

TRANSCRIPT

"GUNS, MARRIAGE, AND THE CONSTITUTION"

A Conversation With David Keene and Evan Wolfson

Moderator: David Cole

Introduction: Andrea Batista Schlesinger

ANNOUNCER:

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ANDREA BATISTA SCHLESINGER:

My name is Andrea Batista Schlesinger and I'm deputy director of US programs. And my job is to introduce-- and welcome our speakers. I found myself surprised a few times since I joined Open Society Foundation seven months ago. The first is that after spending a career begging for resources-- running a nonprofit and finally feeling that I had arrived-- by coming to the second largest foundation in the world-- that I would spend a significant amount of time in a tent. I'm-- for those of you who don't know, I'm speaking of the Talking Transition Tent that we built to-- enable civic participation and the transition in city governance, but regardless of the high purpose, I was roundly teased by everyone-- for my fancy job in which I went camping (LAUGH) every day. Today would be the second time-- that-- I am surprised here.

I didn't imagine that either Open Society Foundations would host-- the past president of-- of the NRA or that I would be introducing him. And in especially in a conversation that pairs him with Evan Wolfson. But this is us-- both-- provoking conversation and living our-- our values-- which is harder to do than it is to talk about-- while creating open societies for ourselves here in this building-- even as we try-- to do it-- around the world.

Of course, we really just invited David to coax-- him into giving us the secret for NRA's success-- and then to steal those secrets to advance our goals. Let's be-- frank. (LAUGH) So-- but you should still feel free to be completely candid (UNINTEL). It's just us. It's just us. And-- I have a personal connection to both of the issues-- that we're bringing together today. I grew up in Brooklyn, New York-- with-- raised by a dad who was an NRA member and who-- kept guns on-- in our home. And as soon as marriage equality was legalized in New York-- I became-- one of the first to-- with my-- my wife now to take the plunge.

I don't think there's any relationship between those two things, but I just wanted to share. (LAUGH) And I'm-- that's-- this seems an appropriate moment to mention that this event is being recorded-- (UNINTEL). Was there a more legal-- way I should say that? No, it's being recorded.

Okay-- more seriously. We structured today's event-- as a means of exploring how civil society groups-- committed to a particular constitutional vision have-- worked to make their vision a reality. In both cases, this effort has involved more than simply winning judgments-- favorable for the court-- or not, but figuring out a long-term strategy, figuring out-- the interim steps to get there, thinking about how to mobilize people, shaping a political conversation, but at the same time, shaping a cultural conversation. And we're hoping that-- that David and Evan-- will touch upon-- these facets of their strategy in their work as they tell their stories.

Anyway, my job is-- is to introduce you. So I'll start by introducing David Cole, an Open Society fellow who's focused on the effectiveness of civil society organizations and making human rights-- meaningful. David-- when he's not following for us is a professor at the Georgetown University Law Center and-- serves as the legal affairs correspondent to *The Nation*-- to which I'm sure David Keene-- subscribes.

(LAUGH) David Keene-- well, how many of you do? David Keene-- I do, proudly-- was president of the National Rifle Association from 2011 to 2013. And continues to serve on its board and executive council. He's opinion editor at the *Washington Times* and from 1982 to 2011-- was chairman of the American Conservative Union.

Evan-- Wolfson is founder and president of Freedom to Marry, the campaign to win marriage equality nationwide. During the '90s, he served as co-council in the historic Hawaii marriage case-- that launched the ongoing global movement for the freedom to marry. *Newsweek* and *The Daily Beast* dubbed him, "the godfather of gay marriage--" which does, of course, imply consequences-- for the states that have not enacted it. So I'm sure we'll hear about that. (LAUGHTER) An offer-- they couldn't refuse. So David Cole. Take it away.

DAVID COLE:

Thank you. So thank you-- thank you all for coming. The title-- of the-- the-- afternoon session is guns, marriage and the constitution, so it's-- but it's not about shotgun weddings. (LAUGH) I-- I-- asked David and Evan to come in-- in part, it's

grown out of the project that I've-- I've been working on as a fellow for-- Open Society Foundation which is really asking how-- how does the Constitution change? How do-- how does constitutional law change?

And in law schools, we teach constitutional law really from the standpoint of-- appellate legal practice. What kinds of doctrinal arguments can you make to move constitutional law in one direction or another? And that is an important part of constitutional law and-- and the development and change of constitutional law. But I think it's only-- a small part.

And indeed-- much of the work of constitutional isn't by people who want to change the Constitution has to take place outside of the Supreme Court, outside of federal courts all together-- and in a variety of other-- forums-- to make it possible for constitutional law to change in the way that they-- they want to see it change. And the-- the-- I think we have here-- representatives from-- the two most successful constitutional law change efforts of-- of our generation.

From obviously different-- political-- vantage points, and I want to-- especially thank-- David for coming-- here to the-- to be willing to speak to-- a group who-- who-- you know, understandably many won't necessarily share the substantive vision of-- of the NRA. But I think that both the-- gun rights movement and the-- marriage equality movement shared a number of things in common.

They both-- saw a hostile, legal, constitutional order, so that-- in the 1970s, when somebody made an argument about-- the right to marry in the Minnesota Supreme Court, the-- one of the justices on the Minnesota Supreme Court turned his back on the lawyer arguing for the right to marry, wouldn't even look at him. And no justice asked a question, was-- and in the 1990s, as people know, when-- Hawaii-- so much as-- as suggested that they might recognize-- gay marriage, President Clinton signed-- the Defense of Marriage Act with substantial majority-- in Congress.

We've come a long way-- since that period of time. In 1991, Chief Justice-- Burger, retired Chief Justice Burger, said that the right to-- the notion of an individual right to bear arms was the greatest fraud perpetrated on the American people-- that he had witnessed. And-- the courts of appeals were-- by and large unanimous in rejecting the notion that the Second Amendment protected an individual right to bear arms. It protected the rights of states to have militias and that-- that was it.

So they-- so both the gun rights movement-- people who are committed to a notion of the right to bear arms and the gay rights movement committed to-- a notion that-- that people should be able to marry regardless of their-- of their gender-- saw a substantial-- legal obstacle in constitutional law. Both-- groups, I think, worked in a variety of-- forum-- forums to move the law in the way that they-- to bring the law into-- into consistency with their-- point of view.

Both groups, I think, required a kind of institutional commitment. Constitutional change does not happen-- overnight. The-- both of these changes are actually remarkably swift for a constitutional law doctrine, but it's still-- you know, decades-- of-- of work. And both-- groups have succeeded beyond what I think anybody would

have predicted at-- at the time that they-- they began.

So now there are 17 states in the District of Columbia that recognize same sex marriage. About 40% of the-- representing about 40% of the American-- population. And the notion has majority support in the population-- at large. Individual right to bear arms was recognized by the Supreme Court in 2008 in the Heller case-- and was extended to the states a couple years later in the McDonald case.

And the NRA-- has shown itself-- able to-- protect its vision of the right to bear arms, even where the court might not. So the-- the federal legislation to enact universal background checks almost certainly would have been-- ruled constitutional by-- by the Supreme Court if it had ever-- had ever gotten there. And yet the-- the gun rights groups were able and the NRA in particular able to mo-- mobilize their people around their-- the vision of the right to defeat that-- that effort.

So I don't think we could have two better people to talk about the-- common-- the-- the-- the-- the common efforts to-- what-- what it takes to change the Constitution than-- Evan, who's been involved in this since he was a law student at Harvard Law School and writing a paper on the right to-- same sex marriage that-- was considered so crazy that no constitution law professor at Harvard would be will-- was willing to-- oversee it. And-- and David, who-- has been involved with the-- with the NRA for-- for decades and served on its board since 1990 and-- and as its president until last-- summer.

So I wanted to start, though-- with one of the commonalities between-- the-- the-- the gay rights movement and the-- and the NRA and that was concern about-- Supreme Court litigation. So-- when the Heller case was brought, the case Heller versus District of Columbia, which was designed to-- challenge-- challenge the handgun ban in-- in-- in the District of Columbia, the NRA was opposed-- to filing that-- lawsuit. And when-- Perry, the case challenging Prop 8, in-- in California was-- in the planning stages, the gay rights groups in unison were opposed to filing-- that-- that lawsuit. So I'll start with David. Why was the NRA concerned about the filing of Perry, of--

DAVID KEENE:

Probably for the same reason that-- that they were. I mean, you're-- you-- whenever you do something like that, you're rolling the dice and you may think that they're gonna come up right, but they might not. There has been a decades-long public fight-- not public in the sense of being on the networks about the interpretation of the-- of the Second Amendment, whether it was an individual right or a collective right.

And we felt that by that time, that the-- that the bulk of the judgment was that it was, in fact, an individual right, but whether that was something that was in the minds of the justices of the Supreme Court's a whole different question. That fight went on for a long time as this-- as even before Heller was brought-- Sarah Brady's group had

contacted Laurence Tribe at Harvard and asked-- him. They wanted him to be the spokesperson for the anti-gun position.

And-- Larry Tribe, as you know, is very liberal. He's also very honest and he spent a year studying it and came back and said, "I dislike guns as much as you do. I'd like to have 'em banned, but the founders didn't really agree with that position. And I've come to the conclusion from my research that it's an individual right."

So we felt that we were winning that, but when you go to the Supreme Court-- you have-- you're taking a big chance. And you can never be sure, obviously, when you go to any court, that you're gonna prevail. It was-- obviously a divided court. It was going to be.

And the NRA rarely actually brings cases itself. We get involved in the cases very quickly when they affect Second Amendment rights. And many of the attempts-- to get to the-- to get to the courts over the years are very-- none were accepted at the Supreme Court level. The ones that were decided lower level were relatively easy.

It was somebody who robbed a bank (LAUGH) that said, "Well, I had a right to have that gun, you know, under the Second Amendment." When we looked at the Heller case as it began to move, in many ways, it was the perfect case. So we got on-- on board to make sure that-- that-- Heller had the representation that he needed. As you'll-- recall, those who looked at it, this was a man with a security guard background, law enforcement background-- wanted to own a firearm for self-defense in his home. That's what the question was.

Did the Second Amendment-- guarantee that right? If-- and it was-- it was a fairly clear-cut case in the District of Columbia who had the worst, from our standpoint, the worst firearm laws in the country and one of the highest crime rates. And therefore, the question was starkly drawn to the Supreme Court.

