



Couples celebrate their relationships and demonstrate in favor of same-sex marriage at a mass wedding ceremony held at San Diego Pride in 2005. Photograph by Angela Brinskele. Courtesy Angela Brinskele.

Same-Sex Marriage

by Gregory A. Johnson ; Claude J. Summers

Encyclopedia Copyright © 2015, glbtq, Inc.
Entry Copyright © 2004, glbtq, inc.
Reprinted from <http://www.glbtq.com>

Same-sex couples have been fighting for the freedom to marry since the dawn of the modern lesbian and gay civil rights movement. This struggle is important to the movement because of the myriad of rights and responsibilities married couples enjoy and because of the special status marriage has in America.

A 1996 General Accounting Office study found that federal statutes and regulations confer 1,096 rights and benefits to married couples. It has been estimated that state laws confer approximately 300 additional rights and responsibilities on spouses. Many of these rights and responsibilities (such as the right to sue for wrongful death, the right to family medical leave, and the spousal privilege against testifying in court) cannot be obtained through private contract; rather, they are available only through the state's grant of a marriage license.

But marriage is more than just a bundle of rights. It is a unique institution seen by many as the building block of society. The United States Supreme Court has said that marriage is "fundamental to our very existence and survival" and that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness" (*Loving v. Virginia* [1967]).

Committed same-sex couples seek the right to marry for the happiness, the sense of worth, and the social respect that comes with marriage. With marriage the community will mature, in the words of Professor William Eskridge, "from sexual liberty to civilized commitment."

Early Cases

The first same-sex marriage case was filed in Minnesota in May of 1970, a mere nine months after the Stonewall riots, by Jack Baker and Michael McConnell. Baker and McConnell relied on the United States Supreme Court 1967 decision in *Loving v. Virginia*, which struck down Virginia's ban on interracial marriage, but the Minnesota Supreme Court distinguished *Loving*, concluding "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely on race and one based upon the fundamental difference in sex" (*Baker v. Nelson* [1971]).

The court refused to consider Baker and McConnell's equal protection claim, holding instead that "[t]he institution of marriage as a union of man and woman . . . is as old as the book of Genesis." Baker and McConnell appealed the decision to the United States Supreme Court, which summarily dismissed the appeal for "lack of a substantial federal question."

Two other post-Stonewall same-sex marriage cases, filed in Kentucky by a lesbian couple (*Jones v. Hallahan* [1973]) and in Washington State by a gay male couple (*Singer v. Hara* [1974]), met the same fate as *Baker*.

In all of these early same-sex marriage cases the courts were content to rest their decisions on the circular argument that the couples' equal protection rights were not violated because the definition of marriage

excluded them from coverage. As the Kentucky court put it, "the relationship proposed by the applicants does not authorize the issuance of a marriage license because what they propose is not a marriage." The Washington court followed a similar reasoning: "Appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."

The Hawaii and Alaska Cases

These early, resounding defeats, coming in quick succession, quieted the drive for marriage equality for almost twenty years. While the lesbian and gay civil rights movement focused its energies and achieved many legal victories in the twenty-five years after Stonewall on issues such as the repeal of sodomy laws, protection from workplace discrimination, and hate crimes, little was said about same-sex marriage. That changed in a heartbeat with the Hawaii Supreme Court's landmark decision in *Baehr v. Lewin* in 1993, a case brought by six same-sex couples seeking the right to marry.

The court reviewed the Minnesota, Kentucky, and Washington same-sex marriage cases, cases that had held sway for a generation, and forcefully rejected them, calling their reasoning an "exercise in tortured and conclusory sophistry." The court held that denying same-sex couples marriage licenses would violate Hawaii's Equal Rights Amendment unless the state could show a compelling interest justifying the exclusion. The court remanded the case to the trial court for a hearing to allow the state to present evidence satisfying the compelling interest standard.

The trial court took testimony from eight witnesses expert in the fields of sociology, psychiatry, and gender development. In a 1996 decision the trial court concluded that "same-sex couples can, and do, have successful, loving and committed relationships," and "[g]ay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples." The court held the state had not met its burden under the compelling interest standard, but stayed enforcement of its decision pending appeal to the Hawaii Supreme Court.

The Hawaii Supreme Court sat on the appeal for over two years, which gave the legislature time to pass a proposed constitutional amendment reserving marriage to opposite-sex couples. The people of Hawaii overwhelmingly ratified the amendment in November 1998. In December 1999, the Hawaii Supreme Court unceremoniously dismissed the *Baehr* case due to the new amendment. In the end, no marriage licenses were ever issued in Hawaii, and the struggle moved on to other states.

A court victory in Alaska was also squelched by voters at the polls. In February 1998, a trial court in Anchorage ruled in favor of two gay men who brought suit seeking a marriage license. The court based its decision on equal protection grounds, as the Hawaii court had, but in a judicial first, the Alaska court also held that denying plaintiffs a marriage license violated their right to privacy. The court held that the right to privacy, enshrined in Alaska's Constitution, included the right "to choose one's life partner."

As in Hawaii, the court ordered the state to show a compelling reason for intruding on this right. The state never had to meet this challenge, however, since the Alaska legislature rushed through a proposed amendment to the constitution limiting marriage to opposite-sex couples. The amendment was ratified by the people of Alaska on the same day as the Hawaii amendment.

Vermont Civil Union

The first lasting victory in the struggle for marriage rights and responsibilities came in December 1999, with the Vermont Supreme Court's decision in *Baker v. State*.

