

How Same-Sex Marriage Came to Be

On activism, litigation, and social change in America

by Michael J. Klarman

FIFTY YEARS AGO, every state criminalized homosexual sex, and even the American Civil Liberties Union did not object. The federal government would not hire people who were openly gay or permit them to serve in the military. Police routinely raided gay bars. Only a handful of gay-rights organizations existed, and their membership was sparse. Most Americans would have considered the idea of same-sex marriage facetious.

Today, opinion polls consistently show a majority of Americans endorsing such marriages; among those aged 18 to 29, support is as high as 70 percent. President Barack Obama has embraced marriage equality. Last November, for the first time, a majority of voters in a state—in fact, in *three* states—approved same-sex marriage, and in a fourth, they rejected a proposed state constitutional amendment to forbid it.

How did support for gay marriage grow so quickly—to the point where the Supreme Court may deem it a constitutional right in 2013?

The Pre-Marriage Era

IN THE EARLY 1970s, amid a burst of gay activism unleashed by the Stonewall riots in Greenwich Village, several same-sex couples filed lawsuits demanding marriage licenses. Courts did not take their arguments very seriously. A trial judge in Kentucky instructed one lesbian plaintiff that she would not be permitted



A movement moment: the Stonewall Inn raid and riot, Greenwich Village, 1969

Stonewall Rebellion

into the courtroom unless she exchanged her pantsuit for a dress. Minnesota Supreme Court justices would not dignify the gay-marriage claim by asking even a single question at oral argument.

Marriage equality was not then a priority of gay activists. Rather, they focused on decriminalizing consensual sex between same-sex partners, securing legislation forbidding discrimination based on sexual orientation in public accommodations and employment, and electing the nation's first openly gay public officials. Indeed, most gays and lesbians at the time were deeply ambivalent about marriage. Lesbian feminists tended to regard the institution as oppressive, given the traditional rules that defined it, such as coverture and immunity from rape. Most sex radicals objected to traditional marriage's insistence on monogamy; for them, gay liberation meant sexual liberation.

Only in the late 1980s did activists begin to pursue legal recognition of their relationships—and even gay marriage. The AIDS epidemic had highlighted the vulnerability of gay and lesbian partnerships: nearly 50,000 people had died of AIDS, two-thirds of them gay men; the median age of the deceased was 36. An entire generation of young gay men was forced to contemplate legal issues surrounding their relationships: hospital visitation, surrogate medical decisionmaking, and property inheritance. In addition, the many gay and lesbian baby boomers who were becoming parents sought legal recognition of their families.

Still, as late as 1990, roughly 75 percent of Americans deemed homosexual sex immoral, only 29 percent supported gay adoptions, and only 10 percent to 20 percent backed same-sex marriage. Not a single jurisdiction *in the world* had yet embraced marriage equality.

Litigation and Backlash

IN 1991, three gay couples in Hawaii challenged the constitution-

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1969

1970

1971

1972

1973

1980

1986

1987



1971-1973: Lawsuits filed in Minnesota, Washington, and Kentucky seeking the right to same-sex marriage are brushed off by courts.

Jack Baker and James Michael McConnell apply for a marriage license in Minneapolis, May 18, 1970.

25% of Americans claim to know a gay person.

48% support laws barring discrimination based on sexual orientation.

ality of laws limiting marriage to a man and woman. No national gay-rights organization would support litigation considered hopeless—but in 1993, the state supreme court unexpectedly ruled that excluding same-sex couples from marriage was presumptively unconstitutional. The case was remanded for a trial, at which the government had the opportunity to show a compelling justification for banning gay marriage. In 1996, a trial judge ruled that same-sex couples were entitled to marry. But even in a relatively gay-friendly state, marriage equality was then a radical concept: in 1998, Hawaiian voters rejected it, 69 percent to 31 percent. (A similar vote in Alaska that year produced a nearly identical outcome.)