But that-- that nervousness existed. We didn't want to go to the Supreme Court until we were ready, until the public was ready. I mean, it is-- it-- the-- the Supreme Court may not always follow the election returns, but public sentiment-- has a great deal to do with where the court is ultimately gonna come down, if it's a close question. And I think that's true in both of our cases, so-- we ultimately decided to do it, but we do it-- we did it-- knowing it was a big risk. And-- and when we-- when we went in and we-- when we won that, then everything else began to fall into place.

DAVID COLE:

And Evan, was is the same-- same concern on your part?

EVAN WOLFSON:

Yeah, broadly speaking, yes. Freedom to marry strategy, the strategy that has led to the success as you described and the strategy that is going to bring it home has

always been to know that ultimately, it's the Supreme Court that is gonna bring the country to national resolution. We-- we don't have to win within the four corners of each of the 50 states. No social change, no social justice, no civil rights movement in the US has ever done that.

But at the same time, we know that the Supreme Court will bring the country to national resolution when we have built a critical mass of states and a critical mass of support. And so the-- the work has always been to build that critical mass of states, build that critical mass of su-- support, to create the climate for the right case at the right time to bring the country to national resolution.

When-- when the Perry case was announced, it was an effort to push past that and just race to the Supreme Court. And it came at a point where if you remember back, it-- there's been so much momentum and progress that people now have a hard time even remembering that, but at that time, we had only won two states and we'd just seen one state stripped away, California. We were only just on the verge of having a majority that we had eked out over the years.

We didn't yet have a solid statement of majority. We hadn't yet won the freedom to marry in New York, which was a real turning point because that was the first battle we won legislatively with the support of Republicans as well as Democrats. We hadn't yet secured the support of the president and the administration. We hadn't yet won at the ballot, something that when we did in 2012 and proved able to win ballot measures that previously we had lost every one of them was a tremendous turning point in-- in the political momentum.

And of course, we hadn't yet won all the states that, you know, we just talked about. So there was great concern that that was gonna be too quick, because it's-- they-- they really-- when they announce it, said, "We're gonna get there in nine months." Well, as it turned out, cases are more complicated and things don't happen the way even the lawyers planned and the way even the lawyers planned.

And it dragged on longer. That gave us-- the time to make all the tremendous progress that we've just talked about, to the point where when the case did eventually get to the Supreme Court, we were all actually hoping, not sure, but hoping that maybe we did have that critical mass. And there was at least the prospect that we were there.

Of course, as it turned out, we didn't quite have that critical mass and we didn't get the full national win that was the declared intention, but because we also won on the very same day, the very important ruling striking down the federal discrimination or at least a large part of it, it added to our momentum. It restored the freedom to marry in California. And we're now on track, very much again, with this same strategy.

In fact, literally just today, Freedom to Marry put out a strategy memo and you can all see it online now where we talked about what I now call one strategy, two timelines. And that's because there's such tremendous dynamism, such momentum literally-- literally every day brings some new development, most of them happily positive,

though they won't all be positive.

But mostly because of this momentum and the shift in the country and so on, we're seeing such progress, whether it's out of Utah or Oklahoma or today's announcement out of Virginia and so on. So we've basically put out the pathway forward is what we call the memo in which we're just-- we're saying, "Look, we're still on the same strategy. It's still the same work. It's still the same concerns of building a critical mass of public opinion as quickly as possible, building a critical mass of states as-- as soon as we can."

But at the same time, given where the-- the litigation map is, there are 40-some cases out there in the country now. No one can control which case is gonna go, how and when and they all think they're gonna go to the Supreme Court, but we don't know which one it's gonna be. But there are cases that are pretty far along that theoretically could put us on a timeline for a Supreme Court decision as soon as 2015.

If that doesn't happen or depending on what the court does, were it to do anything, we may be on a timeline that we're building towards 2016, 2017 or thereabouts. So we need to work on both these timelines, 'cause we don't know which one it's-- it's gonna be. We need to be laying the groundwork, doing the same work, but it is that strategy that's gonna get us there, even though we don't fully control the timeline.

So that's what we've literally said as recently as today. And it reflects the very same understanding of the dynamics that are out there and the things you can control and the things you can't control. And my general philosophy as an advocate, less perfectly observed in my own life, is to not worry about the things (LAUGHTER) I can't control, but instead to really focus on the things we can control. And what we can control is maximizing our chances by building that critical mass of states and critical mass of support and creating that climate and saying to decision makers, including the justices, "America is ready for you to do the right thing."

DAVID COLE:

And David, I think-- I think you wanted to comment on that, but-- and-- and in commenting on that, I-- I'd be interested in some of the specific things that the NRA did at the state level, because I think, you know, again, both-- both movements worked at the state level and-- to try to create-- the this culture. So what were some of the things--

DAVID KEENE:

Well, I was struck by the fact that if you took the issue away, probably the very same discussions were taking place in the boardrooms of both organizations. And then when the suit came, everybody looked at each other and said, "Oh my God. Are we really ready for this," because that's the natural way-- that you have to look at it.

And-- and we began-- let me give you a little bit of the timeline on Second

Amendment questions. The NRA has existed since 1873. But prior to about 1970-- we didn't have a lobbyist. We didn't spend any money on politics. We didn't have a political action arm. We had none of those things, because there wasn't much controversy about the Second Amendment during that period.

It was only what we now call the culture wars when they broke out in the late '60s and '70s-- that things divided in an ideological way. I mean, prior to 1970, Hubert Humphrey was a life member, John Kennedy, Dwight Eisenhower, all these people. So-- our political arm began after Lyndon Johnson torched (?) through the-- Gun Control Act of 1968. And it was formed at the insistence of a Democratic Congressman who is still there, John Dingell of Michigan, who came to us and said, "You can provide all the technical information you want. You can do-- train all the hunters. You can have all the instructors you want. If you don't step up and fight this on the political level, it's not gonna matter," because if you remember back then, some of-- many of you don't.

But some of us are old enough. (LAUGH) The-- the public situation was very different, a little bit like what you're talking about with the gay marriage situation. Lyndon Johnson forced through the Gun Control Act of 1968. Gun control was-- a bipartisan issue. Elliot Richardson, as Richard Nixon's attorney general a couple years later, announced a plan that would result in the confiscation of all privately held side arms by the 1980s.

And-- if-- if anyone-- anyone who was in-- from my standpoint was alive then who thought we'd be where we are now-- wouldn't believe that we'd been able to do that. And we did that by changing public thinking and with act (?) and the NRA, unique among organizations in many ways, one of the reasons for the-- for the political influence that we may have-- from that history is not-- is not like a lot of political organizations which-- which really appeal primarily to one part of the spectrum.

Today, the-- the NRA's probably-- 50% Republican, 30% Democrat. It's got all of these different groups in it. We only care about one issue. Our people only care about that issue. And the difference between the NRA and other groups is that we've developed a community-- when that-- when they see Second Amendment-- rights threatened as their perception (SNAPS), they vote.

They cross party lines. They do whatever they need to do. They get out. They give money. They're active at the state level. They're active at the national level. You saw that right here in New York when-- after Sandy Hook and-- and the governor got the so-called Safe Act through the legislature-- the narrative then was that we didn't matter anymore, that gun owners really didn't believe in these things. And I got a call from some folks that said, "We're having a rally in Albany. Would you come up?" And I got up there. And it was 30° and raining and there were 12,000 people on the lawn in front of the state capital. And I called back and said, "We better be ready around the country, because it's all breaking loose right now."

And there were hundreds of thousands of people, all over the country, who stepped up. And that destroyed the narrative. And what it demonstrated (NOISE) was-- that

the-- is that the-- is that the narrative that we had was the one that had influence. And that's really what-- in many ways what you-- you did over time.

At the state level, think about this in terms of-- you were talking and in that situation in 1968 to today, prior to the passage of-- of-- well, when Heller-- was decided by the Supreme Court, 48 states had concealed carry laws. Right after Heller, Wisconsin, which was one of the two that didn't adopt a concealed carry law. And then in the wake of McDonald, the lawsuit in Illinois which was going to strike. Now Illinois is a state that never in its history allowed concealed carry.

The-- court basically said, "Either the legislature passes a law or we're gonna strike down all of this." And the legislature then, under duress-- passed a concealed carry law, so that today, 50 states have enacted these laws all over the country. That could not have been something that would have been predicted in 1968. And in the process, you know, the-- the community of people that care about this issue had grown so-- so large that you'll re-- recall-- on the evening at the point at which-- President Obama took this up as a cause, took gun control up as a cause, he was warned by Bill Clinton, who said, "This is a road you might not want to go down, 'cause you don't know what's at the other end of it."

He did. It was 1994 that was at the other end of it for him. And the community of gun owners and people who care on that issue had grown as-- as had-- had the-- the gay marriage community. Gallup polls over the years have shown that the NRA really formally represents about 10% of the people who vote on that issue.

So if you use that just as an indicator of how many people cared about it in the 1990s, which was the last time we had a big fight with the Clinton administration, we had 1.8 million people-- enrolled as members. When this one broke out, we had four million people. And when it ended, we had five. And that's a huge difference in terms of the overall concern about the issue, so we had-- building from the state level, building an organization and building concerns-- we had-- we had a huge number of people that cared about it. That affected everything. It affected the politicians. It affected the courts, because-- because there was developing a consensus on the view of these things. And that helps. That's-- that's how you go about doing it.

DAVID COLE:

Right. And the NRA also-- got state constitu-- state constitutional amendments, right, to recognize-- some state constitutional provisions on the right to bear arms, right--

DAVID KEENE:

Many had-- a number of states, particularly the original states-- had right to keep and bear arms-- provisions in their constitutions from the-- from the time of their formation.

DAVID COLE:

But those--

DAVID KEENE:

But we extended that and-- extended it even beyond that-- to-- to-- in some states, to include concealed carry and all of those kinds of things.

EVAN WOLFSON:

And just-- just quickly on that, David, 'cause one of the themes that already come up is the-- the synergy between state and federal strategy and when-- again, when Perry was filed, some of the commentary then, later-- later changing was we don't want to bother with going state by state. We don't want to bother with your building strategy. Why not just get the Supreme Court to do it and make it federal and be done? And the-- the problem, of course, with that very understandable impulse is that's not how it works.