Two lesbian couples and one gay couple sued for marriage licenses, basing their claim on the Common Benefits Clause of the Vermont Constitution, a clause which states in part that "government is . . . instituted for the common benefit, protection, and security of the people, nation, or community, and not

for the particular emolument or advantage of any single person, family, or set of persons who are only a part of that community" The court saw this clause as expressing the founders' belief in "inclusion," and said that "at its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage."

The court unanimously declared the marriage laws unconstitutional since they advantaged opposite-sex couples and denied same-sex couples a host of benefits and protections. In ringing terms the court concluded, "The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity."

Alas, the court was nowhere near as forceful in its choice of remedy. One justice would have ordered the state to issue the plaintiffs marriage licenses immediately. However, the majority stopped short of this since it felt that a "sudden change in the marriage laws . . . might have disruptive and unforeseen consequences," although it did not elaborate on what these consequences might be. The court instead directed the legislature to craft a constitutionally permissible solution.

In a rancorous and extremely high profile debate, the Vermont legislature eventually passed the civil union law, which took effect on July 1, 2000. The civil union law entitled same-sex couples to "all the same benefits, protections and responsibilities" offered to opposite-sex couples who marry (Vt. Stat. Ann. tit. 15, § 1204(a)).

The registration process for civil union was the same as for marriage, and those seeking to dissolve a civil union must use the family court and follow the same law governing the dissolution of marriage, "including annulment, separation and divorce, child custody and support, and property division and maintenance" (Vt. Stat. Ann. tit. 15, § 1204(b)). Following passage of the civil union law the plaintiffs in *Baker* moved to withdraw their suit, and in December 2000, the Vermont Supreme Court dismissed the case.

[In April 2009, the Vermont legislature passed a bill providing for marriage equality, in effect repealing the civil union law. After September 1, 2009, when the new marriage law went into effect, civil unions were no longer offered in Vermont, though civil unions already performed will continue to be recognized.]

Massachusetts

Same-sex marriage advocates finally achieved their breakthrough with the historic decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Dep't of Public Health* (2003). In that case seven same-sex couples brought suit seeking the right to marry under the Massachusetts Constitution. The court found for the plaintiffs. It concluded, "a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law."

The court's opinion is filled with affirming language about the worth of same-sex relationships and the importance of marriage. The court rejected the argument that allowing same-sex marriage would somehow "trivialize or destroy the institution of marriage." To that it said, "the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. . . . Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race."

Unlike *Baker*, which was unanimous, the plaintiffs prevailed in *Goodridge* by a slim 4-3 majority. Justice Sosman in dissent argued "[the Legislature can rationally view the state of the scientific study as unsettled

on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes?" Justice Cordy added, "the Legislature could conclude that redefining the institution of marriage to permit same-sex couples to marry would impair the State's interest in promoting and supporting heterosexual marriage as the social institution that it has determined best normalizes, stabilizes, and links the acts of procreation and child rearing."

The court gave the legislature 180 days "to take such action as it may deem appropriate" but offered no further guidance. The decision was imbued with a tone suggesting that only marriage will constitutionally suffice, but many legislators saw in the vagueness of the court's ruling the possibility that civil union might pass constitutional muster. However, on February 3, 2004, in response to the legislature's request for an advisory opinion, the court ruled that only marriage, and not civil union, would satisfy *Goodridge*. The four-judge majority remarked that "The history of our nation has demonstrated that separate is seldom, if ever, equal." (For briefs making the argument in favor of marriage, see www.glad.org).

The legislature convened on February 11, 2004 to consider several constitutional amendments to override *Goodridge*. The votes were close, but none of the amendments passed. In two days of lengthy and dramatic testimony, dozens and dozens of legislators spoke eloquently and passionately in favor of same-sex marriage.

On March 11, 2004, the legislature reconvened. After spirited debate and in a spirit of compromise, it approved a proposed constitutional amendment that would ban gay marriage but institute civil unions.

Notwithstanding the legislature's approval of the proposed constitutional amendment, however, it had no authority to prevent the court-ordered issuance of marriage licenses to same-sex couples. On May 17, 2004, for the first time in American history, gay and lesbian couples obtained fully legal marriage licenses. In towns across Massachusetts, in city halls and in temples and churches, overjoyed gay men and lesbians, often accompanied by their children and family and friends, entered into legal matrimony.

Republican Governor Mitt Romney invoked a 1913 law to prohibit out-of-state same-sex couples from marrying in Massachusetts. That law, originally intended to bar out-of-state interracial couples from marrying in Massachusetts, was challenged, but in 2006 it was upheld by the Supreme Judicial Court, at least when applied to couples from states that outlaw same-sex marriage. Under that ruling, couples from Rhode Island were permitted to be married in Massachusetts.

According to the Massachusetts Constitution, amendments to the constitution must be ratified by two consecutive legislatures before they can be put to a vote in the ensuing general election. The proposed amendment banning same-sex marriage and instituting civil union was, thus, taken up again by the legislature in September 2005. This time, the amendment failed by a lopsided vote of 157 against and only 39 in favor.

Many moderate lawmakers who voted in favor of the proposed amendment the first time said that the reality of same-sex marriage in the state had changed their minds. One lawmaker, representing this sentiment, said that between the votes, "we saw . . . how important marriage really is. We saw couples who had been together longer than some of us had been alive finally be able to receive the same benefits that other couples had always received and taken for granted."

