



Make Change, Not Lawsuits

Now that we've won marriage in five states, should we be bringing lawsuits in other states or suing the federal government? If not, what can we do to help secure the freedom to marry nationwide?

Bottom Line: If you're ready and it's right for you, get married. If you do, claim the name and act like what you are—married. But don't go suing right away. Most lawsuits will likely set us all back. There are other ways to fight that are more likely to win.

Summary: The fastest way to win the freedom to marry throughout America is by getting marriage through state courts (to show that fairness requires it) and state legislatures (to show that people support it). We need to start with states where we have the best odds of winning, and then ask Congress and the Executive Branch to end the federal government's discrimination against same-sex couples. When we've won in a critical mass of states and have basic support in federal law and policy, we can turn to the federal courts and ask that the U.S. government end any remaining discrimination against LGBT people. And we'll ask that all states give equal treatment to all marriages and civil unions that are celebrated in other states. Couples who want to should get married where they can, call themselves married, and ask that family, friends, neighbors, businesses, employers and the community treat their marriages with respect. Making the marriages of same-sex couples a conspicuous part of American society will help us get something we'll need to win ultimately: public acceptance of equal treatment for LGBT families. [A word to the wise: getting married could have unintended and damaging consequences for some people. If you are in the military, on a visa, thinking about adopting or getting government benefits, you should talk to a lawyer who knows that area, or get in touch with one of the LGBT legal organizations]

These are among the many things people can and should do—urgently—to get marriage nationwide. Working together we can defend the transformative wins in Massachusetts, Connecticut, Iowa, Vermont, and Maine and build on them until we win equality, liberty and justice for all.

But one thing couples shouldn't do is just sue the federal government or, if they are from other states, go sue their home state or their employer to recognize their marriage or open up the health plan for same-sex spouses. Pushing the federal government with multiple lawsuits before we have a critical mass of states recognizing same-sex relationships or suing in states where the

courts aren't ready is likely to lead to bad rulings. Bad rulings will make it much more difficult for us to win marriage, and will certainly make it take much longer.

1. Should we use the good court decisions on marriage (in MA, CA, CT, and IA) to get marriage in other states?

Absolutely, but not necessarily by filing a lawsuit. We all need to be smart about how we go about making progress on this issue. We've now won marriage in four state courts (MA, CA, CT, and IA) and didn't win marriage, but at least got civil unions in two others (NJ and VT). But marriage cases have lost altogether, for now, in five other state courts (AZ, IN, MD, NY, and WA) in the past ten years. So far, we've gotten civil unions and domestic partnerships from legislatures (without court orders) in seven states (CA, CT, HI, ME, NH, OR, WA) and this spring three state legislatures passed marriage laws (VT, ME, NH). And while we won an inspiring marriage victory in court in California, we also lost that right (at least for now) at the ballot box just months later, after an exhausting and expensive fight.

So, going forward, we'll use the brilliant reasoning and stirring language from the good court decisions and recent legislative debates to try to persuade more legislatures to end marriage discrimination in several states that are nearly ready to pass marriage laws. We also will defend the good new laws in Maine and Washington that may be subject to voter referenda. We'll work as well to identify other state legislatures and courts that may be ready to do the right thing. And we'll need everyone to help create the climate that helps judges and legislators to do the right thing.

Right now, we need to choose the courts and legislatures where we have the best chance of winning for two reasons. First, these efforts take time and money, and we don't have unlimited resources. We have to pick. Second, as answer number 3 (below) explains in a bit more detail, losses hurt. Courts and legislatures pay attention to what is going on in other states. When we lose in one state, the loss makes it tougher to win in others.

2. Should folks travel from their home state to other states to get married, and then sue to get their home states and employers to recognize the marriages?

Probably not. Courts have already said that New York will respect marriages that same-sex couples legally enter in other states and countries. But the legal arguments that worked in New York probably won't work in most states because they have passed laws or constitutional amendments saying that they will refuse to respect the marriages of same-sex couples. It will be tougher to win in those states. We need to lay the groundwork by changing the climate—convincing community leaders, moving public opinion—before we rush into court.