And-- you know, justices look at the map of states and they look at the map of public opinion as well as, of course, looking at the Constitution--

DAVID KEENE:

Even when they deny it--

EVAN WOLFSON:

--and-- and experience. Even when they deny it (LAUGHTER), exactly. And-- and so successful strategies for social change in this country and this has been true over the-- the-- over the centuries have struggled with and argued over but also employed synergistic strategies that are looking at the national map that have a federal strategy as well as a state by state strategy. That's the work we've done--

DAVID COLE:

What were some of the things-- what were some of the things that you did state by state to try to--

EVAN WOLFSON:

Well--

DAVID COLE:

--create this-- create the possibility?

EVAN WOLFSON:

Right. Well, first of all, the freedom to marry is something that you first exercise at the state level. Congress doesn't issue marriage licenses. States issue marriage licenses, so it's the states that are denying people the freedom to marry. So-- and it's-- and-- and-- and in the early days, they were doing so under state law. Then they added a layer of additional discrimination under the state constitutional amendments, which is what we're-- we're overturning now.

But it was the denial was at the state level, so the first challenge was to win a state and get people married. And then to win more states and get more people married and then have the lived experience of people married that refuted the scare tactics of the opposition and showed that when the gays are able to marry, they don't use up all the marriage licenses. And (LAUGHTER)-- and the sky doesn't fall and there are no locusts and so on.

And that's exactly what's happened. As people have experienced it as a real thing involving real people and real love and real commitment and real non-gay family members happy for their gay family members and neighbors and so on, they've realized that families are helped and no one's hurt, but that was all about winning first in the states. And so of course, as I described, a cornerstone, a key element, a key track of our three track strategy, which is not a secret. It's on our website, the road map to victory.

It talks about one of the tracks being we need to win more states. And as you mentioned, we've gone from zero to now 17, plus DC, in a decade. And that's really crucial, because A, it means real people can get married, but B, because it also means that we win over hearts and minds. So it's always been a key element, a key track of the strategy and remains so.

But what's also true is that as you began by saying that there is a floor below which states are not supposed to be able to go in our-- in our system. The genius of our system is we have a constitution that guarantees basic freedoms and rights to people and says that even if the majority of a state doesn't want to provide those rights or respect those rights. It may not go below the floor.

And the vision that has animated me has always been that when the Constitution speaks of equal protection of the laws and when it talks about, as the Supreme Court has acknowledged at least 14 times a freedom to marry as a fundamental and important freedom, that freedom cannot be arbitrarily denied, because that freedom ultimately is an inherent freedom of the individual that cannot be denied. And so at some point, you do say, "We're not gonna just go state by state and couple by couple and battle by battle for-- for century by century. We have a Constitution and the

Supreme Court should fulfill it."

DAVID COLE:

And it wasn't just getting the first state to recognize marriage, right? The work began before that in getting non-discrimination laws enacted, getting-- private corporations to recognize domestic partnership benefits, changing family law, right? There was a whole set of incremental steps, civil unions, a whole set of incremental steps that made it possible to move to marriage, right?

EVAN WOLFSON:

Well, that's-- that's true in-- in a way, because of course, what's at stake in gay people's pursuit of the freedom to marry is not only marriage, but full human equality and dignity and respect and full citizenship and full opportunity in society. So every aspect of our lives where we're being denied or excluded is something that needs to be improved.

But-- but the difference is that for the first several decades of the movement, in part, because as you described, right after Stonewall, there was at least three cases in which couples challenged the denial of marriage and were basically rubber stamped away. For the first several decades, much of the movement's work and strategy was to try to find ways other than marriage to-- to advance on the range of concerns and the range of oppression we were confronted with.

What changed was in the very late '80s, early '90s, most importantly, the Hawaii case brought by couples seeking the freedom to marry launched the second wave of marriage litigation. And unlike the first wave, which was all denied and rubber stamped, because the conversation in the country just weren't there, in that second wave, we launched an ongoing global movement that has brought the freedom to marry to 40% of the American people, but also 18 countries on five continents, all up from zero just virtually a little more than a decade ago.

And you can ask why was there a difference between the first wave and the second wave. And that's a whole other long story. The short answer is AIDS, which shattered the silence about gay people's lives and-- and elevated the stakes and transformed our movement from being a movement in which we were basically fighting to be let alone, "Don't harass us. Don't arrest us. Don't-- don't persecute us," into a movement where we were fighting now as we are fighting now to be let in.

"Let us participate fully in society. Let us share in all the opportunities and rights that we together share-- should have as Americans." And so the marriage fight was part of the-- the movement's fight and part of the aspiration's people because the freedom to marry is one of-- and a very important one, not the only one, of the aspirations people have.

But at the same time, when our movement embarked in the freedom to marry

chapter of the struggle, we actually found that because marriage is such a powerful vocabulary of love and commitment and connection and family, that it's deep resonance and power actually turned out to be the most powerful transformer of non-gay people's understanding of who gay people are with respect to marriage, but also more broadly.

And as a result, we have now been able to win during this period of the movement more non-discrimination laws, more partnership laws, more gender identity protections, more safe schools programs, all the other things we care about have been accelerated and have been amplified by this powerful vocabulary and engine of the freedom to marry.

DAVID COLE:

So-- thanks and so-- so-- and one of the-- one of the things I think that people who are trying to get the Constitution to reflect their vision and-- and create the ground for doing that is, you know, how to frame-- your acclaim, how to frame your-- your right, in a way that that will be-- appealing and will-- lead to-- a broader-- broader support for the view. And I-- I wonder if you could both talk about lessons learned in terms of framing-- framing the right in a way that-- that brings people to the table--

DAVID KEENE:

From our standpoint, let-- if I can just comment here. Most of, of course, the Heller case was essentially a state case. It was the District of Columbia, but the same thing. 90% of the laws that the NRA has-- contended with over the course of the last few decades have not been the federal laws, but have been state and local restrictions on gun ownership and gun use and they-- everything from zoning laws to-- restrictions on where you can carry or where you can do this or when you can do that or registration and the like.

And so it's-- it's very similar in that and that-- and then the-- the differences between the states. At this point, even right now, if you're-- a firearms owner in one state and you're gonna drive across the country, you better take a lawyer with you-- because you can cross a border and all of a sudden, you've committed a felony.

The-- the most egregious acts take place in New York City and in Illinois, which are two of the states that-- had-- that I received a call one-- in the middle of the night from somebody who'd been arrested at LaGuardia, apologized to by the police arresting him, saying this is New York. He had passed-- had-- had complied with all federal laws, passed through TSA to transport his firearm-- and then after all that was done, the poor police arrested him, threw-- they threw him in at Queens and said that he was-- guilty of felony possession of a firearm with intent to do harm, 15 year prison sentence if he were convicted.

And I asked the lawyer. I got a lawyer for him and got him out. And he said, "Well, I

can get it reduced to disorderly conduct." And-- this guy was very concerned. I said, "Are you sure?" Well, it turns out that the Firearm Owner's Protection Act, which is a federal law, says that-- you cannot arrest someone for legally transporting a firearm from jurisdiction to jurisdiction, but it's been determined that that's an affirmative defense to be raised at trial.

So in New York, people are arrested, thrown in jail, have their firearms confiscated, have to pay roughly \$10,000 in legal and court costs and the rest to get out of it and they end up-- being charged with a misdemeanor disorderly conduct. And I asked the attorney. I said, "Is that-- are you sure you can get it reduced?" And he said, "Oh yeah."

And I (LAUGH)-- I said, "Well, how many similar cases have there been?" He said, "Last year, about 600." So these kinds of things take place at the state law. A lot of its harassment of people in groups, just as-- there that you don't like. You find all kinds of ways to do it. And that's where a lot of the action is, which then builds to the kind of thing that you can do federally.

From our standpoint-- you have-- two narratives and-- in-- in politics and everything else today, the narrative is all-important. Our narrative has been-- that-- firearms ownership is part of the American DNA, that is why this country is what it-- what it's been, that families had been hunting and shooting together for hundreds of years. And that more important, in many ways, from a constitutional standpoint that the second amendment of the United States constitution-- is merely an incorporation of something that goes back far, far, into history before that Constitution was written, which is the right to defend yourself, your community and your family.

And-- it's-- it's actually that side of it-- that has been the-- the-- the thing that-- the part of it, because somebody might say, "I don't-- I don't care if you want to hunt, you know. We don't like hunting so we'll get rid of that-- this." But the whole idea of self-defense and the whole idea of the-- of that part of the Constitution and-- and the-- the philosophical right to defend oneself is something that has had traction over time.

We present it that way-- and then-- and the reason there-- there was-- a liberal study recently that asked the question, "Why is it that after Sandy Hook and after every one of these kinds of things, support for gun control drops rather than increases," which has been the historic case.

And our view of it is that the reason it goes precisely to the presentation and to the empirical evidence and that is that you have this emotional period-- when rather than blaming something on the perpetrator, the criminal or in most of these cases, the person with mental health problems-- it's easy to say, "Well, it was-- it was the gun." And after that emotional period disappears, there's an actual debate.

And in those debates-- we tend-- our-- our narrative tends to trump the other narrative-- along with the empirical evidence and the-- the experience that's taken place over time. So after that initial jump-- then it drops, because people look at it and say, you know, this doesn't make any sense. Our refrain which-- the media made

fun of-- during the Senate debates was we kept asking in each one of these proposals, "Okay, if your bill passed, how would that have affected any of this if it had been in place."

And they all had to say, "Well, it wouldn't, but it's still a good idea." And-- and we says-- we-- our argument was, "If you are restricting people's rights, you better have a reason for doing it, in addition to just the fact that you don't like them to have those rights--" and that's-- that's where we-- that narrative has-- has been one that's been-- that's been very successful for us over time, because in each of these instances, they've been unable to answer that question.

So that it becomes more an emotional and an ideological fight than a facts-based fight. And I think in many ways, just as-- as you've done over time, the facts and the experience trumps the prejudice. And that's-- that's what we've found over a long period of time that-- I had-- when-- when-- these concealed carry laws were passed around the country-- now that we have a videotape and all of this and what we have today.

In every one of these jurisdictions-- opponents said, "If this passes-- there are gonna be gunfights at-- in bars. There are gonna be shootings in-- intersections. There-- all these things are gonna happen." Every one of these, that was the political argument.

And in every single one of those jurisdictions, crime dropped. That wasn't exclusively for that reason, but in some-- to some degree, it was. And at the very least, it proved the foolishness of that argument-- on-- on the-- on the part of the other side. So we've been very confident whenever we get into the substantive argument-- that our narrative trumps the other one, because there's no evidence on the other side. And we've been very pleased with that.