For the Republican Party in the 1990s, gay marriage was a dream issue that mobilized its religious-conservative base and put it on the same side as most swing voters. Objecting that “some radical judges in Hawaii may get to dictate the moral code for the entire nation,” Republicans in 1996 introduced bills in most state legislatures to deny recognition to gay marriages lawfully performed elsewhere. (Such marriages were nonexistent at the time.) One poll showed that 68 percent of Americans opposed gay marriage. By 2001, 35 states had enacted statutes or constitutional provisions to “defend” traditional marriage—usually by overwhelming margins.

Gay marriage also entered the national political arena in 1996. Just days before the Republican Party’s Iowa caucuses, antigay activists conducted a “marriage protection” rally at which presidential candidates denounced the “homosexual agenda,” which was said to be “destroying the integrity of the marriage-based family.” A few months later, the party’s nominee, Senator Robert Dole, co-sponsored the Defense of Marriage Act (DOMA), which provided that no state was required to recognize another’s same-sex marriages and that the federal government would not recognize them for purposes of determining eligibility for federal benefits. Congress passed the bill by lopsided margins, and President Bill Clinton, eager to neutralize the issue, signed it.

•Vermont. The litigation victory in Hawaii inspired activists in Vermont to follow suit. In 1999, that state’s high court ruled that the traditional definition of marriage discriminated against same-sex couples. The court gave the legisla-

ture the option of amending the marriage law to include same-sex couples or of creating a new institution (which came to be called “civil unions”) that provided them with all of the benefits of marriage.

At that time, no American state had enacted anything like civil unions. An enormous political controversy erupted; the legislature’s 2000 session was dominated by the issue. After weeks of impassioned debate, lawmakers narrowly approved a civil-unions law, causing opponents to encourage voters to “keep your blood boiling” for the fall election and “Take Back Vermont.” Governor Howard Dean, a strong proponent of civil unions, faced his toughest reelection contest, and as many as three dozen state lawmakers may have lost their jobs over the issue (though the law survived Republican efforts to repeal it in the next legislative session).

Developments in Vermont resonated nationally. All 10 candidates for the Republican presidential nomination in 2000 denounced civil unions. One of them, Gary Bauer, called the Vermont decision “in some ways worse than terrorism.”

•Massachusetts. Activists in Massachusetts, inspired by Vermont, filed their own lawsuit in 2001 demanding marriage equality. In 2003, the Supreme Judicial Court vindicated their claim in *Goodridge v. Department of Public Health*, while rejecting civil unions as “second-class citizenship.” Massachusetts thus became the first American state—and only the fifth jurisdiction in the world—to recognize same-sex marriage.

The ruling sparked only a mild local backlash: the state legislature briefly but seriously debated overturning the decision by constitutional amendment, but popular support for such a measure quickly dissipated as same-sex couples began marrying. In the ensuing state elections, marriage-equality supporters actually gained seats in the legislature.

Elsewhere, however, the Massachusetts ruling generated enormous political resistance. President George W. Bush immediately denounced it, and many Republican representatives called for a federal constitutional amendment to define marriage as the union of a man and woman. In February 2004, after Mayor Gavin Newsom of San Francisco had begun marrying same-sex couples in defiance of California law, Bush endorsed such an amendment, explaining that, “after more than two centuries of American jurisprudence, and millennia of human experience, a few judges and local authori-

75 % of Americans deem homosexual sex immoral.

10% to 20% support same-sex marriage.

29% support gay adoption.

1988

1989

1990

1991

1992

1993

23% of Americans support granting same-sex couples the legal rights and benefits of marriage without the title.



Baehr lawsuit filed in Hawaii.

Hawaiian litigants Ninia Baehr (left) and Genora Dancel in a 1996 appearance

56% favor allowing gays and lesbians to serve openly in the military.

Hawaii Supreme Court provisionally rules in favor of same-sex marriage.

ties are presuming to change the most fundamental institution of civilization.”