Since states generally do honor marriages from other states, people tend to think the federal constitution, through "full faith and credit," requires that. Actually, for the most part, states honor out-of-state marriages voluntarily, for common-sense reasons. Occasionally states refuse, for example with marriage of couples too young to marry in their home state. So far, the U.S. Supreme Court hasn't said the Constitution requires "full faith and credit" for things like marriage licenses. Using state laws that support honoring other states' marriages (the legal doctrine of "comity"), rather than the federal constitutional doctrine of "full faith and credit," is the better place to start.

And in a state with a law against honoring the marriages of same-sex couples, suing a private employer or other institution that isn't part of the government over its refusal to honor your

marriage is almost always a really bad idea. Private employers don't make the law, so they are likely to seem like an innocent bystander to many juries and judges. That makes the odds of winning even more remote and it could unnecessarily anger a public whose support we ultimately want to have. At the same time, there is every reason to try to convince employers to honor marriages from out-of-state. See question 7.

3. What's the problem with losing a few cases? Since we can't marry in many states now, we're no worse off, right?

Wrong. Losses hurt, for three reasons.

1. It will take longer to win the right to marry in states where we first lose cases, than it would if we waited and took other steps first. As society gets more used to same-sex couples being married, it will be easier to win cases in states that look iffy now. In a few years, the cases just won't seem like such a big jump. If we plunge ahead and lose cases in those states now, the courts will have to overrule themselves later to go our way. That usually takes a few years at least, and often much longer. That means it is likely to take longer to get a good decision than it would have taken if we hadn't brought a case early on and lost it.

2. It will slow us down in stronger states. It will be easier for us to convince courts and legislatures that the marriage ban should be ended if we win a series of cases, especially if we win more marriage cases than we lose. Currently we've got 4 wins and 5 losses among the marriage cases brought in state courts over the last ten years. And the handful of cases brought years ago and more recently in federal courts all have lost. Courts pay attention to what other courts do. If we win most cases, that will confirm that we have the stronger constitutional arguments. And while legislatures don't have to agree, court rulings that say the exclusion is unfair and unequal are a major help to our political arguments. Courts still have considerable moral authority in America, especially on the constitutional requirements of fairness and equal treatment. By contrast, early and unnecessary court losses in Arizona and Indiana hurt our other cases, including the ones in New York, Washington, and Maryland, where we lost by close margins and the courts adopted contorted reasoning from those earlier decisions. And because, so far, more marriage cases have been lost than won, taking on a principled but long-shot case and racking up more losses now would just make it harder to convince other courts and legislatures.

3. It will hurt LGBT people on other issues. The constitutional arguments that we make in the marriage cases also appear in our cases about other issues, such as employment, adoption, or child custody. If we bring a marriage case in which a court says that the constitution does not protect us, we'll be harmed in these other contexts as well.

4. Shouldn't we try to bring a federal case and get it to the U.S. Supreme Court as soon as possible to settle the issue once and for all?

No. The history is pretty clear: the U.S. Supreme Court typically does not get too far ahead of either public opinion or the law in the majority of states. For example, few states still had laws requiring racial segregation or outlawing interracial marriage by the time the Court struck those laws down. Most states had already struck down or repealed their own laws against same-sex intimacy when the Supreme Court finally invalidated Texas's law.

Right now, we need to make gains in both public opinion and state law. The current Supreme Court has been taking a pretty narrow view of civil rights and civil liberties. Even the strongest LGBT rights decision the Court has issued—the *Lawrence v. Texas* case striking down laws against intimacy for same-sex couples—explicitly commented that it was not saying anything about formal recognition of same-sex relationships. The arguments in the briefs are not the only thing that influences the Court’s decisions. The climate of receptivity and momentum in the country on these issues matter as well. There is much we can and should do together to strengthen our hand before we put a federal marriage case before the justices.

There are also serious risks if we go to the Supreme Court and lose, especially if we’ve asked it to set aside state limits on marriage. We could still ask state courts to strike down marriage bans under state constitutions, and we could still ask state legislatures to pass marriage laws. But most state courts and legislatures pay attention to what the U.S. Supreme Court says about constitutional principles of fairness and equality. It will be harder for us to get state courts to strike down laws excluding same-sex couples from marriage (and many from civil unions, too) if the U.S. Supreme Court has said such laws are okay under the federal constitution.

