

Cal Anderson Memorial Lecture Series

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Winning Marriage Equality: The Road Ahead

By Evan Wolfson

When I accepted the invitation to come to Olympia and give this Cal Anderson Memorial Lecture several months ago, I did so, first, because of my desire to pay tribute to the legacy and courage of Cal Anderson, a beloved and respected leader and pioneer.

I also had a hunch that this would be a historic moment in Washington, and wanted to line up the opportunity to be here and cheer you on in the work at hand.

Given the timing, I thought that by now I might be able to report to you something like this:

In its recent ruling, the court carefully examined the justifications put forward to defend discrimination in marriage, and concluded, in the clear, cool, dispassionate light of a courtroom, that none of them stood up. The court declared there is no good reason to continue the exclusion of committed same-sex couples from making the legal commitment of marriage, with all its rights and responsibilities of such importance to them, their children, and their loved ones.

*The court recognized that the different-sex restriction on the choice of a partner in marriage is, in fact, sex discrimination. Moreover, as the court wrote in rejecting fear-mongering and discomfort with change, “**When tradition is the guise under which prejudice or animosity hides, it is not a legitimate state interest.**”*

*And, finally, the court rejected half-measures or piecemeal responses, such as civil union, recognizing that what the couples seek is not gay marriage, but marriage itself – same rules, same responsibilities, same respect. The court held that a “**separate but equal remedy**’ [such as civil unions] is not a remedy at all.”*

In fact, tonight we *do* gather here at a historic moment in WA – with passage of a non-discrimination law within reach after nearly thirty years of work – another fitting tribute to Cal Anderson who laid the foundation on which this triumph of justice is achieved. We thank the sponsor of the bill, Rep. Ed Murray, Senator Lisa Brown, and the others who are leading this fight, alongside groups such as Equal Rights Washington and the Religious Coalition for Equality.

And tonight, too, I can report a marriage victory... but the court I am describing is not – **not yet** – the Washington Supreme Court, now on the verge, we believe, of handing down its decision in the historic marriage case here.

Instead, the court decision in favor of couples seeking the freedom to marry that I reported to you tonight was, handed down last Friday in Maryland, the latest of many, and not, we trust, the last to come.

Now we look to the Washington Supreme Court to do justice in the case brought by Washington couples unfairly denied the freedom to marry.

Nearly 60 years ago, a four-justice majority of the California Supreme Court had the commitment to the constitutional mandate of equality for all and the institutional integrity as judges not to be deterred from their constitutional role even in the face of tremendous political pressure, including many of the same arguments pressed on our courts today. With its 1948 decision in *Perez v. Lippold*, that supreme court entered history as an example of a court's willingness to stand up for justice in the case before it, without fear or favor, unswayed by those who urged it to, in the words of Alexander Hamilton, "connive at infractions" of constitutional guarantees and the human dignity of a vulnerable minority.

Each person seeking a license to marry the "wrong" kind of person, said the California Supreme Court, "finds himself barred by law from marrying the person of his choice and that *person* to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains."

Striking down discrimination in marriage in fulfillment of the constitutional guarantees of equality they had enunciated and were, in part, pioneering, the 4-3 majority rejected the dissent's assertion that in such matters, courts should defer to public opinion or even a long and sorry history of discrimination defended as "tradition." Instead, by frankly acknowledging the harms in discrimination and the lack of compelling justification, and by refusing to falter or delay, *that* supreme court fulfilled the mission of the judiciary, did justice, spared the state drawn-out political trauma, and immeasurably enriched the nation.

The decision in *Perez*, marking the beginning of the end of race discrimination in marriage, came **before** *Brown v. Board of Education*, **before** *Loving v. Virginia*, **before** an anti-civil rights backlash effort to amend the California state constitution and **before** a U.S. Supreme Court decision rejecting such efforts to subvert equality, **before** legislators in most states (including California) were willing to stand against discrimination, and **before** the polls showed the public's acceptance of equality in marriage or other civil rights. But some state had to show leadership, and the court was properly asked to provide it through a direct and timely challenge to existing discrimination.

"The courts correct the aberrations of democracy," Tocqueville wrote, and "though they can never stop the movements of the majority, they do succeed in checking and directing

them." In the freedom to marry case before it in 1948, California's Supreme Court did not flinch. History has upheld it.

Today in Washington, couples in love claim what the California Supreme Court in *Perez* denoted "the essence of the right to marry [-] the freedom to join in marriage with the person of one's choice."

These Washington couples and their lawyers at Northwest Women's Law Center, Lambda Legal, and the ACLU have reminded the state Supreme Court that the denial of the rights and responsibilities of civil marriage to same-sex couples benefits no one, and is a cruel interference with a choice that properly belongs to the couple. And as the court in Hawaii held; as courts from Canada to South Africa have held; as the high court of Massachusetts in its epic ruling held; as lower courts here in Washington, in New York, California, and now, Maryland, have held; and as the *Perez* and *Loving* Courts held over fifty years ago and again over thirty years ago, the state has no good reason -- and certainly no compelling reason -- for the unfairness, interference, exclusion, and inequality these Washington families challenge here.