The issue proved an enormous election-year boon to Republicans. Americans at the time rejected gay marriage by two to one, and opponents generally were more passionate than supporters. At the same time, the issue proved vexing to Democrats. Approximately 70 percent of self-identified gays voted Democratic, yet some of the party’s traditional constituencies, such as working-class Catholics and African Americans, tended to strongly oppose gay marriage.

That summer, Republican congressional leaders forced a vote on the proposed amendment, even though it had no realistic chance of passing. Its principal sponsor, Senator Wayne Allard of Colorado, warned, “There is a master plan out there from those who want to destroy the institution of marriage.” Although most congressional Democrats opposed the amendment, while supporting civil unions, most swing voters found the Republicans’ position more to their liking.

Republicans also placed referenda to preserve the traditional definition of marriage on the ballot in 13 states in 2004, hoping to make gay marriage more salient in the minds of voters and inspire religious conservatives to come to the polls. All the measures passed easily, by margins of as much as 86 percent to 14 percent (in Mississippi). One newspaper aptly described a “resounding, coast-to-coast rejection of gay marriage.” Most of the amendments forbade civil unions as well.

The issue proved decisive in some 2004 political contests. In Kentucky, incumbent Senator Jim Bunning, a Republican, began attacking gay marriage to rescue

his floundering campaign. State party leaders called his opponent, a 44-year-old bachelor who opposed the federal marriage amendment, “limp-wristed” and a “switch hitter,” and reporters began asking him if he was gay. On Election Day, a state ballot measure barring gay marriage passed by three to one, while Bunning squeaked through with just 50.7 percent of the vote. Analysts attributed his victory to a large turnout of rural conservatives mobilized to vote against gay marriage.

In South Dakota, Republican John Thune, an evangelical Christian, challenged Senate minority leader Tom Daschle and made opposition to gay marriage a centerpiece of his campaign. Thune pressed Daschle to explain his opposition to the federal marriage amendment and warned that “the institution of marriage is under attack from extremist groups. They have done it in Massachusetts and they can do it here.” In November, he defeated Daschle by 51 percent to 49 percent—the first defeat of a Senate party leader in more than 50 years. Across the border in North Dakota, a state marriage amendment passed by 73 percent to 27 percent.

In the 2004 presidential election contest, the incumbent would not have won a second term had he not received Ohio’s electoral votes. President Bush regularly called for passage of the federal marriage amendment during the campaign and reminded voters that his opponent, John Kerry, hailed from Massachusetts, whose judges had decreed gay marriage a constitutional right. Bush’s margin of victory in Ohio was about 2 percent, while the gay-marriage ban passed by 24 percentage points. If the marriage amendment mobilized enough conservatives to turn out or induced enough swing voters to support Bush, it may have determined the outcome of the presidential election. Among frequent churchgoers—the group most likely to oppose gay marriage—the increase in Bush’s share of the popular vote in Ohio from 2000 was 17 percentage points, compared to just 1 percentage point nationally.

During the next two years, 10 more states passed constitutional amendments barring same-sex marriage. In 2006-07,

Republicans introduce bills to allow states to deny recognition of same-sex unions.

Republican presidential nominee Robert Dole co-sponsors the Defense of Marriage Act in the Senate; President Bill Clinton signs it.



Peter Harrington (left) and Stan Baker, the Vermont litigants (1999)

1999
Vermont Supreme Court ruling in Baker lawsuit

74% of Americans claim to know a gay person.

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1996

Hawaii declares same-sex couples are entitled to marry.



Ellen DeGeneres comes out on *Ellen*.

Ellen DeGeneres (left) and Laura Dern in the coming-out episode of the television series

1998

Hawaiian voters reject marriage equality.

1999



Civil-unions issue dominates Vermont elections; supporters lose legislative seats.

In Montpelier, a protest on July 1, 2000—the first day civil unions were legally recognized

2000

35 states have enacted provisions to “defend” traditional marriage.

high courts in Maryland, New Jersey, New York, and Washington—possibly influenced by the political backlash ignited by the Massachusetts ruling—also rejected gay marriage.

