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Overview of Same-Sex Marriage in the United States

ANALYSIS December 7, 2012

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On Dec. 7, 2012, the U.S. Supreme Court agreed to review a number of federal appeals court decisions on same-sex marriage: one striking down part of the federal Defense of Marriage Act (DOMA), which defines marriage as a union between a man and a woman, and another invalidating California's Proposition 8, a ballot measure passed in 2008 that amended the state's constitution to ban gay marriage. (For more details, see [Same-Sex Marriage in the Courts.](#))

The court's decision comes just a month after voters in three states – Maine, Maryland and Washington – approved ballot initiatives legalizing same-sex marriage. On the same day, Nov. 6, 2012, voters in Minnesota rejected an attempt to add language to the state's constitution banning gay marriage. Same-sex marriage is now, or soon will be, legal in the District of Columbia and nine states: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont and Washington. At the same time, 30 states have added language to their constitutions banning same-sex marriage. (See Graphic: [State Policies on Same-Sex Marriage.](#))

Between these poles, a fierce battle is taking place pitting those who hope all gays and lesbians, regardless of where they live, will soon have the right to marry against those who believe that same-sex marriage is helping to undermine heterosexual marriage, which they see as the foundation of healthy families.

The State of Play

Both sides in the debate over same-sex marriage have scored important victories in the last few years. In February 2012, the 9th U.S. Circuit Court of Appeals gave same-sex marriage supporters a big win when it upheld a lower court ruling that a California referendum banning gay marriage (Proposition 8) was unconstitutional. In addition, several appeals courts have struck down part of the federal Defense of Marriage Act, which was signed into law by President Bill Clinton in 1996. In May 2012, President Barack Obama announced that he favors the right of gay and lesbian couples to marry, becoming the first sitting president to do so. One of the nation's largest and most important states, New York, legalized same-sex marriage in June 2011 and, as noted above, three additional states – Maine, Maryland and Washington – legalized gay marriage in 2012.

Opponents of gay marriage also have had successes in recent years. After the New Jersey legislature in February 2012 passed legislation legalizing gay marriage, the state's Republican governor, Chris Christie, vetoed it. And in May 2012, voters in North Carolina approved an amendment to the state's constitution banning gay marriage, making North Carolina the 30th state to have such limits written into its constitution.

In 2012, Pew Research Center polling finds slightly more support for same-sex marriage (48%) than opposition to it (43%). The public has gradually become more supportive of granting legal recognition to same-sex marriages over the past decade. In 2001, roughly one-third of American adults supported gay marriage (35%), while 57% opposed it. (See [Slideshow: Changing Attitudes on Gay Marriage.](#))

Differing Views

Most supporters of same-sex marriage contend that gay and lesbian couples should be treated no

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differently than their heterosexual counterparts and that they should be able to marry like anyone else. Beyond wanting to uphold the legal principles of nondiscrimination and equal treatment, supporters say there are very practical reasons behind the fight for what they call "marriage equality." They point out, for instance, that same-sex couples who have been together for years, if not decades, often find themselves without the basic rights and privileges that are currently enjoyed by heterosexual couples who legally marry – from the sharing of health and pension benefits to hospital visitation rights.

Most social conservatives and others who oppose same-sex marriage argue that marriage between a man and a woman is the bedrock of a healthy society because it leads to stable families and, ultimately, to children who grow up to be productive adults. Allowing gay and lesbian couples to wed, they contend, will radically redefine marriage and further weaken it at a time when the institution is already in serious trouble due to high divorce rates and a significant and growing number of out-of-wedlock births.¹ Moreover, many predict that giving gay couples the right to marry will ultimately lead to granting people in polygamous and other nontraditional relationships the right to marry as well.

In recent years, the debate has moved beyond questions of individual rights and proper family formation to include questions that pit religious liberty against non-discrimination policies. While all laws legalizing same-sex marriage contain some conscience protections allowing churches and other religious groups to refuse to marry gay and lesbian couples, the legal ground is murkier for religiously affiliated organizations, such as hospitals, schools and other social-service providers, that may not want to grant benefits to the spouse of an employee in a same-sex marriage or provide adoption and other services to a gay or lesbian couple that are routinely provided to heterosexual couples.