DAVID COLE:

And Evan, your-- on--

EVAN WOLFSON:

Yeah, I would say a few things. First of all, the-- the-- the very first thing that we tried to do and have always tried to do and keep needing to do is to get people to have conversations about gay couples and their realities, their lives and why marriage matters and connect the dots. And in the beginning, it was very much about getting anybody to talk about that at all.

And now it's about getting people to continue having those conversations, because those conversations, those personal conversations amplified by the-- the air cover of TV coverage and the ads and Hollywood and the battles. But it's the ground game of the personal conversations that are the key source of people changing-- their hearts and minds.

So in the beginning, it was just getting people to put the words gay and marriage in the same sentence and talk about it. And connect to their values, connect to the person, make it local, make it emotional, make it personal and to be authentic, to really talk about this in real ways that matter.

Now, of course, the country is talking about it and-- and that's been the key driver of the change. But as that has happened, we've looked very carefully at how can we make this case even more effectively. How can we reach the people we haven't yet reached?

And so a very-- one example of a very profound effort we put into making sure we were talking about this in the most effective way, not coming up with some magic phrase that wasn't true, but was tricky. But to the contrary, being authentic and really figuring out what is it that the people who weren't quite with us yet, if they understood it, would-- would move. And this is actually detailed very well in an article that appeared in *The Atlantic* magazine by a reporter named Molly Ball at the end of 2012. It's called "The Marriage Plot: How-- How They Changed the Hearts and Minds," or something like that. And so I really recommend people's reading it if they want to understand how a campaign such as ours is able to-- to move people. But the-- the key point was that by-- by 2010, 2011, in a relatively historically short period of time but after decades of struggle, we had built a near-majority or just a fragile majority of support.

And the question we were asking ourselves, particularly after we lost in California with Proposition Eight was, what was it we weren't explaining well to the reachable but not yet reached, people who want to be fair, not the hardcore opponents, not the people who hated gay people, but the people who thought of themselves as fair and liking gay people or being okay with gay people, but just not getting why marriage.

And what we found in a nutshell was that an overemphasis on legal and abstract and rights and benefits, all of which were very real, somehow prevented people from connecting with what was really at the heart of the aspiration, which was love and the desire for commitment and the desire for family and connection. And non-gay people who weren't with us didn't get it.

When we asked them, "Why did you get married?" They would say, "Well, for love." And we asked them, "Why do you think gay people want to get married?" And they would say, "I don't know." (LAUGHTER) And then the number two answer would be, "Well, maybe for the healthcare. Maybe for rights. I-- I've heard something about that."

"But the problem was, we might be able to get them on healthcare. We might be able to get them on-- it's unfair to deny gay people all the thousands of legal protections." They agree with that, but that didn't add up to marriage, because that's not why they wanted to get married. So what we realized was by overemphasizing one part of why marriage was important, we were not helping people engage on what actually connected us all to the freedom to marry, which primarily was about love and commitment and family and-- and basic values like treating others as you'd wanted to

be treated, the golden rule and so on.

So we worked very hard over the-- over the succeeding few years to really get ourselves and to get people who are talking about this to be able to connect with people where they were, so that they can bring their own values into play and connect with the real and the personal stories of love and connection and so on.

And as we did that, public opinion began to really move dramatically and accelerating and continues to move in our favor because people were now able to understand it in a way that connected with their own values and their own lives. So that-- that's one very big example of how we were more able to more effectively make the case. And it came out of number one, authenticity, the reality, and number two, a real effort to research it and to think about it and then to propagate it, to get our colleagues, to get other lawyers who are writing briefs, to get politicians who are talking about this to talk about it in the most effective way.

And really the-- the high point of that effort came when President Obama talked about his journey, his evolution, to use his word, in favor of the freedom of marry. And if you think back or if you go back on YouTube and look at the interview, you'll see that when he talked about how he had changed his mind, he doesn't talk about it as a lawyer or as a constitutional scholar, which he is, or as president particularly.

He talks about it as a father, who somebody who knows gay people, as somebody who's trying to teach his kids value, as a Christian. And he explains that when he has-- when he and Michelle talked with Malia and Sasha about gay people, they-- the girls told their parents about their classmates being raised by gay parents. And the girls said, "It's not fair that those families should be treated differently from our family."

And the president says, "I realized if-- if I'm gonna teach my daughters the golden rule and other values that I believe in, I have to live up to them." Well, that rang very true, because that was the same journey that so many Americans had moved onto build this 55% majority that we now have (COUGHING) up from 27% back in 1996, when Congress passed the so-called Defense of Marriage Act and when I was doing the trial in Hawaii, a more than doubling of support in less than two decades, a very profound historical shift and it came about because of the lived experience of seeing with their own eyes when it was real, no harm followed, and because the conversations were now being made in a most effective way.

DAVID COLE:

Great. So yes, so you-- so you've both really talked about emphasizing lived experiences, real-- evidence-based kinds of arguments as opposed to abstract doc (?) trying arguments--

DAVID KEENE:

Absolutely.

(OVERTALK)

DAVID COLE:

But-- but the NRA also-- encouraged and supported, right, acad-- legal academics in developing the legal architecture as well, right? Could you talk a little bit about that?

DAVID KEENE:

Sure, there was-- a big battle, actually-- prior to running for public office, Barack Obama was involved in this, because a Chicago foundation really took the lead in trying to develop the collective view of the First Amendment, that there was no individual right, that it was a collective right. And in fact, they got into some trouble because they were buying law reviews to publish. They were actually paying to get their-- their view out there.

We were-- we were fighting defensively and to advance the individual. So that-- that was an intellectual battle that took place which, of course, was part of the argument in the Heller case was that-- was it an individual right or was it a community right? And the individual rights sort of held sway in the early part of the-- not the case, but in the early part of the country.

Then this battle took place and I think that-- it's fair to say that they were winning that for a while. And then the scholarship and things changed. I mean, you had all kinds of things thrown into that. There was the fellow later discredited who wrote the book that said, you know, "Back in colonial days, nobody had guns-- or they-- you know, it was--" I said, "What?" (LAUGH) You know, so there was this whole effort to-- to shape what that meant, what the-- what the Second Amendment meant.

And so that was important, because ultimately, in both cases, ultimately the justices or the-- or the appeals court judges are gonna look at the Constitution. They are gonna look at the language. They are gonna look at the history. So they have to look at legislative history and all of that.

So that's important. But at the same time, recognizing that you're not going to win the hearts and minds of 55% of the public by talking to 'em about-- what the thinking was in 1793 or '94. You're gonna have to tell 'em how does this relate to your life. And-- and in both cases, I think-- the-- what I was referring-- talking to earlier about the-- concealed carry, the-- these things have-- have a habit of accelerating, because just as-- our critics said, "Well, if you pass these laws, there are gonna be murder, mayhem and blood in the streets."

And then you pass the laws and lo and behold, there's no blood, mayhem and blood--

and blood in the streets. People say, "Well, that was wrong." So then you can move onto the next thing and I think if they say, "Well, if you have gay marriage, the-- you know, the family's gonna collapse. The community's gonna be-- whatever it's gonna be."

And so then you have it. And that doesn't happen. And as a result, people say, "Well, we can-- you know, we can move on from that." So-- so it's-- it's one of those things where in this area, in the public acceptance area, as long as you're-- if experience demonstrates that your narrative rather than your critic's narrative is more not just sensing (?), but is-- is supported by what happens afterwards, that's gonna accelerate your ability to move forward.

I mean, with our-- in our case, and this is, I'm sure, true-- in yours, maybe more so in our case, all the-- the-- the-- the Heller case and the McDonald case, because the Supreme-- because-- a First Amendment, Second Amendment Bill of Rights case, every right is subject to what they call reasonable restriction. Second Amendment law is now probably where First Amendment law was in the '20s.

Everybody recognizes-- the courts recognize that yes, you have-- a right to own a firearm for self-defensive purposes. But what are reasonable restrictions on that? And the cases that are now-- and there are hundreds of 'em now, winding their way through the courts. Our cases were-- you know, have the extreme situation where-- where-- for example, the District of Columbia-- said, "Well, yes, we recognize the Heller case and that people have a right to own a firearm in their home-- for self-defensive purposes, but they have to buy it in the District. And oh, by the way, there aren't any gun dealers in the district. Too bad."

So we had to go threaten to go back to court on that. And since they had to pay a million dollars in legal fees the first time, the city council decided, for financial reasons, that wasn't a wise thing. You had the same situation in many ways in Chicago, where they had to back down, but-- but the-- the next ten years, at least-- in terms of litigation and in terms of the law for the Second Amendment is gonna be determining what is and isn't reasonable, in terms of-- in terms of restrictions on those rights.

As you know, when we were in law school, it was as if the Second Amendment wasn't even there. I mean, they printed it (LAUGH), but there wasn't a chapter and-- and now there is, because now this is an area of-- of the law that has become real and vital and there are cases all over the country moving along-- and-- and that's what-- that's what these-- that's what, when you get to the Supreme Court, that's what happens.

All of a sudden-- it doesn't solve all the problems, but it does make you look at 'em from a different perspective. From the Second Amendment standpoint, after the McDonald case was decided, the-- I thought the best articulation of the changed situation that we faced came from the court in Puerto Rico, which for all-- for legal purposes is a state.

A retired-- National Guard general-- had gone into the real estate business in San Juan and residential real estate and had to go around and collect money from his

tenants and had been robbed four times. And so he went to the magistrate and asked for a concealed carry permit and was turned down, because he hadn't demonstrated a need for it, I guess under the grounds that nobody killed him during those four robberies that he didn't really need protection.

He appealed that and the court obser-- he won that appeal. And the court observed that in the wake of McDonald, it has to be recognized that most of the restrictions passed at the state and local levels on firearms ownership-- and controls on firearms ownership were passed during a period when most people-- people who had-- who proposed the laws, who passed the laws and executed 'em were of the opinion that firearms ownership was a privilege and not a right.

And that the import of Heller and McDonald was that all of those restrictions had to be revisited-- because the kinds of restrictions you can put on a privilege as opposed to the kinds of restrictions you can put on a right are very different. And I think that's summed up where the legality, where-- where the situation was going because of Second Amendment rights. And I'm sure there's some analogy here, because if-- if you get-- if you get the federal right, you've still got all this other stuff that you have to-- you have to worry about.