A loss now may make it harder to go to court later, and we may need to. It will take us a lot longer to get a good Supreme Court decision if the Court has to overrule itself. Let’s not forget: it took 17 years to undo *Bowers v. Hardwick*, the 1986 Supreme Court decision that upheld Georgia’s sodomy law. That was fast for the Supreme Court. And during that time, many LGBT Americans lost jobs, lost custody of their children, and suffered other harms because the *Bowers* decision was taken as a license to discriminate against us.

5. Should we get married and then sue the federal government to get it to honor our marriages, say for example, for immigration, tax, or social security?

No. In 1996, Congress passed a law saying that the federal government would discriminate against the marriages of same-sex couples (the so-called “Defense of Marriage Act” or DOMA) by denying them all the protections that the federal government gives to all other validly married couples. As a result, the federal government for five years has been discriminating against the married same-sex couples of Massachusetts. It will, as things now stand, continue to deny equal treatment to same-sex couples that marry in Connecticut, Iowa, Vermont, and Maine, and to those who married in California in 2008.

There are two ways to get rid of “DOMA”: going to court to have the law declared unconstitutional or getting Congress to repeal it (something President Obama has said he supports). These approaches can work together, and we are doing both. We’re working with members of Congress on repeal legislation now. In addition, Gay & Lesbian Advocates & Defenders (GLAD) has filed a thoughtfully constructed lawsuit in federal court on behalf of a diverse group of plaintiffs married for years in Massachusetts. These plaintiffs are eligible for a range of federal benefits, applied for those benefits, and were denied following extensive administrative procedures. If that lawsuit succeeds, it should establish a principle that will be fatal to DOMA, and we can bring other lawsuits addressing other federal protections to build on it.

GLAD’s lawsuit challenging DOMA is more modest than a case claiming there is a federal constitutional right to marry. Until DOMA was passed, the federal government deferred to the

states' determinations of marital status. DOMA creates a "gay exception" and says the federal government will not honor a state's marriage of same-sex couples. GLAD's legal challenge to DOMA simply asks that the courts tell the federal government to go back to doing what it did before—recognize all marriages that a state has approved. In contrast, a federal case arguing that it is unconstitutional not to let same-sex couples marry would ask the courts in effect to order that couples be allowed to marry in every state, overthrowing most state marriage laws. That case asks for much bolder action from the courts, and it requires a much bigger development in constitutional law. We think the courts aren't ready to do that yet.

And last, but not least, before bringing any federal case, people should beware of unintended consequences. For example, a case focused on immigration could lead to the deportation of the non-American member of a bi-national couple.

6. If we're not going to win by suing more states or the federal government now, how are we going to win?

There are two things we need to do to win the freedom to marry nationwide. First, we need to change the law. Like other civil rights movements, we are doing that state by state, starting with the states where we have the best shot. In some states, we'll get marriage through the state legislature, to emphasize that it has popular support. In other states, we'll go to the courts, to highlight that excluding same-sex couples is inconsistent with basic principles of fair play.

When we've been successful in the states most likely to go our way, it will be easier to win in other states. As we build significant support among the states, we'll be able to ask Congress and the Obama Administration to give our marriages the same treatment the federal government gives all other marriages, by including them in federal laws and programs. Congress could do that in a single bill. The Administration also could increase LGBT equality through countless federal regulations and Executive Branch policies.

Even as America embraces, state by state and in the federal government, the view that it is unfair to exclude same-sex couples from marriage, a few states may hold out against the emerging consensus. Ultimately, the key to national equality may be the federal government, as it has been in all the other civil rights movements – but national resolution comes after groundwork, not in one quick roll of the dice.

The second thing we need to do, as explained more in the answer to question 7, is convince America to accept the change, to accept the idea that our constitution does not allow discrimination. Equal treatment under the law is all we are asking for – not more, not less.