Opponents of same-sex marriage in Massachusetts quickly initiated a new drive to amend the constitution under a different amendment procedure. Backers of a proposed amendment that would ban same-sex marriage (without adding a civil union substitute) gathered more than the 66,000 signatures needed to reopen the question. Under this procedure, the proposed amendment needed the support of only 50 lawmakers in two successive sessions in order for it to appear on the ballot in 2008. Some conservative lawmakers who had voted for the compromise civil union amendment the first time voted against it in the

second session because they favored the new, more restrictive amendment. Governor Mitt Romney, who supported the initial compromise amendment, switched his support to the new amendment.

After various legislative maneuvers, the amendment received 62 votes in January 2007, thus making it eligible for a state-wide referendum if it received more than 50 votes in the next legislative session.

However, on June 14, 2007, when the constitutional convention reconvened, the amendment was swiftly voted down on a vote of 45 to 151, handing a great victory to the gay and lesbian community. The success was due to strong support from the new Democratic leadership, including Governor Deval Patrick. The rejection of the amendment meant that a referendum on same-sex marriage in Massachusetts could not be held before 2012, but by 2012 same-sex marriage in Massachusetts was supported by a large majority of citizens and was regarded as settled law.

In late July 2008, the Massachusetts legislature repealed the 1913 law that Governor Romney had invoked to prohibit out-of-state couples from marrying in Massachusetts. The overwhelming vote in favor of the repeal reflected both a new easiness with same-sex marriage in the state and a desire to reap economic benefits from having out-of-state couples wed in the state, particularly in light of New York's 2008 decision to recognize same-sex marriages performed in other jurisdictions.

Setbacks in New York, Washington, and Maryland

In a long-anticipated ruling on several New York cases, in July 2006 the state's highest court dealt a surprising blow to the momentum that was building for same-sex marriage in the country's second-largest state. In a 4-2 ruling, the Court of Appeal rejected the claim that the state constitution compelled same-sex marriage.

The ruling was especially disappointing because the majority seemed to have no interest at all in questions of justice or equity. It seemed to accept the dubious proposition that the purpose of marriage is procreation and implied that protecting the children of opposite-sex marriages was more important than protecting the children of same-sex marriages. The majority opinion makes a mockery of the notion of equal protection.

The Court's chief judge, Judith S. Kaye, wrote a carefully reasoned dissent in which she noted that denying marriage to same-sex couples does not serve the interest of children. She predicted that future generations would consider the decision "an unfortunate misstep."

The ruling by the state's highest court had the effect of shifting the debate from the courts to the legislature. Polls in New York suggested that a majority of the state's population favors same-sex marriage. Still, the political struggle would be long and difficult.

In 2008, however, Governor David Patterson, in response to an appellate decision in one part of the state, ordered that same-sex marriages legally performed in other jurisdictions be recognized as valid throughout New York state.

Scarcely two weeks after New York state's highest court declared that the state constitution did not compel marriage equality, a bitterly divided Washington State Supreme Court also rejected equal marriage rights for same-sex couples. In a 5-4 decision that generated five separate opinions, the court emphasized its need to defer to the legislature. Although the controlling three-judge opinion repeatedly said that the Court understood the difficulties faced by same-sex couples denied the protections of marriage, it was unwilling to direct the legislature to provide appropriate remedies. It did urge the legislature to reconsider the state's marriage laws.

The dissenting justices in the Washington case accused the majority of circular reasoning and of ignoring the discrimination faced by homosexuals.

Justice Mary E. Fairhurst questioned the logic of the majority's contention that the legislature's refusal to grant same-sex couples marriage rights somehow advanced the state's interest in procreation, pointedly asking, "Would giving same-sex couples the same right that opposite-sex couples enjoy injure the state's interest in procreation and healthy child rearing?"

Justice Bobbe J. Bridge bitterly disputed the majority's refusal to enforce equal protection for homosexuals, likening the idea "that it is not our place to require equality for Washington's gay and lesbian citizens" to condoning racial injustice. Had the majority's opinion prevailed in 1954 on racial issues, "there would have been no *Brown v. Board of Education*."

The disappointments in New York and Washington were followed by a similar disappointment in Maryland. In September 2007, in a 4-3 decision characterized by same-sex marriage advocate Evan Wolfson as "shallow and inadequate," the state's highest court upheld the state's ban against same-sex marriage.

Victory in New Jersey

In January 2004, the New Jersey legislature passed a domestic partnership law that provided some of-- though not all--the benefits of marriage.

In 2002, seven gay and lesbian couples had initiated a lawsuit demanding the right to marry. Finally, in October 2006, the New Jersey Supreme Court issued its ruling. Coming after setbacks in the highest courts of New York and Washington, the New Jersey ruling, while not mandating marriage, was a significant victory in the battle for equal treatment of gay and lesbian couples.

A unanimous court ruled that "our State Constitution guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples."

The court, however, left it to the state legislature whether the ruling be implemented by amending the marriage law in order to permit same-sex couples to wed or by creating a Vermont-like parallel system of civil unions. Three of the court's seven members dissented on the remedy, arguing that the state should simply allow same-sex couples to marry, and pointing out the symbolic value of the term marriage. Nevertheless, the legislature quickly adopted the civil union option, making New Jersey one of the first states to accord same-sex couples in civil unions all the rights and benefits of marriage.