EVAN WOLFSON:

Well, I mean, we're-- we're really-- we're not getting so much into the substance of our respective movements and where we agree or disagree and we're talking about what are a lot of commonalities in the successful constitutional engagement to-- to-- and I wouldn't even say to change the Constitution. Rather-- in my-- from my point of view, it's to fill the Constitution.

DAVID KEENE:

He had to change it. We had to defend it. (LAUGH) But the result was the same and the tactics were the same.

EVAN WOLFSON:

I-- I see us not changing. I see us fulfilling.

DAVID COLE:

No one ever--
(OVERTALK)

DAVID KEENE:

And that's an argu-- that's arguably right--

EVAN WOLFSON:

But-- but-- but there--

DAVID COLE:

NRA-- I've interviewed a lot of NRA people. No NRA people--
(OVERTALK)

DAVID COLE:

I've interviewed a lot of NRA people from my book. No NRA person would admit that they were changing the Constitution. What they said is we were-- we were restoring the original--

DAVID KEENE:

Well, that's what he's doing. We're-- we're doing the same thing--

EVAN WOLFSON:

Exactly. That-- that parts (LAUGHTER)-- yeah, we're doing that. I mean, I-- but-- but there are some-- there are some-- also some differences. And obviously, I'm not an expert in your field, but the-- on the one hand, as you describe, certainly gun ownership has been a large part in-- of American history and whe-- whether the Second Amendment bears the interpretation you-- you fight for or what others believes is a different question.

But gay people were a vulnerable minority. And the idea of gay people marrying was something that most people, including many gay people, treated as a oxymoron or ridi-- you know, absurd or ridiculous and didn't start from the same sort of bedrock of support and so on. So that's-- that's one difference that shaped some of our employment of common--

DAVID KEENE:

I always say ours is in the DNA of the American people, that there's a presumption-- on the part of a lot of people-- that we were-- that we start out being right and that

the restrictionists are the people that start out being wrong, where in your case, it's sort of the opposite.

EVAN WOLFSON:

Right. We had to connect the values that are in the DNA of the American people to the American people who happened to be gay. And--

(OVERTALK)

EVAN WOLFSON:

But let me just say-- the-- but-- but another difference and I think it's gonna be interesting to see where the next few decades, God willing, under somebody else's leadership-- go is-- is that-- and I know-- I'm sure you have an answer to this, which we don't really have to debate, but I mean, one big difference, when gay people are able to marry, nobody's hurt. Nothing happens. There is no real complication. There is no great landscape.

And that's why when reporters ask me the-- the usual predictable question of, "Are you worried about a backlash?" You know, first of all, I point out their backlash began before we even lashed. I mean, we're (LAUGHTER)-- we're the ones who are fighting to change something and-- but then once gay people can marry, people accept it because it didn't take anything away from anyone else. But let me just say--

DAVID COLE:

I'm gonna press you on that.

EVAN WOLFSON:

Right, but okay, but let me just make my point and then-- then you can both press me. (LAUGHTER) Whereas with guns, whatever the rights and so on, whatever the-- the different views people can have, I mean, there are-- there are gun deaths happening every day and there are massacres happening, it seems almost weekly and so on.

I know. We're gonna have a different view on that. But so I-- I do think that while there are many commonalities to-- there are also some big differences. And-- and the question of even what is a reasonable restriction is gonna have a very different weight when it comes to the-- the-- the arena of gun-- guns versus the arena of should gay people be treated with equally and be able to marry and who's hurt.

DAVID COLE:

Right. But I was just gonna say on-- on-- on-- on backlash, I mean, one of-- one-- and I think this-- this sort of underscores one of the differences, right? The-- the-- you faced tremendous backlash, right? That-- that Hawaii-- decision led to a federal-- a federal statute that-- that-- that you know, plenty of Democrats and the support of the president signed and-- and the-- and the-- and then you had what-- 14 constitutional referendums in one year in 2004 or 13? All of which you lost.

And you-- and there are now-- what, 30, roughly, constitutional amendments around-- which reflect, I think-- the extent to which you're really push-- you're pushing the-- you know, pushing against something that people do react to. And they don't just say, "Well, okay, well, Hawaii recognized gay marriage. Oh, we-- we'll-- we'll accept it." No, in fact, they responded very-- strongly and-- and politically and sort of forced you to-- to take a kind of more political-- stance, right?

EVAN WOLFSON:

Yeah, well, the struggle you're describing is absolutely true. What I don't agree with is the conception of it as a backlash. And in my book, *Why Marriage Matters*, I quote Martin Luther King who I'll paraphrase here, gave a speech saying, "I hate the word backlash. Backlash," King said, "falsely conveys the idea that everything was just fine and then those of who favored a change, need a change, went too far and too fast and the other side then, quote, reacted," whereas what King said, "what's really happening," and this is what I absolutely agree with in this point, "is a struggle between two visions of what kind of country we're gonna have, two visions of what the Constitution commands." And that is a struggle. And whether the struggle is shaped by the denial of that freedom to a group of people or the struggle is now shaped by the rising claim to the freedom, that's not a backlash. It's a struggle.

And the reason it's important is because backlash is often used as a debilitating argument against those who are working to fulfill the Constitution. And-- even-- I wrote that book, actually, and quoted that passage in 2004, the year of the 13 ballot measures. And what I argued in that year to my colleagues and to the movement and to the public was any year in which we endure 13 attacks that add, by the way, additional, not new, but additional layers of discrimination we already have, but also win the freedom to marry is a winning year.

And if you do your activism and your advocacy right, wins trump losses. You're not gonna win every battle. You're not gonna win immediately. But if you win and engage and persist, you're-- the power of your win done right will overcome the barriers, even if some new barriers are erected as part of that struggle.

DAVID COLE:

What do you-- what do you say to people who-- who argue that-- you know, it was a mistake to go to court early. You should have engaged in a more incrementalist's strategy that might have led us to the position we are in today without having 35 amend-- Constitutional amendments to contend with at the state level that-- that-- that in a way, you do have to be strategic about pushing too far too fast.

EVAN WOLFSON:

You do have to be as best as you can strategic. I agree with that and so I certainly have never advocated, and we talked a little bit about the-- the Perry case. I've never argued everybody should just do anything and nothing matters and let's just do whatever. That's-- that's not what's on our website.

DAVID KEENE:

(LAUGHTER) That's not the path forward.

EVAN WOLFSON:

That's not the pathway forward. It's a pathway, but it's not the path-- but on the other hand, I-- I also think that those who make the-- the argument you just said are-- are wrong, historically. The movement did, as I describe, after the failure of the first wave of marriage litigation, spend nearly two decades pursuing (UNINTEL)-- you know, other strategies that some might label as incremental. They also labeled alternative, et cetera, et cetera.

And it yielded what it yielded and it was-- it was valid and-- and-- and-- and yielded a lot. But as we then launch this next phase of the freedom to marry work and the gay movement inflected by the freedom to marry work, we've-- we've won so much more. But at the same time, I also have to point out that the Hawaii case, the case I was co-council on, the case that really launched this ongoing momentum and this ongoing movement was also a case that many of the lawyers and legal groups turned down out of fear because of the first wave, very understandable fear, also because of ideological divisions that are understandable, but less defensible, in my view.

And the-- the couples went ahead anyway, because they wanted the freedom to marry. And then 20 years ago last year, a court finally agreed with them. And that was the day the earth moved. And everything changed. So you can be strategic and you should be strategic and-- but you also have to understand, you don't always control everything and history is dynamic.

And we're-- we're now living in this phase and this is why we put this-- strat-- strategy memo out today to explain to people where we are in this landscape now where we have this irrefutable momentum. We clearly have the winning strategy. But we also have these flash points and what Donald Rumsfeld would call the known unknowns of litigation and things that are gonna happen. And-- we-- we-- we don't control all of that, so how do we be as strategic as possible, focusing on the things we can control, knowing that there are going to be things that happen and that we have to just embrace and move on.

Again, that's not an argument for let's not think about it at all and let's just do whatever, but it is an-- an argument for understanding that we're-- we're talking about a movement, not an army. And we're talking about history. And that doesn't always unfold according to anybody's plan.

DAVID COLE:

Dave, I-- I want to talk a little bit about the sort of politics of protecting the right. And in particular, the electoral politics of protecting the right. And talk a little bit about sort of what the NRA does in terms of-- engaging in attempting to influence electoral politics in defense of the right to bear arms.

DAVID KEENE:

Sure, I-- I will and-- and let me-- but let me go back to something you said, because you will never-- as just as we will never-- convince all of the skeptics and the critics that we're right.

EVAN WOLFSON:

That's right.

DAVID KEENE:

Because at one level it is about what you suggested, different visions-- and so there will always be people who find-- something that-- gay married person does, 'cause my experience with gays is that there are good ones, bad ones, crazy ones, they're just-- they're human beings. It has nothing to do with them being gay. Same is true of gun owners and everybody else.

And if you don't like gays, if something some crazy gay does is bad, well, that's just proof that all of gays are bad. If somebody misuses a gun, well, that's just proof, you know (LAUGH), that gun owners are bad or they shouldn't have. So it's-- that's something we'll never solve.

What we do want-- is enough people to accept our vision-- that-- we can overcome that. And then if people want to disagree with us, that's fine. But it's a struggle always. And people have different visions and they're-- they're vying for a majority or whatever. So that-- and I-- 'cause I think that's the same.

But politically-- as I said earlier in my remarks, our political operations, if you will, was formed in the early '70s and really at the behest of John Dingell. And-- I was not involved directly with the NRA at the time. I was in fact in the Nixon White House. That was a long time ago.

(LAUGH) But-- we had not been involved at all. And-- one thing politicians have always been unable to do is read a poll accurately. They're always mistaking things and doing the wrong things based on polls. And the sponsor of the-- of the Gun Control Act-- the main sponsor was a fellow by the name of Joe Tidings from Maryland, which from today's terms would be, even then, a blue state. He was safely up for reelection.

He had been the sponsor-- the gun community was starting to say this was all awful. And he read the polls and said that-- you know, most people supported him on this. So Tidings-- said, "Well, why am I-- why should I be afraid of these people?" And he changed all his advertising to-- to promote the fact that he was the sponsor of the Gun Control Act of 1968.