Growing Support

DESPITE THE FIERCE *political* backlash ignited by gay-marriage rulings in the 1990s and 2000s, *public* backing for gay rights continued to grow, bolstered by sociological, demographic, and cultural factors. Perhaps the most important was that the proportion of Americans who reported knowing someone gay increased from 25 percent in 1985 to 74 percent in 2000. Knowing gay people strongly predicts support for gay rights; a 2004 study found that 65 percent of those who reported knowing someone gay favored gay marriage or civil unions, versus just 35 percent of those who reported not knowing any gays.

Support for allowing gays and lesbians to serve openly in the military increased from 56 percent in 1992 to 81 percent in 2004. Backing for laws barring discrimination based on sexual orientation in public accommodations rose from 48 percent in 1988 to 75 percent in 2004. Support for granting same-sex couples the legal rights and benefits of marriage without the title increased from 23 percent in 1989 to 56 percent in 2004.

Shifts in opinion translated into policy changes. The number of Fortune 500 companies offering healthcare benefits for same-sex partners rose from zero in 1990 to 263 in 2006. The number of states providing health benefits to the same-sex partners of public employees rose from zero in 1993 to 15 in 2008.

Those states with antidiscrimination laws covering sexual orientation increased from one in 1988 to 20 in 2008.

Dramatic changes were also afoot in the popular culture. In 1990, only one network television show had a regularly appearing gay character, and a majority of Americans reported that they would not permit their child to watch a show with gay characters. By mid decade, however, the most popular situation comedies, such as *Friends* and *Mad About You*, were dealing with gay marriage, and in 1997, Ellen DeGeneres famously came out in a special one-hour episode of her popular show, *Ellen*. Forty-six million viewers were watching, and *Time* put her on its cover. Many Americans feel as if they know their favorite television characters, so such small-screen changes also tended to foster acceptance of homosexuality.

As society became more gay-friendly, millions of gays and lesbians chose to come out of the closet. And support for gay marriage gradually increased as well, despite the political backlash against court rulings in its favor. Between the late 1980s and the late 1990s, support grew from roughly 10 or 20 percent, to 30 or 35 percent. In 2004, the year after the Massachusetts ruling, one study showed that opponents of gay marriage outnumbered supporters by 29 percentage points; by 2008, that gap had narrowed to 12 percentage points.

Support for gay marriage grew for a second, related reason: young people had come to overwhelmingly support it. They are far more likely to know someone who is openly gay and have grown up in an environment that is much more tolerant of homosexuality than that of their parents. One scholarly study found an extraordinary gap of 44 percentage points between the oldest and youngest survey respondents in their attitudes toward gay marriage.

Moreover, despite the short-term political backlash it sparked, gay marriage litigation has probably advanced the cause of marriage equality over the longer term. The litigation has undoubtedly raised the salience of gay

81% of Americans favor gays and lesbians serving openly in the military.

75% support laws barring discrimination based on sexual orientation in public accommodations

56% support granting same-sex couples the legal rights and benefits of marriage without the title.

Kentucky state ballot measure barring gay marriage passes 3 to 1.

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Julie (left) and Hillary Goodridge celebrate their marriage, Boston, May 17, 2004.

The Massachusetts Supreme Judicial Court decides *Goodridge*.

2002

2003

2004

2005

2006



San Francisco mayor Gavin Newsom begins to marry gay couples.

Mayor Newsom at the 2008 City Hall ceremony for Del Martin (center) and Phyllis Lyon, whose 2004 marriage license had been nullified by the state's high court

Two more states pass constitutional amendments barring gay marriage.

Eight more states pass constitutional amendments barring gay marriage.

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marriage, making it an issue subject to much broader discussion and action—an initial prerequisite for social change.

