own marriage, and their gay friend should have the same opportunity. Ads showed sympathy toward those who were conflicted, and how they overcame their doubts out of love and concern for their gay friends. [p.74] [What the author says may be true, but these campaigns are about more than winning a specific election. They also strive to put LGBT people into the realm of normal. When spending the money for ads, it is good to show actual LGBT people in diversity, not all straight-acting white picket fence conformists.]

In a longterm campaign for social change, even the losses can be productive. By bringing more attention to the losing side, losses can inspire volunteers to come out and take action they might not have if they won. By learning from past mistakes and improving tactics, the losing side can be "losing forward." [p.75]

Instead of citing case law or the 5th Amendment, the ads appealed to empathy and emotion.

In 2013 the campaign got a big boost from the U.S. Supreme Court, which ruled in *U.S. v. Windsor* that the 1996 federal Defense of Marriage Act (DOMA) was unconstitutional. Though the ruling was based on the narrow view that DOMA interfered in state laws, it was a shot in the arm for a federal effort. President Barack Obama, who had gotten elected with strong support from the gay community, took the extraordinary step of refusing to defend DOMA before the court. On the contrary, he spoke out against it as nothing more than prejudice. [pp.83-86]

Immediately, more than eighty lawsuits were filed by LGBT couples across the country, and nearly all the district courts ruled in favor of the couples. When one federal court of appeals in Ohio ruled against James Obergefell and John Arthur, a gay couple, the Supreme Court agreed to hear their case. GLAD's longtime attorney Mary Bonauto argued the case. Obama's Solicitor General gave strong support, saying "It is emphatically the duty of this Court, in this case... to decide what the Fourteenth Amendment requires.... It is simply untenable, untenable, to suggest that they can be denied the right of equal participation in an institution of marriage.... They deserve equal protection of the laws, and they deserve it now." [p.89]

On June 26, 2015, the Supreme Court announced its decision in *Obergefell v. Hodges*, that denial of marriage to same-sex couples is unconstitutional. The decision was written by Justice Anthony Kennedy, who also wrote the decision in *Lawrence v. Texas* in 2003, which ruled anti-gay sodomy laws to be unconstitutional. Kennedy acknowledged that he was inspired to write these decisions because, earlier in his life, his main mentor was a gay man whom he admired. Once again, this is evidence of the strong impact that personally knowing a person leads to attitude change. [pp.77-78]

In *Lawrence v. Texas*, Kennedy wrote that moral disapproval of homosexuality could not justify a law that intruded into the "personal and private life of the individual" by restricting sexual intimacy. [Though Kennedy made a restriction of this right to "consenting adults," his reasoning can easily be applied to persons who are below age eighteen.] [p.82] Kennedy wrote that "individual liberty" cannot be deprived without "due process of law," which protects fundamental rights central to private life.

"Many commentators remarked that the constitutional right to same-sex marriage had developed with blinding speed. In fact, the campaign took more than twenty years, and built on progress made on other gay rights issues over more than half a century before that. Still, constitutional law tends to move at a glacial pace,

and especially at the end, the progress on marriage equality was anything but glacial.” [p.78]

“Constitutional law develops through public debate about fundamental principles and values, pressed by people with powerful commitments willing to make sustained efforts in multiple arenas—local, state, and federal, public and private, at home and at work. Gay rights advocates had pursued just such a debate over many decades, and it was their work and their commitment, not an abstract legal rationale, that was the foundation of their victory.” [p.91]

“The result was dictated by doctrinal argumentation as much as by a transformation in Americans’ fundamental values.... The Constitution is designed to reflect the nation’s deepest commitments. Those commitments have evolved over time, and will continue to evolve. Constitutional law has changed to reflect those developments, and will continue to do so.” [pp.92-93]

Gay rights won because they changed attitudes in “local governments, private businesses, state courts and legislatures, ballot initiatives, the media, and personal conversations... Progress was due to advocacy of small groups of committed individuals, countless state-based groups, and visionary leaders.” [p.03]

“Legal arguments once considered frivolous or hopeless can gain legitimacy if they are adopted by powerful constituencies, including intellectuals, social movements, political parties, or the public at large.”[p.254].... “In fact constitutional law does evolve over time, and its content is determined not by the view of long-dead Framers, or by justices’ personal preferences, but by ongoing public debates, informed and often driven by organizations dedicated to constitutional change.” [p.255] “Especially when constitutional rights are broadly defined, as in due process or equal protection, development over time is to be expected. This flexibility is a strength, not a weakness. It keeps the Constitution alive for each generation.” [p.255]