And on election day, we didn't have all of this sophisticated stuff we've got today. But somebody said, "Well, what's going on in Maryland?" And somebody said, "Well, let's call our guy there and ask him." And the answer was, "Well, I don't know, but outside Baltimore," this is a different day, remember, "outside Baltimore, there were long lines of pick-up trucks and they've all got gun racks in the back window." And Joe Tidings lost, because the voting majority of people were people who cared about gun ownership. And the other people were people who said, "Yeah, I don't like 'em."

You know, and-- and that's been-- that's-- that's one of the reasons that the-- the NRA membership and the supporters of the Second Amendment have the political potential that they have-- because they are-- they do care on the issue and they will vote on the issue. One of the problems with most advocacy groups and most positions we take is that half the people on whatever it is that agree with us don't vote on that anyway. They just agree with us.

And so it's not a politically moving kind of issue. This-- this one is. On gun issues, generally speaking, remember this last year-- your-- previous mayor said that we're gonna be every place in the country and we've got as many people as these gun owners do and we're gonna match 'em ma-- man for man.

Typically-- I-- I talked to a western state governor. And what they had was mirroring the federal things. There was packages of gun control legislation put in in all the state legislature. He said his office got 200,000 calls. I said, "I didn't even know you had 200,000 phones in your state." He said, "We got 200,000 calls and 98% of 'em were from gun owners--" because they care. And the other folks might say, "I don't like guns," but they not gonna vote on it. So that's the-- that's the-- sort of the

geography and the-- and-- that you're dealing with.

DAVID COLE:

And institutionally, what do you do to sort of--

DAVID KEENE:

We do several things. One is we grade people based on how they vote. And our-- our position-- is that if you support the Second Amendment, Republican, Democrat, whatever, if you support the Second Amendment, we don't desert you. And that's very important, because-- just as an example, when-- President Obama was sworn in for his first term and Eric Holder went up to the senate, they talked about all the gun control things they wanted to do.

He got sidetracked 'cause he wanted to do something with the health care system, but that was-- they wanted to do that. And-- within-- within two weeks, 65 Democratic members of the House sent a letter to the president when he was new and popular and said, "Don't even think about it, because if you do, we're not with you."

Now those Democrats had to know that we wouldn't in the next election say, "Oh, by the way, we were just kidding. You know, (LAUGH) we-- we'll be with somebody else." So we always get flack from both parties really, but particularly from Republicans who think somehow that they should-- we should be with them, because we're often supporting Democrats.

And generally, those Democrats are from the most vulnerable districts, because they're in areas that are trending the other way. So that's our first rule. And we do that. I think we endorse something like 4500 candidates in any election cycle, at the state legislative level, all governors, the rest. And we-- and those rules are the reason for our credibility, because they're very strict.

Just to give you an example, years ago, when-- Haley Barbour ran for governor of Mississippi against a Democrat who'd been in office-- Haley Barbour, I got him his first job outside Mississippi. He was a personal friend of all of ours. And we called 'em up and said, "We're supporting your opponent." And-- he was very upset about that.

But I said, "You know, you may be be-- you may even be better than he is on issues of concern to us, but he was with us and we don't desert people that were with us." So any politician knows that that's the case. The people that are NRA members and I-- I'll give you an example that-- probably the starkest example was the-- was the-- recall election in Wisconsin with Governor Scott Walker.

That was-- actually a public employee union crusade against Walker for a fight that had nothing to do with us. But Scott Walker had been the guy who had carried our

legislation when he was in the Wisconsin legislature and who had announced that when that was over, he wanted a concealed carry bill on his desk. It was gonna be the first thing he did after the budget battle.

So when he ran-- he was running against Tom Barrett, a former member of Congress, who was the mayor of Milwaukee in the recall. And-- Barrett had always been F-rated by the NRA. So he had a stark difference between the two. We went in-- in part to make sure that we were still right. We didn't worry about-- and this is the case when we get involved in a campaign.

We don't worry about NRA members. They get an orange postcard-- that says, you know, this is what we think you should do. And they wait for that postcard. But it's the other 90% of the gun owners, the Second Amendment voters in Wisconsin, we were concerned about. We focused only on union members-- and on independents, not on Republicans or Democrats or NRA (NOISE) members. And-- and when-- and then we did-- polls at the end--

(OFF-MIC CONVERSATION)

DAVID KEENE:

And at the end, as you-- if you'll recall-- his-- that was supposed to be a very close race. And in fact, it was-- more than a six point difference. And his pollster said, "We can't claim that you guys won it, because we might have won it by 200 votes, you know, without you." But the-- the media was shocked at the fact that he got 38% of the union vote in what was a union crusade against him. It turned out that among Second Amendment-friendly union members, which are a lot in a state like Wisconsin, 'cause they're hunters, he got 78% of the vote. And there was no difference between public and private unions, public employee unions and regular unions voted-- for Walker in the same percentages.

He got 72% of the independents who favored-- who were Second Amendment voters. And that's a lot. And so-- and-- and that's what we focus on, because those are voters that would not be available to that candidate if it weren't for the presence of the NRA. But we always-- we-- we don't care, in reality, whether they're Republican or a Democrat.

Or what I can tell you, a case here, I can remember some years ago, there was a big fight up in the Adirondacks-- about-- a woman who was-- running as-- special elections, Republican, conservative and-- and a Democrat. And I, in a different capacity, was supporting the conservative. A reporter called me up and said, "Well, you're on the NRA board and-- the only group that the media would consider right of center that endorsed the woman was the National Rifle Association."

She'd been in the legislature. She'd supported the Second Amendment. I said, "Well, if I had-- you know, I would vote for that endorsement, 'cause she deserved it." I wouldn't vote for her. (LAUGH) That's a different question, but we make our decisions individually on lots of different things, but we do not back down-- or

abandon anyone who's supported our position on the Second Amendment. And politicians know that.

And-- and-- I think that's where-- that's where it really comes from. And they're cohesive. Our people wait for that orange postcard. And-- and our experience has been that if we can reach that other 90%, they'll act in similar ways, but if we can convince that-- there-- there's a real difference. And one of the-- one of the things that happened in this-- in 2012, remember Barack Obama ran ads-- in all of these states in which the-- the famous ad was-- was, "I will not take your pistol. I will not take your shotgun. I'm a believer in the Second Amendment," on and on.

So the people were saying, "Well, you know, it's okay." And if-- if it's-- if it's muddled, then unless we have a lot more money than we'll ever have, we're not in a position to-- (UNINTEL) but when there's a sharp divide and when one candidate is-- is clearly strongly Second Amendment and the other one isn't, we can affect in a state-- typically 2% or 3% of the vote in the general election. And in today's America, 2% or 3% of the vote's a lot.

DAVID COLE:

And Evan, what's your sense of the-- of whether the gay rights groups have-- have engaged in electoral politics to try to change results to-- to try to defend people who've stood up for them and the like? Is that-- do you have the same kind of-- sophisticated political operation to-- in defense of the right?

EVAN WOLFSON:

Well, we don't have the same kind, because we're a lot smaller than--

DAVID KEENE:

And a lot of your members are gun owners.

EVAN WOLFSON:

--and the NRA. (LAUGH) And a lot of your members are gay--

DAVID KEENE:

That's right.

EVAN WOLFSON:

(LAUGHTER) For better or for worse. But-- but-- so we don't have the same, but-- but increasingly, we had-- we did come to understand that electoral engagement and candidate work, in addition to the public education and litigation and ballot measure work that we were already doing was an essential tool. And fortunately-- fortunately, some of the-- the-- the-- the individuals in the community and some of the leaders in the community and some organizations stepped forward to begin supplying that muscle and that tool and that methodology of change.

Tim Gill, out in Colorado-- an important philanthropist in the movement and a very engaged philanthropist, created a team that really went to work, for example, here in New York, alongside the organizations who don't do candidate work and basically said, "We're going to, as you pointed out, punish the lawmakers regardless of party who-- who-- who let us down in New York in the New York battle in 2009," and took a couple of them out and gave others a really close race.

And that along with other factors, electing a strong governor, doing much more public engagement, going door to door, making sure people were hearing from stories-- stories of couples and families, consider all-- all the efforts together, but that additional ingredient certainly helped, set the engagement on a different footing when we resumed the engagement with the political and elected-- officials.

So adding that methodology has been very important and learning how to win ballot measures was something we worked very hard to do after Proposition Eight and after our loss in Maine and all the other losses you described, to the point where we then won four for four in 2012. That was very important. I will say that I think there is a bit of a dynamic difference, again, in the two struggles, in part because I think, in one, the stakes are what they are, and in the other, the stakes are what they are.

In-- in our effort, part of our work has be-- was to break the silence to get people to talk about it, to get the hearts and minds to change, to get the people who were with us and reachable to come together and engage in those, at least in the conversations, if not all the other action that we just talked about, political action, supporting groups, litigation and so on.

That-- that obviously is-- still a very central part of any social engagement, but for many years, I've also said that the-- one of the big things we need to do is remind a lot of other people that they don't care. It's not so much about we need to get everyone to care. We need to get people to actually realize they can live with it. They don't care. And then if enough of us are doing the work and make-- telling the stories and having the conversations, that will be enough to carry the days, because the stakes are what they are in this defined struggle.

And one other very important change that's happened over the last several years as I talked about the growth in public support and the increasing public momentum and the vindication of this strategy has been that not only have we seen support for the freedom to marry more than double in 17 or 18 years, as we've had this conversation

and done this work, but what's also shifted now is-- is what the pollsters call salience. In other words, how strongly do you feel about this? And it-- for many, many years of our work, even as we were making progress, the opposition was much more determined, much stronger than we were. We had soft support from an increasing number of people. But the hardcore opposition was remaining what it was. That changed a couple years ago.

(OVERTALK)

EVAN WOLFSON:

And we now have-- we have stronger salient support on our side fueled, I will say, a lot by younger people who've come into this conversation and who do understand, gay and non-gay, that this is something really important that goes to the vision of the country and who care deeply about it. And our salience now outweighs the other sides, in part also because the opposition is increasingly isolated and confined to just a few segments of the population, as opposed to being the broad majority that it was when we started.

DAVID COLE:

And I-- I-- I have one more question, then I'm gonna open it up to the audience-- this is for both of you. So one-- one, you know, one-- vision of this is, you know, this is how you can change the constitution. If you get enough committed people together, acting strategically through institutional actors to take the long view and are willing to-- you know, engage in-- on all of these fronts, you can change the Constitution.