The gay-marriage rulings have also affected individuals' actions and preferences. Litigation victories inspired gay activists to file lawsuits in additional states. The rulings also led more gay couples to *want* marriage—an institution about which they previously had been ambivalent. People often teach themselves not to want something they know they cannot have; the court decisions made gay marriage seem more attainable.

Finally, the gay-marriage rulings created thousands of same-sex married couples, who quickly became the public face of the issue. In turn, friends, neighbors, and co-workers of these couples began to think differently about marriage equality. The sky did not fall.

Legislated Marriage Equality

AS SUPPORT for gay marriage grew, high courts in California and Connecticut ruled in its favor in 2008. But the California decision was quickly overturned by Proposition 8, which passed by a margin of about 5 percentage points. (Support for gay marriage in California had grown by about 1 percentage point a year since 2000, but its backers remained just shy of a majority.)

Six months after this bitter defeat, gay marriage took an enormous leap forward. Within a few weeks in the spring of 2009, the Iowa Supreme Court and three legislatures in New England embraced marriage equality. The Iowa ruling appeared especially significant: it was unanimous, unlike other state court rulings in favor of marriage equality; and it came from the nation's heartland, not one of its politically left-of-center coasts. Just days later, Vermont became the first state to enact gay marriage legislatively, and New Hampshire and Maine quickly followed. It seemed possible that

New York and New Jersey would do so by year's end.

But that fall, Maine voters vetoed the gay-marriage law by 52.8 percent to 47.2 percent. That result seemed to influence some legislators in New York and New Jersey, where gay-marriage bills were defeated after the election. And in Iowa, polls showed a substantial majority opposed to their high court's ruling, but Democrats controlling the state legislature refused to permit a referendum on a state marriage amendment. In the 2010 Republican gubernatorial primary, all five candidates denounced gay marriage; four supported a state constitutional amendment to ban it; and the most extreme candidate, Bob Vander Plaats, promised an executive order to block implementation of the court's ruling. Vander Plaats came in second in the primary, winning 40 percent of the vote, then turned his attention to removing the judges responsible for the ruling, three of whom were up for retention elections that fall. In 50 years, not a single Iowa justice had ever been defeated for retention, but Vander Plaats and his allies made the election into a referendum on gay marriage, and the justices lost.

Elsewhere, gay marriage leapt forward. In 2011, the New York legislature enacted it. Early in 2012, legislatures in Washington, Maryland, and New Jersey passed gay-marriage bills, though Governor Chris Christie vetoed the last of these. Last November 6, for the first time, American voters endorsed gay marriage, in three states: voters in Washington and Maryland ratified marriage-equality bills; Mainers approved a gay-marriage initiative (reversing the 2009 outcome). That same day, Minnesotans rejected a proposed constitutional amendment to bar gay marriage—becoming only the second state in which voters had done so.

To the Supreme Court

THIS PAST DECEMBER, the Supreme Court agreed to review cases challenging the constitutionality of the Defense of Marriage



Activists celebrate Iowa Supreme Court's same-sex marriage ruling, April 3, 2009.

Iowa high court rules in favor of gay marriage; legislatures in Vermont, Maine, and New Hampshire pass statutes authorizing gay marriage.

Iowa voters reject three high court justices up for retention.

Maryland legislature narrowly rejects gay marriage; New York legislature enacts it.

2006-07
New York, New Jersey, Washington, Maryland, and Georgia high courts reject gay marriage.

2007

2008

2009

2010

2011

California and Connecticut high courts rule in favor of gay marriage; Proposition 8 overturns California court decision.

Signs supporting the 2008 ballot initiative to overturn same-sex marriage in California

Maine voters overturn gay-marriage statute; New Jersey and New York legislatures reject gay marriage.

Congress repeals Don't Ask, Don't Tell.



Lt. Dan Choi (center) and others handcuff themselves to the White House fence to advocate repeal of Don't Ask, Don't Tell, November 15, 2010.