Progress in Connecticut, New Hampshire, and Oregon

In April 2005, Connecticut became the first state to enact a Vermont-style civil union bill without a court mandate. The bill, signed into law by Republican Governor Jodi Rell, extended all the rights and responsibilities of marriage to same-sex couples, except for the right to marry. A companion bill defined marriage as the union of one man and one woman. The Connecticut civil union law took effect on October 1, 2005.

[On October 10, 2008, however, the Connecticut Supreme Court declared that the civil unions law was discriminatory and ordered the state to allow same-sex marriage (see below). Civil unions ceased being offered after October 1, 2010. However, civil unions entered into before that date continue to be honored.]

In 2007, significant progress in achieving something approaching equality for same-sex couples was also made in a few other states, including especially New Hampshire and Oregon.

The New Hampshire legislature adopted civil unions, similar to those provided by Vermont, Connecticut, and New Jersey.

[The New Hampshire civil unions law was repealed by passage of marriage equality in the state in June 2009. After that law became effective in January 2010, the state ceased offering civil unions. Couples already in civil unions were able to obtain marriage licenses at no charge; in 2012 civil unions were automatically be changed to marriage.]

Oregon opted for domestic partnerships similar to those in California. The Oregon domestic partnership law, passed by a Democratic legislature and signed into law by a Democratic governor, went into effect in 2008 and provides virtually all the rights made available to married couples. Inasmuch as Oregon passed a constitutional amendment banning same-sex marriage, the Oregon domestic partnership law scrupulously avoids terms such as marriage or civil union, while nevertheless making the rights and responsibilities associated with marriage available to gay and lesbian couples.

Domestic Partnerships in California

Beginning in 2003, the California legislature passed a series of laws that gave a growing number of important rights and responsibilities to same-sex couples who register as domestic partners.

In 2003, Governor Gray Davis signed a domestic partnership law, which took effect January 1, 2005. It is essentially equivalent to Vermont's civil union law and extends almost all marital benefits and responsibilities to couples in a domestic partnership. Since then additional rights have been added to the domestic partnership, which made domestic partnership almost equivalent to marriage in terms of the rights and responsibilities it accords, if not necessarily in terms of the respect and dignity conferred by the name "domestic partnership" as opposed to "marriage."

In September 2005, the California Assembly made history by becoming the first legislature in the country to pass a bill authorizing same-sex marriage. Governor Schwarzenegger vetoed this bill, as he did a 2007 bill also authorizing marriage equality, saying that he preferred to let the California Supreme Court decide the issue. This is ironic since in every state where a same-sex marriage case has been filed, opponents of same-sex marriage argue that the legislature should decide the issue, not the courts.

Victory in California Supreme Court

On February 12, 2004, San Francisco's Mayor Gavin Newsom announced that the city would begin issuing marriage licenses to same-sex couples. Literally overnight thousands of same-sex couples converged on city hall for their licenses. Riveting footage of couples waiting in line for hours and having their unions blessed on the steps of city hall brought national and international attention. These marriages, unfortunately, were soon nullified by the California Supreme Court, which did not at that time address the substantive question of the constitutionality of banning same-sex marriage but ruled that Mayor Newsom lacked the authority to issue marriage licenses to same-sex couples.

In the litigation that followed the San Francisco marriages, advocates for same-sex marriage won an impressive victory at the trial court, which ruled that the ban on same-sex marriage is unconstitutional. This decision, however, was reversed by the California Court of Appeals.

On May 15, 2008, the California Supreme Court, in a 4-3 decision, ruled that the prohibition of same-sex marriage is unconstitutional. The Court struck down two state laws that banned same-sex marriage and declared that the domestic partnership law was not sufficient.

Writing for the majority, Chief Justice Ronald George declared that the right to marriage is a fundamental right that must be accorded to same-sex as well as opposite-sex couples. "The right to marry," he wrote, "represents the right of an individual to establish a legally recognized family with a person of one's choice and, as such, is of fundamental significance both to society and to the individual."

Basing its ruling on the equal protection clause of the state constitution, the Court also adopted a new standard of review in determining claims of discrimination based on sexual orientation. Rather than the "rational basis" test, the Court ruled that claims of discrimination on the basis of sexual orientation require "strict scrutiny."

The ruling by the widely respected California Supreme Court is of enormous significance. Not only is California the largest of the American states, containing more than ten per cent of the nation's population, but its Supreme Court is a trend-setter. The high courts of some other states are likely to follow its lead.

Despite pleas from opponents of same-sex marriage and the attorneys general of eleven states, the Court refused to delay the effect of its decision, so on June 17, 2008, same-sex couples began marrying in California. Since California has no residency requirement, couples from out-of-state were also eligible to marry in the state.

Reversal at the Polls and in Court

At about the same time that glbtq people were celebrating the achievement of marriage equality in California, a coalition of anti-gay activists succeeded in placing on the November 2008 ballot a constitutional amendment that would override the Court's decision and ban same-sex marriage.

Known as Proposition 8, the amendment was supported by an extraordinarily well-financed campaign, the largest donors to which were members of the Church of Jesus Christ of Latter Day Saints (Mormons) and the Roman Catholic Church.

Despite polls indicating that Proposition 8 would be rejected, on November 4, 2008 it passed by a margin of 52% for and 48% against.

A stunned and bitterly disappointed glbtq community took to the streets to protest the injustice of stripping away equality rights. Many of the protests were directed at Mormon, Catholic, and Evangelical Churches.

Almost as soon as the votes were counted, lawsuits were filed challenging the constitutionality of Proposition 8.