And another-- and that's-- that's a good-- great story. That's the kind of story Americans like. It's-- you know-- it's uplifting and et cetera. The other story is-- you can change the constitution if you have a group of committed people who have enough money. And so-- I wanted to ask you both about, you know, money in the-- in all of this, because sometimes you hear, well, the NRA, you know, they're just the biggest elephant in the room with the-- well, most amount of money.

And-- and that's why-- there's a right to bear arms, because there's money there. And-- and similarly, you-- you sometimes hear people say, "Well, yeah, you won in Maine-- but you outspent the opposition four to one or five to one in order to win. You had to spend millions of dollars to eke out-- you know, a four point victory or six point victory, whatever-- whatever it was. So-- how do you respond to the claim that this is really all about money? An appropriate question to end my part of it, at least, at Open Society.

DAVID KEENE:

I think first of all, on behalf of both of us, we're only-- we're not trying to change the Constitution. We're just trying to--

EVAN WOLFSON:

Oh, right, right.

DAVID KEENE:

I just-- (LAUGHTER) I think I speak for us both on that one.

EVAN WOLFSON:

I have to say you do.

DAVID KEENE:

(LAUGHTER) And-- on the money question, I-- one of the groups that's-- studying-- finances now came to me and said, you know, studying it over the last few cycles that you have never outspent your opposition, which is true. The power of the National Rifle Association doesn't come from money, which doesn't mean we don't have to spend money, because we do. But it comes from votes. It comes from people. It comes from the-- from the narrative that we have.

In the recent Colorado recalls, the anti-gun people outspent the pro-gun people by better than six to eight to one and didn't make any difference, because we had the votes. We had the people. And when-- in today's world, yeah, there are politicians that-- they've got to raise money that they can raise money in a lot of different ways from a lot of different places.

But if you tell a politician you've got 8000 members in his district, he's willing to think about things other than money, because what-- what-- his job depends or her job depends on whether those people are gonna vote for or against. That's where the real power of-- of-- an advocacy group in-- in a free society comes from.

Yeah, you have to have money, but-- my favorite expenditure was that Michael Bloomberg wrote a check in Colorado for \$350,000 so that this group could run ads decrying out-of-state money coming into Colorado. (LAUGH) You know, it doesn't-- it doesn't work. You've got to have enough money to participate. You-- you can-- and if everything else is equal, money's gonna make a difference. But everything else isn't equal, so you got to have enough. We spend-- I can tell. We-- we have a \$70

million a year budget. And of that money, in a typical year--

DAVID COLE:

You're talking about the political arm of--

MALE VOICE:

No, that's not the political arm. That's the whole thing.

DAVID COLE:

That's the whole--

MALE VOICE:

The-- we spend about eight or nine percent of our funds on politics and lobbying and that's always been the case. It'll be a little higher in the election year. It'll be a little lower in the non-election year, but that's all that we-- that's all that goes into that. We'd like to have more, but-- reality is reality and we have other-- most of our money goes to service to-- to running ranges, to doing competition.

We have these 90,000 certified instructors. We do all the different things that goes to the Boy Scouts and the 4H and the shooting teams around the country and running national matches and police matches and the like. But-- part of our core responsibility, obviously, is to make sure that all those things can happen by fulfilling the political advocacy role.

And-- but it is-- and so we have to make sure that we have funds to try and reach that 90% of Second Amendment voters that are not enrolled in our-- that are not formal members-- but that's never been the real key. The real key has been-- has been the votes and not the money.

EVAN WOLFSON:

So well, first of all, you may or may not be delighted to hear that Barney Frank would have said exactly the same thing that you just said that the choice between money and votes, it's votes that-- that political and that's what you need to do is engage in the political process. It's not just the money. So on-- on that point, I-- I do think that is right. I think also when you describe, for example, where the bulk of your money goes, that's-- that is also political, even though it may not be--

(OVERTALK)

DAVID KEENE:

Well, I'll tell you how it is. And this is-- this is probably an area where we have for different reasons similarities. You know, if somebody says, "I'm a high tax-- low tax group, all of this," this is-- that's sort of-- when you talk about salience, it's not-- it's something people agree or disagree with and there are groups that are simply advocacy groups to advocate on policy. The NRA, we-- we like to talk about the fact that we're family.

And-- and-- I can-- if I've got this-- this is of a past president, but if I have on-- if I walk into a Burger King in Seattle and somebody spots that-- I could go to their home and stay overnight. You know, I mean, it's (LAUGH)-- it's-- you can-- it-- because it is a family and it's a family not because we simply agree on political issues.

It's because-- because generations of people have been raised-- in that-- in that culture. The kids, the wives, the-- the-- you know, the-- I said the 4H, the-- all of that. They go to the range. They go hunting. My grandfather did it and all that. So it's-- it's more-- and-- and is successful in-- in a society like ours-- and I think this is one of the advantages you've got, because your folks do feel an affinity and they-- they care about these things, be-- some of that's forged under fire, you know, and some of it's forged because-- because they have common interests. But the fact of the matter is that that's-- that is, in my view, in the long run, yes, it's political in that it creates the community.

EVAN WOLFSON:

Exactly.

DAVID KEENE:

That may not why-- that may not why you di-- did it. But it does-- it obviously helps that way and in the long run, in-- in a civil society like ours, those are the groups that are gonna be successful, because they're more than simply groups that say, "Hey, you ought to vote this way." They're people who-- who represent a lifestyle and a culture that-- that their membership and their-- and the affinity groups share.

EVAN WOLFSON:

Right. So I mean, so that-- but that is the point I was gonna make-- that I was making over there, which is that you-- you just used the word family, but then you went to community. Also I was gonna use the word community. You are building a community maybe for other purposes or a related pur-- whatever, but that's--

DAVID KEENE:

But that's what makes--
(OVERTALK)

EVAN WOLFSON:

But that's still-- right, but that still counts as money, you know, into-- not in a bad way, but that's-- that's the work. And-- and where-- where gay people began in a sense at a disadvantage is gay people are not born into community. Gay people are not born in-- even into their own ident-- identity-based family. Gay people have to find their way. And they sometimes hopefully can bring their family and friends along on this, whereas the opposition that prevailed until quite recently, in some sense, didn't have to spend the money in the direct ways, because they had that infrastructure and that dissemination of ideas and prejudices and so on.

We had to overcome all of that. So the-- if you just look at the-- the-- sort of the narrow expenditure of money reported in a ballot measure campaign, it may indeed be true that we've gotten to the point where we're able as part of the work and it is part of the work to raise the money needed to bring the message to the people, build the community often under fire.

DAVID KEENE:

But there's nothing wrong with that either.

EVAN WOLFSON:

But-- but that's what ha-- needed to be done and it's against this opposition that began with this massive default advantage in structure and--
(OVERTALK)

DAVID KEENE:

Religious community--

EVAN WOLFSON:

Religious infrastructure-- anti-gay oppo-- ideas unchallenged by the visibility of gay people in-- in that same kind of community you're describing. So-- so-- so that's just one point, I mean, it's just-- it's-- it's-- it's too superficial to look at the-- the filings and say, "Oh, you spent more this year, therefore you're-- you know."

But-- but the other point I would make is-- is that raising money and investing money and-- and being funded is absolutely part of doing any good work. It's not-- I think this is another thing we agree on. Ultimately, it's not the most important thing. Having the truth on your side, having-- having--

DAVID KEENE:

Necessary reduction.

EVAN WOLFSON:

Having vision, having tenacity, but-- but it is necessary. It is an element. It is part of the work of activism and it remains part of what's needed. It is true we have this momentum. It is true we've made this progress. It's true we've now built a majority, but we are not going to just waft into winning on the strength of what we did last year or five years ago or the momentum. We-- we have to continue to raise money and spend money alongside have the conversations and do the work and all the truly important elements of constitutional engagement.

DAVID COLE:

Great. I'm gonna open it to questions. There's a mic in the-- in the aisle there that you are welcome to-- (UNINTEL).

SARAH:

Sarah (UNINTEL). Is there a way to apply these successful models to inherently federal issues, that don't lend themselves to the synergistic state, federal strategy like national security issues, for example? In this case, civil society consensus, in so far as there is any, doesn't seem to have a significant impact. And I'm ready for your rebuttal on that, Mr. Cole.

DAVID COLE:

Who-- who was that question-- directed to?

SARAH:

Any.

DAVID KEENE:

Well-- had the-- had the Congress-- passed-- Diane Feinstein's so-called assault weapons ban, we would have challenged that federal law in the courts. As it is, we're challenging the New York and Maryland laws in the court. So it-- it depends on where it comes from. The NRA doesn't get involved-- at all in things that are not Second Amendment-oriented, although this time, this year-- this year, for the first time-- we joined as an amicus (PH) in the ACLU's-- suit against the National Security Agency, because in the-- in the discovery-- they found a memo in which it was talked about how metadata could be used to track gun owners. So that gave us the opening we needed to join in a broader federal suit. Now that's--

DAVID COLE:

I-- I would say this more generally, that-- I think the-- the-- the lesson that you draw from these two stories, one lesson is that if you have an obstacle here, you look for ways around that obstacle to-- you know, to-- to sort of-- eventually knock it down. You can't go at it directly 'cause you're gonna just lose.

And I think in-- you're-- you're right. In the federal area, in the area of national security, it's more difficult because the obstacle is there and not-- it's hard to-- to affect it at the state level. But I think one of the things that-- that national security, civil liberties, human rights did in the wake of 9/11 was to engage the world, to engage other governments and other populations, to-- to bring them-- to get them to bring pressure to bear on the-- United States, who needed to work with them on a variety of fronts, including Iraq-- including counterterrorism generally.

And so those voices-- had to be taken-- taken seriously. And so many of the people who were six-- 600 plus people have been released from Guantanamo. Not one of them by virtue of a court order-- but many of them by virtue of significant lobbying done in foreign countries, the countries of their origin, that then led those countries to press the administration on-- you know, release those people back to us.

EVAN WOLFSON:

And just to connect these two points, both of which I agree with, that-- you may not have the geographic federal-state synergy to work, but you may have people who have-- who can get a dog in the fight and who can care about an angle, even if it's not directly related to your primary national security vision in the way that was just described or-- if you're engaging different countries, they may care about it, not because necessarily of your first principle, but because it affects their country or their constituency or their cause in a particular way. And so you need to think about it synergistically that way.