TOP: DAVID GREEDY/GETTY IMAGES; BOTTOM LEFT: STEVE YANTER/ASSOCIATED PRESS; BOTTOM RIGHT: PABLO MARTINEZ/NOISIA/ASSOCIATED PRESS



Act and California's Proposition 8.

Assuming the justices address the substantive merits of either challenge (which is uncertain, given procedural issues), they are more likely to invalidate DOMA. Several lower courts have already done so, at least partly on federalism grounds. Historically, Congress has deferred to state definitions of marriage; conservative justices who care about preserving traditional spheres of state autonomy may combine with liberal justices who probably support marriage equality to invalidate the 1996 law. Indeed, a contrary outcome would be surprising. In 1996, some sponsors of DOMA defended it in blatantly homophobic terms, and Supreme Court precedent forbids statutes to be rooted in prejudice. Further, justices are not indifferent to public sentiment, and one recent poll shows that Americans favor repeal by 51 percent to 34 percent.

Predicting how the Court will rule on Proposition 8 is harder. The justices are likely to divide five to four, as they do today on most important constitutional issues, such as abortion, affirmative action, and campaign-finance reform. As usual, Justice Anthony Kennedy is likely to determine the outcome. His vote may turn on how he balances two seemingly opposing proclivities. On one hand, his rulings often convert dominant national norms into constitutional mandates to suppress outlier state practices. (His decisions barring the death penalty for minors and the mentally disabled fit this description.) This propensity would counsel restraint on the Court's part with regard to gay marriage, given that only nine states and the District of Columbia currently permit it.

On the other hand, Kennedy wrote the Court's only two decisions supporting gay rights, one of which explicitly embraces the notion of a living Constitution whose meaning evolves to reflect changing social mores. Moreover, his opinions frequently treat international norms as relevant to American constitutional interpretation, and marriage equality is rapidly gaining momentum in much of the world.

LGBT activist Zach Wahls addresses the Democratic National Convention, Charlotte, North Carolina, September 6, 2012.

August: The Democratic Party platform endorses gay marriage.



51% of Americans favor repeal of Defense of Marriage Act; 34% do not.

Finally, Kennedy seems especially attuned to his legacy. How tempting might it be for a justice to write the opinion that within a decade or two will likely be regarded as the *Brown v. Board of Education* of the gay-rights movement?

Whether or not the Court deems gay marriage a constitutional right this year, the future seems clear. Of late, support for marriage equality has been growing two or three percentage points annually. A study by statistician Nate Silver finds startling results: in 2013, a majority of people in a majority of states support gay marriage. By 2024, he projects, even the last holdout, Mississippi, will have a majority in favor.

Even many conservatives have begun to acknowledge the inevitability of marriage equality. In March 2011, the president of the Southern Baptist Theological Seminary observed that "it is clear that something like same-sex marriage...is going to become normalized, legalized, and recognized in the culture" and that "it's time for Christians to start thinking about how we're going to deal with that."

That a particular social reform may be inevitable does not mean that opponents will cease fighting it. Although conceding, "You can't fight the federal government and win," many whites in the Deep South continued to massively resist *Brown* and school desegregation, insisting that "We'll never accept it voluntarily" and "They'll have to force it on us."

People who believe that gay marriage contravenes God's will are not likely to stop opposing it simply because their prospects of success are diminishing. Moreover, religious conservatives who condemn gay marriage will continue to influence Republican politicians who need their support to win primary elections. Thus, an intense struggle over marriage equality is likely to continue for several more years, even though the ultimate outcome is no longer seriously in doubt.

Kirkland & Ellis professor of law Michael J. Klarman is the author of the recently published *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*.

2012

February: Washington, New Jersey, and Maryland legislatures pass gay marriage; Governor Christie vetoes it in New Jersey.

March: The New Hampshire legislature votes down an effort to repeal gay marriage.



New Hampshire state representative David Bates rallies against same-sex marriage, February 7, 2012.

2013

March: Gay marriage cases come before the U.S. Supreme Court.