Organizations including the American Civil Liberties Union, Lambda Legal Defense Fund, and the National Center for Lesbian Rights filed suit on behalf of Equality California and six same-sex couples asking the California Supreme Court to nullify the proposition.

This suit argued that Proposition 8 should be declared invalid because it improperly attempts to undo the state constitution's core commitment to equality and deprives the courts of their essential role of protecting the rights of minorities.

According to the suit, the California Constitution makes clear that a major change in the roles played by the different branches of government cannot be made by a simple majority vote through the initiative process, but must first go through the state legislature. Changes to the underlying principles of the constitution must be approved by two-thirds of both houses of the legislature before going to voters. Since this procedure was not followed by the proponents of Proposition 8, it should be declared invalid, the suit urged.

Other lawsuits were filed by the City Attorney of the City of San Francisco (joined by his counterparts in the City of Los Angeles, the County of Los Angeles, and Santa Clara) and by Robin Tyler and Diane Olson. The suit by the city attorneys made a similar argument to that of the gay rights organizations, that Proposition 8 attempted to revise rather than amend the constitution.

The suit filed by Tyler and Olson, who were among the first couples to be married after the ruling by the California Supreme Court in May, argued that Proposition 8 introduces a contradiction into the California State Constitution because it violates the equal protection clause.

Another suit was filed by several civil rights organizations, including the Asian Pacific American Legal Center, the California State Conference of the National Association for the Advancement of Colored People, the NAACP Legal Defense and Educational Fund, the Equal Justice Society, and the Mexican American Legal Defense and Educational Fund. This suit emphasized the danger that all minorities would face if the equal protection clause is subject to weakening by initiatives passed by a mere majority.

Still another suit was filed by feminist organizations.

In the aftermath of the election, it was not clear how the passage of Proposition 8 affected the legal status of the 18,000 same-sex marriages performed between June 17 and November 4, 2008. The Attorney General of California, Jerry Brown, issued an opinion that the marriages are valid and must continue to be honored by the state of California. However, this opinion was challenged by the supporters of Proposition 8, who pointed out that the language of the proposition clearly stated that California would "recognize" only marriages between a man and a woman.

On November 19, 2008, the California Supreme Court announced that it would review the lawsuits filed in the aftermath of the passage of Proposition 8. It asked the parties to the suits to file additional papers and scheduled oral arguments for March 2009.

On the basis of the questions asked during oral arguments in March 2009, many observers predicted that the Court would uphold Proposition 8, but that it would not invalidate the same-sex marriages performed between June 17, 2008 and the passage of Proposition 8 in November 2008.

That, in fact, was the decision that the California Supreme Court handed down on May 26, 2009. In a 6-1 decision, written by Chief Justice George, the Court upheld the ban on same-sex marriage, while also narrowing the issue to a dispute about a mere word. The ruling rejected all the arguments put forward by those challenging Proposition 8.

The Court emphasized that the state, through the domestic partnership law, gives gay and lesbian couples the ability to "choose one's life partner and enter with that person into a committed, officially recognized and protected family relationship that enjoys all of the constitutionally based incidents of marriage."

Asserting the Court's continuing commitment to subject laws affecting sexual orientation to "strict scrutiny," the decision characterized Proposition 8 as merely "carving out a narrow and limited exception" to the state's protection of same-sex couples, reserving the official designation of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law."

Whereas in the earlier ruling, the Court had emphasized the significance of the word *marriage*, in this ruling the Court minimized its importance, in effect reducing the dispute to a matter of vocabulary.

The tone of the majority decision was curiously apologetic. Indeed, in emphasizing that domestic partnerships are the equivalent of marriage in all but the name, the ruling may have strengthened the domestic partnership law, making it possible for same-sex couples, for example, to refuse to testify against

each other and claim other rights that married couples assume.

The majority decision let stand the 18,000 existing marriages because, the Court said, Proposition 8 did not include language specifically saying it was retroactive.

In a spirited dissent, Justice Carlos Moreno deplored the majority ruling, saying that Proposition 8 "strikes at the core of the promise of equality that underlies our California Constitution." Upholding it, he said, "places at risk the state constitutional rights of all disfavored minorities."

The ruling was bitterly assailed by proponents of marriage equality and sparked a number of protests and demonstrations.

Federal Challenge to Proposition 8

Soon after the announcement of the California Supreme Court's decision, veteran litigators Theodore Olson and David Boies, who had opposed each other in the bitterly contested *Gore v. Bush* case that decided the 2000 Presidential election, announced that they would take the battle for marriage equality to federal court.

Their announcement was initially greeted less than enthusiastically by some gay legal organizations and experts, who judged the move risky and premature, but the attorneys soon convinced most glbtq groups and individuals of their commitment.

One of the most intriguing aspects of the Boies-Olson suit is that it may make the cause of marriage equality less partisan than it had previously been perceived, since Olson, a former Solicitor General, is a prominent conservative Republican, while Boies is a well-connected liberal Democrat.

The Olson-Boies case, supported by the American Foundation for Equal Rights, was brought on behalf of one lesbian couple, Kris Perry and Sandy Stier, who have four children, and a gay male couple, Paul Katami and Jeff Zarrillo. Because the nominal defendants in the case include the Governor of California and one of the plaintiffs is named Perry, the case became known as *Perry v. Schwarzenegger* (then *Perry v. Brown* and, ultimately, *Hollingsworth v. Perry*).

The case was filed in May 2009 in the Federal District Court for Northern California and was assigned to the court's Chief Judge, Vaughn R. Walker, who was appointed to the bench by President George H. W. Bush in 1989.