DAVID KEENE:

As-- as David knows, because we work on these things together-- when all of this came up, my always question was, "Show me the connection. Show-- find me the connection and then I can do what I might like to do as a private party, but I can't do institutionally." And in the-- in the ACLU case, they found the connection.

NEIL FELDMAN:

My name is Neil Feldman (PH). This is for Mr. Keene. In terms of the debates about-- about the gun ownership and-- and the rights to gun ownership, something that-- that's confused me as an observer is the-- what I-- what seems to be this (UNINTEL) position of the-- of the NRA to anything resembling-- not so much gun controls, but just some type of comparing gun ownership to getting a driver's license and-- and owning a car, basically taking some type of test or exam and show-- approving that you-- that any given individual knows how to own a gun, operate it safely and then has-- you know, and then goes off and gets the gun. And anything-- that-- you know, so-- so treating-- but any type of registration-- regulation of gun ownership in that context, not of ending or banning gun ownership, but just simply having criteria for gun ownership the same way people-- the same way there's criteria for driving a car-- why that seems to be taken as infringement, which is the-- the word in the-- in the Second Amendment.

DAVID KEENE:

Well-- there is a criteria for who is and who is not eligible to purchase a firearm. A felon cannot purchase a firearm. A minor can't purchase a firearm. People who have been adjudicated to be potentially dangerously mentally ill cannot purchase a firearm. So there are whole-- there are groups that are not allowed under federal or state law-- to purchase firearms. I have to say, though, there's a difference, and I go back to that-- Puerto Rican case that I cited. There's a difference between driving a car and owning a firearm, because of the Constitution. You don't have a Constitutional right to drive a car. That's a privilege granted by the state and the-- and the requirements that can be put on that are very different. Now most states-- have-- and this is a state thing, not a federal thing. If you're-- if you're granted-- a concealed carry permit-- or if you've purchased, in some places, if you've purchased a pistol, you're required to take or demonstrate some facility with it. Sometimes it requires-- going to the range, but you know, taking a test and all that.

And part of the question is whether those are reasonable or not. For example, in Maryland-- they just put a whole bunch of these into the law and they have no way to-- they have no way to-- to administer the tests, so that's-- that's a little bit like-- the District of Columbia saying, "You can have a gun, but you got to buy it here and oh, by the way, we don't have a store."

So all of these things are-- end up getting tested in the court. Some of them may be reasonable and some of them may not be. So-- we-- we-- have had-- have had a mixed-- the whole-- this is-- really a topic for a much larger discussion, so I won't get involved in it. But this-- we initially supported and in fact had to go to Congress in the '90s to get money-- to support what's called the National Instant Check system, the background check system.

But we are-- do not support its expansion because one, it's been abused. The statute required that the Justice Department couldn't keep the records. We then had to go to court because they said, "We're just gonna ignore that and keep the records anyway." The-- the-- the law is that if you go to buy a firearm and you pass, if you've got a right to that firearm, they can't keep a federal-- registry of the fact that you own it.

If you're a prohibited person, obviously, they can, because you might-- they might want to prosecute you for trying to buy it. But in addition to which, most states have refused to put-- the people that are adjudicated to be dangerously mentally ill. We're not talking about people that had a bad day which is what-- Martin O'Malley wants to put on in Maryland, anybody who you think has got anger issues shouldn't be allowed-- should be prohibited from having a Second Amendment right to own a firearm.

But most states have refused to put those people who've actually been adjudicated into the records. And so we've objected to that. Many states that-- the president talked about how two million people-- during the course of the background check had been denied the right to buy a firearm. That's true, temporarily, but it turns out that about 98% of those were what they call false positives.

They were people whose name-- like when-- in a different context, when Teddy Kennedy wasn't allowed to board a plane 'cause he had the same name as a terrorist. So you've got all of that kind of-- all kinds of abuses and I was asked in the course of this-- debate, well, can't they expand it and fix it?

I said, "They have 20 years to fix it and they haven't fixed it yet. So why don't we walk before we run?" Because what's happening all around the country is that people who have every right under the Second Amendment to purchase a firearm are being denied it because of the fact that the system that was put into place doesn't work. And then during the Clinton administration, after that was put in, they decided not to give it the money to operate, on the theory that if you pass the background test and the system won't pass you because it doesn't have any money, then you don't get to buy a gun. So we had to go to Congress to lobby to get the money to keep the system operating. So we're very leery of those kinds of things.

JESSE HAWKS:

Hi, I'm Jesse Hawks (PH) from Global Youth Connect and we work on-- numerous human rights issues in (UNINTEL) countries like Rwanda and Bosnia including LGBT

rights. And-- I'm-- we talked a lot about the issue of the relationship and the culture wars in the United States on-- issues internationally. So I'm curious about that. And open to talking afterwards, but I'm also very curious about the implements of international situations like your battles here at home-- the kill the gays law in Uganda, which came before-- you know, largely (UNINTEL) 2009, 2010. And all of these-- laws that we keep hearing about in the Sochi gays. Do any of these things have a positive impact or a negative impact on the freedom to marry-- movement here?

EVAN WOLFSON:

Well, I don't know if they have-- I guess I don't first focus on whether they have a positive or a negative impact on the freedom to marry, because-- they're obviously important in their own right. And they are a reminder of how much work there still is to do and not only within the United States, but around the world. We-- we-- we have made tremendous advances in this country and many other countries.

And in other countries, we're actually seeing horrible abuses and appalling regression-- by tyrants, by corrupt-- by the corrupt and I will say, fueled and funded in much-- in a large part by anti-gay forces here in the US who are taking their hate overseas, because they are increasingly losing in many of the democratic societies around the world. So it's-- it's on its own right something that I commend you for working on and needs to be worked on and needs more attention and more engagement from us in the United States and-- and around the world.

One thing I will say is that sometimes, there's this temptation on the part of some to say, "Well, we need to drop what we're doing here," or, "We've already made progress in the United States or in the west or whatever and instead focus solely on these horrors." And I think that is a mistake also, because I think the single most effective thing any of us can do to improve human rights around the world is to get our home-- get us where we need to be.

And we're not there yet either, because the more we move the nations and-- and leverage the governments of the world to take action and-- and do more work around the world, the more effective it's going to be. So it's-- it's obvious-- it's not an either-or. We need to be working on both fronts. But it's-- it's not an either-or and we need to remember that.

But at the same time, when I-- when I think of what's going on in Nigeria or Uganda or Russia or much of the Arab world or Iran, my first lens is actually not, "How does this affect the freedom to marry?" What does affect the freedom to marry positively is where we're also making progress. And the fact that we've been able to go from zero countries in the world where gay people can marry as I said earlier to 18. And that some of those 18 are countries like Argentina or Spain that recognize that ending the exclusion and oppression of gay people is an integral part not only of improving the lives of gay people, but of-- of strengthening the country's commitment to

democracy and the empowerment of women and pluralism, the things that really do keep countries moving forward.

And-- and expressly identified how important it was not just for gay people, but for those democratic values, those open society values. That-- that's something that does help the work we do here in the United States, when we can point to a Spain-- an Argentina. And of course, neighbors like Canada or Britain and France, et cetera, the countries where we're winning.

DAVID COLE:

This is going to be the last question.

SARAH STRANAHAN:

Okay, thank you. My name is Sarah Stranahan (PH) and I work at (UNINTEL) for People. Thank you very much for sharing your strategies about how you moved hearts and minds in states-- lower courts to support-- jurisprudence that challenged the dominant constitutional interpretations. I want to put forward a possible third theory in addition to moving-- the strategies you put forward as well as the importance of resources, which is having-- Supreme Court that is committed to (UNINTEL) individual liberties and that includes in the realm of personal freedom-- the rights (UNINTEL) people-- that you already have a dominant jurisprudence that's inclined to expand freedoms, whether it's the freedom to bear arms or the freedom to marry.

But then if, in fact, you are putting forward-- a challenge, a constitutional challenge, that had to do with the state's right to regulate individuals, that you might have different odds or different outcomes. So for example, a huge majority of people in this country-- disagree with the Citizens United ruling. And 16 states have supported an amendment to overturn it. If the court would have offered an opportunity to review it in (UNINTEL) case-- summarily dismissed that case from the state supreme court. So I'm wondering if-- there's a third factor here which is the viewpoint of the highest court.

EVAN WOLFSON:

Well, I'll say. I don't see that as a third factor. I see that as part of the-- the landscape that on which the strategy unfolds and absolutely, political engagement, which also leads to composition of the courts and then creating the climate around the courts is-- is absolutely part of social change work and the need to do the work.

The-- the one thing I'll point out that complicates it a little is that it's not always-- a direct correlation in the way that-- that even the question-- I know you were kind of rushing, might have put things together. I mean, there are justices who voted with us

the last time we were in the Supreme Court on-- on the freedom to marry questions such as they were presented in this federal context, while stopping short, so far, of vindicating the constitutional freedom to marry-- nationwide, who also have strong federalism views and would use a phrase comfortably like states' right that I would never use and-- and so on.

So it is a little more complex than the question might have first suggested, but the main point I completely agree with. Who sits on the court and the climate around her absolutely makes a huge difference.

DAVID COLE:

Yeah, I-- I would just add that-- to characterize this court as a court that favors expanding freedom across the board, I think, doesn't quite capture it. And if you represent criminal defendants-- and their freedoms-- from-- law enforcement interests, you-- you would not say that over the last 20, 30 years, the trend has been towards expanding freedom. Quite-- quite the opposite.

EVAN WOLFSON:

Or-- or both.

DAVID COLE:

But (UNINTEL)-- but that is-- that's an area where you don't ha-- criminal defendants rights scenario where you don't really have the same kind of-- committed civil society, institutions that are--

FEMALE VOICE:

Or the resources.

DAVID COLE:

That are-- or the resources, right, that are-- that are engaged in this struggle. So-- you know, here-- here we have-- two and-- and I want to-- thank Evan Wolfson and Dave Keene for sharing with us-- really what constitutionalism on the ground consists of and thank OSF-- for supporting-- this and for supporting so much constitutionalism on the ground-- throughout the country and throughout the world. I think constitutions are this kind of lived experience. They are not just pieces of paper-- and-- and these are two-- great-- pieces of evidence (LAUGH) for-- the thesis. So thank you very much (APPLAUSE).

* * *END OF TRANSCRIPT* * *