Now it is up to the justices of the Washington Supreme Court to fulfill what Federalist Paper No. 78 described as their "duty as faithful guardians of the Constitution."

And we, gathered here in the name of Cal Anderson, must also do *our* job, the nitty-gritty work of social justice in a democratic republic.

Our job is to give our neighbors and fellow citizens in Washington the two ingredients they need to rise to fairness: information and the time to absorb it.

Working together now, gay and non-gay, we must remind our leaders and neighbors of four important facts, underscoring that the sky will not fall when gay people are allowed to take on the commitment of marriage:

FACT ONE: We have, in our lifetimes, seen four major changes in the "definition" of marriage that were at least as "radical" as anything proposed here today:

- divorce
- choice - decoupling procreation decisions from marriage (i.e., *Griswold v. Connecticut*)
- ending race restrictions on marital choice
- ending the legal subordination of women in marriage, assuring women's equality and completely altering doctrines such as "coverture" (i.e., eliminating married women's loss of legal identity, property, and rights)

FACT TWO: In each of these civil rights struggles, then as now, opponents of equality prophesied that ending discriminatory restrictions on marriage would lead to disaster. Today they sound foolish at best.¹

¹ Several of the following examples are taken from E. J. Graff, *What is Marriage For?* (Beacon Press 2000), which is an excellent history of marriage and the changes that have made it stronger.

A Tennessee judge, for example, wrote that if interracial marriage were allowed:

We might have the father living with his daughter, the son with the mother, the brother with his sister...The Turk or the Mohammedan, with his numerous wives, may establish his harem at the doors ... Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.

Opponents of equality also made dire claims, for example, about contraception. One commentator declared that “Japanese birth control devices in the homes of America can be more destructive than Japanese bombers over Pearl Harbor,” while bishops issued a statement saying that if the Connecticut legislature ended restrictions on contraception, “within twenty-five years the state will be a mass of smoldering ruins.”

In 1844 a New York legislator pleaded with his fellows *not* to allow married women to own property, because:

If any single thing should remain untouched by the hand of the reformer, it is the sacred institution of marriage [which] is about to be destroyed in one thoughtless blow that might produce change in all phases of domestic life.

A Maryland judge agreed with him, saying that if women retained their legal rights within marriage:

What incentive would there be for such a wife ever to reconcile differences with her husband, to act in submission to his wishes, and perform the many onerous duties pertaining to her sphere? Would not every wife ... abandon her husband and her home?

And my personal favorite: One Georgia court upheld restrictions on different-race marriage as “unnatural,” saying it would lead to children who are “generally inferior in physical development and strength” and “sickly, and effeminate.”

Who today – judge, legislator, editorial-writer, citizen – wants to be remembered saying things that seems so appalling or absurd just a generation later?

FACT THREE: There is enough marriage to share.

- Along with Massachusetts -- Holland, Belgium, Canada, Spain, and South Africa have ended discrimination in marriage, and the gays have not used up all the marriage licenses
- By ruling for inclusion and equality, the Supreme Court would not be bucking the tide, but, rather, riding the wave.
- **If Roman Catholic Spain can go from Generalissimo Francisco Franco in 1975 to marriage equality in 2005, surely so can Washington.**

FACT FOUR: The right way to end discrimination in marriage is to end discrimination in marriage, not repackage it.

I am often asked, “why can’t gay couples settle for something less?” Asked it so often, that I devoted an entire chapter of my book, *Why Marriage Matters: America, Equality, and Gay People’s Right to Marry*², to explaining the answer to this question, “Why not use another word?”

In chapter 7, I quote Martin Luther King, Jr. in his famous “Letter from a Birmingham Jail,” written not in anger against the bigots, but in frustration against the “*moderates [who count] themselves as friends of the civil rights movement... [who have] come some distance in step with the thundering drums [of equality] but at the point of [full] application... want[] the bugle to sound a retreat...*”

King chided these friends, who said, “go slow,” “settle for less,” “compromise”:

What is implied here is the amazing assumption that society has a right to bargain with the Negro for the freedom which inherently belongs to him. Some of the most vocal liberals believe they have a valid basis for demanding that, in order to gain certain rights, the Negro ought to pay for them out of the funds of patience and passivity... to accept half a loaf and to pay for that half by waiting willingly for the other half to be distributed in crumbs over a hard and protracted winter of injustice....

The fact is, there is no fair and equal substitute for marriage itself, no need to seek to avoid the obvious right answer.

The question can be framed simply like this:

Either marriage and civil union are the same, in which case, why do we need two lines at the clerk’s office? Or they are not the same, in which case, what is the government withholding from these Washington State families, and why?