The trial began on January 11, 2010. Because Governor Schwarzenegger and California Attorney General Jerry Brown declined to defend Proposition 8, with Brown declaring that he considered Proposition 8 unconstitutional, the ban on same-sex marriage was defended by the proponents of Proposition 8, led by chief counsel Charles Cooper.

In the course of the trial, which spanned twelve days in January and two days in June 2010, Olson and Boies systematically built their case around the history of marriage, the harm that denial of marriage rights does to gay and lesbian couples and their children, and the irrationality of the ban. Introducing a massive amount of evidence, they demonstrated that the ban was enacted out of animus against homosexuals and that it causes great harm to gay men and lesbians for no rational governmental purpose.

The defense was stymied by the fact that they were unable to argue against same-sex marriage on religious grounds or on the inferiority of homosexuals, since such arguments would not be admissible as appropriate

governmental reasons for denying a fundamental right. Instead, they were reduced to arguing that the only purpose of marriage is procreation and that permitting same-sex couples to marry would in some unspecified way contribute to the "deinstitutionalization" of marriage.

On August 4, 2010, Judge Walker issued his decision. His 136-page opinion demolished the credibility of the defendants' witnesses, systematically outlined 80 findings of facts established by the plaintiffs, and concluded unambiguously that Proposition 8 is unconstitutional.

Judge Walker declared that "the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional."

Judge Walker endorsed the contention of Olson and Boies that the ban on same-sex marriage violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

In reaching this conclusion, he found that, although sexual orientation is entitled to heightened scrutiny, Proposition 8 fails to survive even rational basis review. He further found that the ban discriminates on the basis of sex as well as sexual orientation. He described domestic partnerships as a "substitute and inferior institution."

Judge Walker emphatically rejected the defendants' argument that the purpose of marriage is procreation, observing that "states have never required spouses to have an ability or willingness to procreate in order to marry."

He described the exclusion of same-sex couples from marriage "as an artifact of a time when the genders were seen as having distinct roles in society and in marriage," and declared, "That time has passed."

The judge dismissed the idea that a referendum of voters is somehow sacrosanct. The referendum's outcome was "irrelevant," he said, because "fundamental rights may not be submitted to a vote."

In his findings of fact, Judge Walker established that same-sex couples are identical to opposite-sex couples in their ability to form successful marital unions and raise children.

Judge Walker's stayed his historic ruling to allow its appeal to the Ninth Circuit Court of Appeals.

The editorial page of the *New York Times* described Judge Walker's decision as both "an instant landmark in American legal history" and also "a stirring and eloquently reasoned denunciation of all forms of irrational discrimination, the latest link in a chain of pathbreaking decisions that permitted interracial marriages and decriminalized gay sex between consenting adults."

Victory in Connecticut

In a decision released on October 10, 2008, the Connecticut Supreme Court declared unconstitutional the state's prohibition on same-sex marriage and its civil union law.

These laws, the majority in a 4-3 decision ruled, violate the constitutional guarantee of equal protection under the law.

In the wide-ranging majority opinion, Justice Richard N. Palmer declared that "Interpreting our state

constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same-sex partner of their choice." He added that "To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others."

Pointing out that "civil unions enjoy a lesser status in our society than marriage," Justice Palmer declared that "Ultimately, the message of the civil unions law is that what same-sex couples have is not as important or as significant as real marriage."

As in the California decision, the Connecticut Court also ruled that sexual orientation was a "suspect" category entitled to "strict scrutiny" in determining allegations of discrimination.

Three justices entered dissents from the ruling. Two of them disagreed that civil unions provided fewer rights and responsibilities than marriage and thought that the issue of marriage equality could best be resolved through the legislative process, pointing to increased public support in the state for same-sex marriage. They also argued against applying "strict scrutiny" to issues involving sexual orientation, contending that gay people have "unique and extraordinary" political power and therefore do not warrant heightened constitutional protections.

The dissent by Justice Peter Zarella argued that marriage laws dealt with procreation, which, he declared, was not a factor in gay relationships, apparently ignoring the fact that many same-sex couples have children. "The ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry," he wrote.

On November 12, 2008, at a time when glbtq communities in California and elsewhere were protesting against the passage of Proposition 8, gay and lesbian couples in Connecticut began exercising their right to marry.

On April 23, 2009 the Connecticut legislature voted to replace the gendered language of its marriage laws with genderless terms and to make all references to marriage gender-neutral. Governor Jodi Rell signed the law. This legislation brought the state into compliance with the Supreme Court ruling in favor of marriage equality.

Victory in Iowa

In a unanimous ruling announced on April 3, 2009, the Iowa Supreme Court struck down the Iowa law banning same-sex marriage on equal protection grounds.

The decision, authored by Justice Mark Cady, stemmed from a 2005 lawsuit filed by six gay and lesbian couples who were denied marriage licenses by the Polk County recorder's office. The seven justices affirmed the appellate ruling of Polk County Judge Robert Hanson that Iowa's ban on same-sex marriages treated gay and lesbian couples unequally under the law.

In a carefully reasoned and firmly stated decision, the court declared, "We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. There is no material fact, genuinely in dispute, that can affect this determination."

Acknowledging that the decision may not be a popular one in a conservative state, the court insisted on its duty to uphold the Iowa constitution. "We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold Iowa's marriage statute, Iowa Code section 595.2, violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty."

The Court rejected civil unions as an alternative to marriage.