The American religious community is deeply divided over the issue of same-sex marriage. The Catholic Church, the Church of Jesus Christ of Latter-day Saints and many evangelical Christian groups, such as the Southern Baptist Convention, have played a leading role in public opposition to gay marriage. On the other side, the Reform and Conservative Jewish movements now accept same-sex marriage – as do a number of liberal Christian churches, such as the United Church of Christ.

Meanwhile, mainline Protestant churches are wrestling with whether to ordain gay clergy and perform same-sex wedding ceremonies. Indeed, the ordination and marriage of gay persons has been a growing wedge between the socially liberal and conservative wings of the Episcopal, Lutheran and Presbyterian churches, leading some conservative congregations – and even whole dioceses – to break away from their national churches as they become more open to gay clergy and gay marriage. (See [Religious Groups' Official Positions on Same-Sex Marriage](#).)

The Beginning of the Debate

Gay and lesbian Americans have been calling for the right to marry, or at least to create more formalized relationships, since the 1960s, but same-sex marriage has only emerged as a national issue within the last 20 years. The spark that started the debate occurred in Hawaii in 1993, when the Hawaii Supreme Court ruled that an existing law banning same-sex marriage would be unconstitutional unless the state government could show that it had a compelling reason for discriminating against gay and lesbian couples.

Even though this decision did not immediately lead to the legalization of gay marriage in that state (the case was sent back to a lower court for further consideration and Hawaiian voters ultimately approved a referendum leaving the issue in the hands of the state's legislature), it did spark a nationwide backlash.

Over the next decade, legislatures in more than 40 states passed what are generally known as Defense of Marriage Acts (DOMAs), which define marriage solely as a union between a man and a woman. While a few of these laws have been struck down, 37 states still have DOMAs on the books. In addition, in 1996 the U.S. Congress passed, and President Bill Clinton signed, a federal DOMA that, for purposes of federal law, defines marriage as a union between a man and a woman. The statute also asserts that no state can be forced to legally recognize a same-sex marriage performed in another state. The enactment of a federal DOMA is significant since the federal protections and benefits conferred by marriage are stipulated in over 1,000 laws and policies, including Social Security, family medical leave and federal taxation and immigration policies. If the Supreme Court overturns DOMA, legally married same-sex couples will be eligible for these federal protections and benefits.

In the late 1990s, Alaska, Nebraska and Nevada amended their state constitutions to prohibit same-sex marriage. These constitutional changes were aimed at taking the issue out of the hands of judges. Conservatives, in particular, feared that without constitutional language specifically defining marriage, many judges would take it upon themselves to interpret other constitutional provisions broadly so as to allow a right to same-sex marriage. Over time, this concern would prompt voters in more than two-dozen other states to approve similar constitutional changes.

Amid widespread efforts in many states to prevent same-sex marriage, there was at least one notable victory for gay-rights advocates during this period. In 1999, the Vermont Supreme Court ruled that gay and lesbian couples were entitled to all the rights and protections associated with marriage. However, the court left it up to the Vermont legislature to determine how to grant these rights to same-sex couples. The following year, the legislature approved a bill granting gay and lesbian couples the right to form civil unions, which grant most of the legal rights of marriage but not the title.

The Massachusetts Decision and Its Aftermath

For a while, the debate over gay marriage seemed to fade from the public eye. But the issue was suddenly catapulted back into the headlines in November 2003, when the highest state court in Massachusetts ruled that the state's constitution guaranteed gay and lesbian couples the right to marry. Unlike the Vermont high court's decision four years earlier, the ruling in this case, *Goodridge v.*

Massachusetts Department of Public Health, left the Massachusetts legislature no option for how to implement the court's decision: the court required the legislature to pass a law granting full marriage rights to same-sex couples. (See [The Constitutional Dimensions of the Same-Sex Marriage Debate](#).)

The Massachusetts decision led to a significant backlash at the federal and state levels. In the U.S. Congress, conservative lawmakers, with support from President George W. Bush, attempted to pass an amendment to the U.S. Constitution that would have banned same-sex marriage nationwide. However, efforts to obtain the two-thirds majority needed in both houses to pass the amendment fell short in 2004 and again in 2006.