But it is not enough to say we are for equality, for marriage equality, and wait for the court or even our legislators to do the heavy lifting. Rather, it is our job to address people’s concerns and discomfort, answer questions, and give them the time and information they need.

So here are **4 reasons** why ending discrimination in marriage, not recreating it through civil union, is the right answer:

1. One of the main protections that come with marriage is the word *marriage*, and the security, clarity, and dignity it brings to families. To be denied the vocabulary of marriage and its meaningful, resonant, and readily understood statement of love and commitment—and instead, have to fumble for 10 documents, explain a new term that doesn’t even have a verb, and, possibly, retain a lawyer just to protect your family in a time of crisis—is not fair and not equal.

² Simon & Schuster 2004, also available in paperback:: <http://www.freedomtomarry.org/node.asp?id=3470>

2. Civil union is good, but limited, and does not provide the full range of protection for families. There is only one system in our country that protects families no matter where they live or travel; it's called marriage. Civil unions do not provide the 1,138 federal incidents of marriage, from social security to immigration to tax equity, or assure families that their legal relationship will be respected outside their home state.
3. Civil union is a product of the work to win marriage itself; we don't get even *civil union* by asking for civil union. Support for civil union represents a placeholder in people's thinking as they grapple with the need to end discrimination against gay people, same-sex couples, and our kids. It does the people of WA an injustice to think they cannot rise to the better angels of their nature if we talk about the reality of gay people's lives, explain why marriage matters, connect the dots, and make the personal ask. Running away from a discussion of how the denial of marriage harms families undercuts the reachable middle's ability to rise to fairness.
4. The opponents of equality are against civil union as well as marriage – just look at their vicious opposition even to an employment non-discrimination measure. They are pushing constitutional amendments that would deny the freedom to marry, but also civil union, domestic partnership, and any other bit of protection, large or small. Separate and unequal so-called “compromises” satisfy no one, and legislators who capitulate on questions of fundamental fairness and basic rights buy no one off, gain no peace, spare the state no debate, avoid no primary challenges, but rather just fall short on all sides. If we are going to have to fight anyway, why not fight for what we fully deserve?

We must challenge Democrats, progressives, allies, friends on their timidity and too-characteristic failure to make a substantive, let alone moral, case for what everyone assumes they stand for, anyway. Those who run away from the marriage discussion, the connecting the dots, the heavy lifting of real engagement and explanation that would help diffuse anxiety, harm this cause and also disserve their own political interests. They miss their opportunity to persuade the persuadables, dispirit their own, and remain vulnerable not only to the opposition but to the contempt of those who can respect leaders they may disagree with, if only those leaders would, in fact, lead.

The silence or hedging of Democrats, progressives, friends in denial colludes with the opponents of equality by depriving the reachable-but-not-yet-reached of the time and information they need and deserve. These allies and friends will never be anti-gay enough to satisfy the opposition. They have a product – marriage equality – like it or not, but are failing to sell it. This, clearly, is the worst of both worlds.

By contrast, authenticity and leadership actually help politicians guide the public to the right result. Consider: In Vermont, where legislators created civil union rather than ending marriage discrimination, a right-wing firestorm followed anyway, with hateful attack ads across the state, primary challenges, and electoral turbulence. By contrast, in Massachusetts, every single legislator who supported marriage equality won reelection, and some of the loudest opponents were defeated, because the public had a chance to see

leadership, hear the case, and, most importantly, witness with their own eyes that when same-sex couples married, the sky didn't fall. Today a majority supports marriage in MA, a plurality even in VT, and the CA legislature has voted for marriage.

Let us hope the Supreme Court does its job and upholds the Constitution's command of equality for all. If the question of marriage discrimination goes to the legislature, let us hope our elected officials do their jobs and end that discrimination, rather than repackaging it. And in the meantime, let us each do our job: helping people around us understand why marriage matters, why equality and fairness require an end to discrimination in marriage.

2 rules:

1. Don't assume that just because someone loves you (such as your mom), or likes you (such as your college roommates or co-workers), or is generally pro-gay or tolerant, or for that matter, is gay – don't assume that means they understand why marriage matters or why they need to take a stand. We must connect the dots and make them ask.
2. The second rule is the flipside of the first. Don't assume that just because someone is not with us now means they can't get there. We owe it to them to help them push through their discomfort or lack of knowledge and give them the chance to be fair. That begins with us **explaining to them why it matters to us, gay or non-gay.**

These are precepts of dealing with others that Cal Anderson followed – and look how far we've come.

With justice and full equality within reach, let us not begin the next round of civil rights conversation bargaining against ourselves. Let us not be complacent, indifferent, timid, or resigned.

Rather, let us engage our neighbors and fellow citizens in the personal and informational conversations they deserve – and trust that from our commitment to engagement will come marriage.