It ordered that marriage licenses be issued to same-sex couples as soon as the decision is officially promulgated. It further ordered that the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman be stricken from the statute, and the remaining statutory language be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.

The Iowa decision is particularly important because it is the first decision in favor of marriage equality from a heartland state. Moreover, the decision is extraordinarily well-written and thoughtful. It may influence the courts of other conservative states.

Although polls indicated that a large majority of Iowans were opposed to same-sex marriage, passing a constitutional amendment to overturn the Court's decision is difficult. The process to amend the Iowa constitution requires approval of a proposed amendment in two sessions of the legislature before being submitted to the voters. The leaders of both houses of the Iowa legislature vowed not to allow consideration of a proposed amendment. Even after the Republicans took control of one house of the legislature in 2010, a constitutional amendment was not introduced.

However, the National Organization for Marriage and other conservative forces successfully targeted three members of the Iowa Supreme Court for removal from the bench in 2010. Their success indicated continuing anger at the Court for its ruling.

It should be noted, however, that the three jurists refused to campaign on their own behalf, feeling that that would be unseemly.

Moreover, in November 2012, an attempt to remove another member of the Court failed. And recent polls have shown that a majority of Iowans now support same-sex marriage, so it seems that marriage equality is now safe in Iowa.

Victory in Vermont

In 2000, Vermont became the first state to adopt civil unions; in 2009, it became the first state to adopt marriage equality by legislative mandate rather than court order.

Following a series of hearings and studies of the civil union law, in which many gay and lesbian couples complained that civil unions were not recognized as the equivalent of marriage, the Vermont legislature took up the question of marriage equality in 2009.

The bill to amend the marriage laws to permit same-sex marriage passed easily in both houses of the Democratic-controlled legislature: 26-4 in the Senate, 95-52 in the House of Representatives.

The bill, however, was opposed by Republican Governor Jim Douglas, who vetoed it as soon as it arrived on his desk. Despite the wide margins by which it was passed, whether the supporters could override the Governor's veto, which would require a 2/3 vote in both chambers, was by no means certain.

On April 7, the Senate, as expected, overwhelmingly approved the override. After a tense debate in the House, where the vote was expected to be very close to the number needed, the House voted 100 to 49--the precise number needed--to override the veto.

Following the vote to override Governor Douglas's veto, Senate President Pro Tem Peter Shumlin declared, "The struggle for equal rights is never easy. I was proud to be President of the Senate nine years ago when Vermont led the country by creating civil unions. Today is another historic day for Vermont and I have never

felt more proud as we become the first state in the country to enact marriage equality not as the result of a court order, but because it is the right thing to do."

When the bill took effect on September 1, 2009, Vermont became the fourth state to offer equal marriage rights.

After September 1, 2009, Vermont ceased offering civil unions, though civil unions already performed will continue to be recognized. If parties to civil unions wish to be married, they will have to obtain marriage licenses and have marriage ceremonies.

The new law also makes explicit that Vermont recognizes same-sex marriages that have been performed in other jurisdictions where they are legal.

Although the debate over marriage equality in Vermont was sometimes tense, and often moving, it was not rancorous in the way the debate over civil unions in 2000 had been. The civility of the debate reflected the fact that Vermonters had grown familiar with gay and lesbian couples in civil unions (and in marriage in Massachusetts and Canada) and realized that none of the dire predictions made by opponents had come to pass: the sky did not fall simply because gay and lesbian couples enjoyed equal rights.

The success in Vermont is remarkable when one considers that, except in a few liberal states, few legislators support marriage equality or even civil unions or domestic partnerships. The ability to marshal a 2/3 vote in favor of marriage equality attests to the effectiveness of grass-roots organizing and to Vermonters' commitment to equality under the law.

Domestic Partnerships in Washington

In 2007, in the aftermath of the bitterly divided Washington state supreme court ruling that gay and lesbian couples had no constitutional right to marriage, the Washington legislature adopted a relatively weak domestic partnership law. It provided hospital visitation rights, the ability to authorize autopsies and organ donations, and inheritance rights when there is no will.

In 2008, the legislature expanded that law to give domestic partners standing under laws covering probate and trusts, community property, and guardianship.

In 2009, the Democratic-controlled legislature expanded the domestic partnership law to confer on same-sex partners all the rights and responsibilities that Washington state offers to married couples. The bill passed the House by a vote of 62-35 and the Senate by a vote of 30-18.

Among the rights granted by the bill are business succession rights; victims' rights, including the right to receive notifications and benefits allowances; legal process rights; the right to use sick leave to care for a spouse; the right to wages and benefits when a spouse is injured, and to unpaid wages upon death of spouse; the right to unemployment and disability benefits; workers' compensation coverage; and insurance rights, including rights under group policies, policy rights after death of spouse, conversion rights, and continuing coverage rights.

After the passage of the legislation by the state senate on April 15, 2009, Governor Chris Gregoire pledged to sign it as soon as it reached her desk, remarking, "Our state is one that thrives on diversity. We have to respect and protect all of the families that make up our communities."

However, a conservative organization announced that they would begin the process of gathering signatures to qualify a proposal repealing the new law. In September 2009, the Washington Secretary of State certified the signatures, despite irregularities in collecting and submitting them. The law thus was submitted to the voters in November 2009 for approval or rejection.

On November 3, 2009, voters in Washington, by a 53% to 47% margin, approved the domestic partner legislation, making Washington the first state in which gay partnerships were affirmed by a popular vote.