7. So if we shouldn't generally be suing, what should we be doing?

Neither court decisions nor legislatures can make effective, enduring change in a democratic republic as diverse as this one unless people either come to agree with the change or to accept that it is required by an important higher principle. That was true with racial segregation, it was true with sex discrimination, and it will be true with discrimination against same-sex couples in marriage.

Changing the law through court decisions based on fundamental principles of fairness and equality helps persuade people that change is the right thing. But the most powerful agent of change in America is people.

Nothing moves Americans on LGBT rights generally and marriage in particular more effectively than conversations that all LGBT people can have with our friends and family members about how it feels to be treated differently and why that is so unfair. Believe it or not, many of our friends and family members don't realize the burdens and barriers we face, but most would agree that our constitution guarantees the same equal protections to everyone, and that no one should be treated differently. The most important thing you can do to make progress in our fight for marriage is to talk to your family, friends, co-workers and community about your marriage if you have married, or about why you want to have the choice to marry, if you have not. Talk in very practical terms about why it is so important. Talk about what it means to be able to marry and have all the fundamental freedoms that others have. Go to www.tell-three.org to see a campaign endorsed by all of our groups, and many others, that explains how to get these conversations started.

Simply getting married (if you can and it's right for you) and telling people will help get those conversations going. But you shouldn't stop there. Changing people's minds happens over time and after long-term, incremental campaigns. California's history on recognizing same-sex relationships is a case in point. Cities in California started adopting Domestic Partnership policies in the mid 80s. The state adopted its first law in 1999, and expanded it over the next six years. Courts in California have been deciding important cases about anti-LGBT discrimination since the 70s. With the marriage victories in five states so far, we should be able to win marriage more quickly in other states and to open serious conversations among members of Congress and Executive Branch officials. But we still need to lay the groundwork at the local level. Ask your employer to include your spouse in the health and benefit plans; ask them to do a domestic partnership policy if they decline. Ask your town to establish a local domestic partnership registry if you don't have one yet. These are some of the concrete tasks and tactics that people can do that will create the climate for the advances we all want, rather than rolling the dice on litigation. You can connect with your local LGBT advocacy group here: www.equalityfederation.org.

Doing those things will have practical benefits. But maybe more important, they'll spark the conversations we need to make the changes in law enduring and real at a day-to-day level.

8. We all have a stake in defending marriage in Maine and winning it back in California at the ballot box.

While we engage in personal conversations to change hearts and minds in all 50 states, and work to win the freedom to marry in more states in the months and years ahead, there are two fights looming now that will be crucial to our continuing to make progress on marriage for same-sex couples: Maine and California.

In Maine, the state legislature overwhelmingly passed a marriage equality bill and the Governor signed it. Now those who oppose equality are forcing a referendum vote on the new marriage law this November. It is critical that we all help defend this legislative breakthrough and it is entirely doable. With support from those of us across the country who are benefiting from Maine's strong example, the state should be able to hold onto marriage in November.

In California, we won marriage in the courts but then lost it at the ballot. Now that the California Supreme Court has refused to overturn that vote, we need to return to the state ballot box to win marriage back.

These fights are important nationally because holding marriage in Maine and regaining it in California will be huge steps forward in the fight for the freedom to marry. As the first popular vote on marriage after Prop 8 and after all of the legislative and court wins this spring, the Maine election is important both for Maine and for the rest of the country. Success in California will have vast influence because California is the largest state, because it is so important to the national economy, and because California is our national trendsetter.

But winning these next battles won't be easy. Antigay groups already are gathering their resources to attempt to swamp Maine with divisive, defamatory propaganda. And in California, there are literally hundreds of thousands of fair-minded people who aren't with us yet and need to be convinced. Convincing the reachable middle in both states needs to happen on a retail level – by engaging them in conversations that will make them more comfortable with LGBT people, more understanding of the challenges we face, and more willing to agree that allowing us to marry gives us crucial protections and does not harm them.

So please, now's the time to contribute – in time, in energy, in conversations, and in money – to the efforts currently being organized to hold onto marriage in Maine and to win it back at the ballot box in California.

May 2009