While the proposed constitutional amendment failed, opponents of gay marriage had better luck at the state level. Prior to 2004, only three states had approved constitutional amendments banning same-sex marriage. In 2004, however, voters in 13 states passed referenda amending their constitutions to prohibit same-sex marriage. Fifteen additional states took the same step between 2005 and 2012, bringing the total number of states with gay marriage bans in their constitutions to 30. Perhaps the biggest and most surprising of these victories came in 2008, when voters in the nation's largest and one of its most socially liberal states, California, approved Proposition 8, which writes a same-sex marriage ban into the state constitution. As already noted, Proposition 8 has subsequently been struck down in federal court, although the gay marriage ban is still in force, pending an appeal to the Supreme Court. (See Graphic: [Same-Sex Marriage State-by-State](#).)

Most of the states that have approved constitutional amendments banning gay marriage are located in the more socially conservative South and Midwest. Likewise, seven of the nine states that have legalized gay marriage – Connecticut, New Hampshire, Maine, Maryland, Massachusetts, New York and Vermont – are in the more socially liberal Northeast. Between the coasts, only one state, Iowa, has so far recognized gay marriage, in this case as the result of a court decision. On the West Coast, only Washington State has legalized gay marriage as of now.

Civil Unions and Domestic Partnerships

While battles have been raging in many states over whether to accept or ban same-sex marriage, a number of states have enacted laws that establish civil unions or domestic partnerships, both of which aim to give gay and lesbian couples many or most of the rights and responsibilities of matrimony without actually granting them the right to wed. Civil unions were first created in Vermont in response to a 1999 ruling by the Vermont Supreme Court ordering the state legislature to provide same-sex couples "the common benefits and protections that flow from marriage under Vermont law." (Vermont has since enacted a same-sex marriage law that supersedes its civil union statute.) Since 2007, five states – New Jersey, Illinois, Hawaii, Delaware and Rhode Island – have enacted civil union statutes.

Meanwhile, five states – California, Oregon, Nevada, Colorado and Wisconsin – currently have domestic partnership laws in force. These statutes range from granting limited rights to same-sex couples (Colorado) to essentially duplicating the full range of rights and responsibilities of marriage (California).

The Road Ahead

Gay marriage advocates hope their recent victories in states like New York, Maryland, and Washington will give their movement greater momentum, and even a sense of inevitability. The recent swing in public opinion – from a solid majority opposed to same-sex marriage to a plurality slightly in favor of allowing gays and lesbians to wed – also has been cause for optimism among gay-rights activists.

At the same time, same-sex marriage opponents still have a much better record at the ballot box than do supporters of gay marriage. In spite of their losses in four states during the 2012 election, opponents have succeeded in adding language banning same-sex marriage to 30 state constitutions, most recently in North Carolina. Because of this past record, they believe that they can still win statewide races on the issue, particularly in more socially conservative to moderate parts of the country.

In the coming year or so, the U.S. Supreme Court could emerge as the most crucial player in the debate. The court's decision to review the DOMA and Proposition 8 cases means that it has an opportunity to determine whether the U.S. Constitution affords same-sex couples the right to marry. Of course, in both cases, the court could decide to skirt the constitutional question and rule narrowly instead. However, if the court does rule that the U.S. Constitution gives gay and lesbian couples the right to marry, same-sex marriage would become legal throughout the United States. Obviously, such a ruling would be a game-changing victory for same-sex marriage advocates.

Likewise, a ruling that the U.S. Constitution does not guarantee the right of same-sex couples to marry would be a victory for gay marriage opponents, though not on the same scale. While such a decision might preclude many future court challenges, it would not overturn existing state laws allowing same-sex marriage. Furthermore, it would not prevent state legislatures from granting marriage rights to same-sex couples in the future. Instead, it would largely preserve the status quo, and the fight over same-sex marriage would continue.

This report was written by David Masci, senior researcher, Pew Research Center's Forum on Religion & Public Life, and Ira C. Lupu, F. Elwood and Eleanor Davis Professor of Law Emeritus at The George Washington University.

Footnotes:

¹ According to a recent report by the Pew Research Center, the number of births in the U.S. to unmarried women has grown from 28% in 1990 to 41% in 2010. For more information, see: http://www.pewsocialtrends.org/files/2012/11/Birth_Rate_Final.pdf (PDF) ([return to text](#))

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