The Human Rights Campaign reported that in 1990 only about 25 U.S. corporations extended benefits to the same-sex partners of their employees. By 2000 the list had grown to 3,572 employers, and by 2005 it was up to 9,370. “Benefits for same-sex couples began as an exception, but over time became the norm..... By 2006, 430 of the nation’s Fortune 500 companies prohibited discrimination on the basis of sexual orientation.” [p.256]

An important movement which is not considered in this book is the movement for transgender recognition and rights. In the 1980s, many feminists were openly hostile to both male-to-female and female-to-male transgender people. Many leaders of gay rights organizations considered transgender issues to be a diversion, or an unimportant issue, which would slow down progress on acceptance of gay rights. Yet, by the 2000s, attitudes in both groups have changed drastically. The way this change came about was due to relentless pressure by trans activists, who sought out hostile feminists and gay leaders, and engaged in extended one-to-one conversations on the issue of transsexual, transgender, and gender fluidity. Gradually, they overcame resistance and converted enemies into allies. This campaign, waged on multiple fronts from universities to the mass media, is deserving of its own book, due to the astounding success in transforming attitudes. Certainly, discrimination against transgender people still exists, and rates of incarceration and of murder of trans people are horribly high. But trans people are publicly visible as never before in society, and their voices are finally being heard. Any group which feels that the potential for change is hopeless should examine the amazing transformation that a small group of trans activists have accomplished. Their work is truly inspiring.

SOURCES:

Influential former leaders in the fight for same-sex marriage, whose endorsement should be sought in current struggles. Get addresses and write to them, asking to call for discussions and questions:

Evan Wolfson, founder and president, Freedom to Marry. and author of *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* (2004).

Jon W. Davidson, Paula Ettelbrick, Jennifer Pizer, Michael Adams, Lambda Legal Defense lawyers (and their successors)

Matthew Coles, legal director of the Center for Equality, ACLU.

James Esseys, director of LGBT Rights Project, ACLU.

Mary Bonauto, legal director, Gay and Lesbian Advocates and Defenders, Boston.

Marc Solomon, director of MassEquality, of Freedom to Marry, and author of *Winning Marriage: The Inside Story of How Same-Sex Couples Took on the Politicians and Pundits—and Won* (2014).

Rea Carey and Sarah Reece of the National LGBTQ Task Force, Shannon Minter, director of the National Center for Lesbian Rights, Seth Kilbourn of Human Rights Campaign, Alexander Robinson of National Black Justice Coalition, Toni Broaddus of Equality Federation, Dave Fleischer of Los Angeles LGBT Center. Michael Klarman, *From the Closet to the Alter: Courts, Backlash, and the Struggle for Same-Sex Marriage* (2013).

Dan Foley, former director of the Hawai'i ACLU, legal counsel for *Baehr v. Lewin* (1993).

William N. Eskridge, professor of law, Georgetown University school of law, author of *Equality Practice: Civil Unions and the Future of Gay Rights* (2002) and *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (1996).

John D. Emilio, professor of history, University of Illinois at Chicago, author of many books, and editor of *Creating Change: Sexuality, Public Policy, and Civil Rights* (2002).

Erwin Chermersky, dean of the school of law, University of California, Irvine. David Lampo, *A Fundamental Freedom: Why Republicans, Conservatives and Libertarians Should Support Gay Rights*.

David Boies and Ted Olson, *Redeeming the Dream: The Case for Marriage Equality* (2014).

Jo Becker, *Forcing the Spring: Inside the Fight for Marriage Equality* (2013).

Martin Duberman, emeritus professor of history, Center for Gay and Lesbian Studies, Graduate Center of the City University of New York, and author of many books, especially *Has the Gay Movement Failed?* (2018)

Joan Garry, former director of Gay and Lesbian Alliance Against Defamation (GLAAD).

Anthony Kennedy, former U.S. Supreme Court justice, and author of the majority opinion in *Lawrence v. Texas* (2003, which is a model legal argument for legalizing all kinds of love and intimacy) and in *Obergefell v. Hodges* (2015).

Also check out the reasoning in these U.S. Supreme Court decisions to see if these decisions are useful models: *Griswold v. Connecticut* (1965, the right to use contraceptives, showing that sex has other functions besides reproduction, and building the right to privacy). *Loving v. Virginia* (1967, establishing the right to marry a person of another race, showing that states cannot criminalize interracial sex). *Roe v. Wade* (1973, establishing the right of women to control their own reproduction, and legalizing abortions). *Turner v. Safley* (1987, the right of prisoners to marry).

Molly Ball, "How Gay Marriage Became a Constitutional Right" *Atlantic* July 1, 2015.

Thalia Zepatos and Lanae Erickson Hatalsky, "The Marriage Movement's Secret Weapon: Radical Cooperation," *Huffington Post* June 26, 2015.

William Baude, "Is Polygamy Next?" *New York Times* July 21, 2015.