Victory in Maine/Defeat in Maine

After a series of public hearings in which supporters and opponents passionately spoke about a proposal to permit same-sex marriage in Maine, the state legislature took up the question in the spring of 2009.

The legislature concluded their work on May 6, 2009, both houses having voted in favor of marriage equality. Within minutes of the bill reaching Governor John Baldacci's desk, the Governor signed it, ending intense speculation as to whether he might exercise his veto power.

The Governor had expressed his belief that marriage was a union of a man and woman, and there was a widespread belief that he might either veto the bill or, at best, allow it to become law without his signature. But on further reflection, Governor Baldacci reached the conclusion that he had a responsibility to sign the legislation because not to do so would undermine the constitutional principle of equal protection under the law.

Declaring that "you cannot allow discrimination to stand," the Governor endorsed marriage equality.

Maine thus became the second state to enact an equal marriage law without being forced to do so by a court decision. However, despite the legislative victory, the new law never went into effect.

Soon after Governor Baldacci signed the bill, opponents announced that they would begin the process of gathering 55,000 signatures to subject the new law to a "people's veto," or public referendum. Opponents of the law in fact submitted more than 100,000 signatures. The marriage equality law was thus suspended pending the results of a referendum in November 2009.

Despite an effective and well-financed campaign to retain marriage equality in Maine, the referendum to veto the law was passed by a 53-47 margin in the election of November 3, 2009.

The defeat sent shock waves through the glbtq community, raising the question of whether it would ever be possible for marriage equality to prevail at the polls, at least until the most homophobic demographic-- those over 65 years of age--die off.

It should be remembered, however, that despite its reputation for live-and-let-live libertarianism, Maine is not a liberal state, especially in comparison with other New England states. Indeed, the "people's veto" was used to derail anti-discrimination legislation twice before it finally prevailed.

In the actual campaign, the opponents of marriage equality, principally the Roman Catholic Church and its front group, the National Organization for Marriage, launched an assault on equal marriage rights by stoking fears that somehow legalizing same-sex marriage would have a deleterious effect on school children. At the same time, they ran ads saying that they had no objection to domestic partnership or civil unions, only to the "redefinition" of marriage. Notwithstanding the fact that the Roman Catholic Church and the National Organization for Marriage had consistently opposed domestic partnerships, their ads alleging their support of gay rights seem to have been effective.

Victory in District of Columbia

The District of Columbia City Council passed a domestic partnership bill in 1992, but because of

Congressional intervention, it was not implemented until 2002. The District's domestic partnership is not limited to same-sex couples and offers a limited number of rights, such as hospital and jail visitation and some benefits for employees of the District.

On May 4, 2009, however, just as the Maine legislature was approving marriage equality, the Washington, D. C. City Council overwhelmingly approved a bill that recognizes same-sex marriages performed in jurisdictions where they are legal.

The bill was described by openly gay Council member David Catania as "the culmination of a long journey as we attempt to be true to our motto--'Justice for All.'"

Under the legislation, same-sex couples who live in the District and who have been married in other jurisdictions are granted such legal rights as joint filing of city tax returns and all private health care and pension benefits that are afforded heterosexual couples.

Catania regarded the bill as a precursor to full marriage equality. That goal advanced in December 2009, when the Council passed a bill on December 15 legalizing same-sex marriage, which was signed into law by Mayor Adrian Fenty on December 18.

Like all D.C. legislation, the law was subject to review by Congress, which had the power to invalidate it within 30 working days. Despite the attempts of some Republican Congressmen to invalidate the law, the Democratic-controlled Congress refused to intervene.

Opponents of same-sex marriage also sued in federal court, alleging that the law should be subject to a referendum. Finally, on March 2, 2010, Supreme Court Chief Justice John Roberts announced the Court's refusal to issue a stay of the legislation. Somewhat ominously, he pointed out that the law might be subject to repeal via the District's initiative process, though that question would have to work its way through the appellate process before reaching the Supreme Court.

On March 3, 2010, the District began issuing marriage licenses to same-sex couples.

In July 2010, the D. C. Court of Appeals rejected, on a 5-4 vote, an appeal by the opponents of same-sex marriage who wanted to force a referendum on the issue. On January 17, 2011, the Supreme Court of the United States announced that it had declined to hear an appeal of the D. C. Court of Appeals' decision.

Nevada Domestic Partnerships

On October 1, 2009, both same-sex and opposite-sex couples in Nevada were offered the option of domestic partnerships, which offer most of the rights and responsibilities of marriage in areas such as estate planning, medical decisions, community property, and child care.

The legislature had passed the law by comfortable, but not veto-proof margins, only to see the embattled Republican governor, Jim Gibbons, a Mormon, veto the measure, saying that the rights conferred by the legislation could be attained through contracts.

After much lobbying by Nevada's powerful gaming and tourism industry, which feared the possibility of a gay boycott of the state, both houses of the legislature voted during the final days of May 2009 to override the gubernatorial veto.

The law, which was sponsored by openly gay Senator David Parks, was hailed by Gary Peck, executive director of the ACLU in Nevada, who characterized the override as putting "our state on the right side of a growing movement to honor this country's promise that every one of us is entitled to equal treatment under the law."

Victory in New Hampshire

After a roller-coaster ride on the question of marriage equality, New Hampshire adopted marriage equality on June 3, 2009, becoming the third state to adopt same-sex marriage through legislative means rather than through a ruling by the judiciary.

The Democratic-controlled legislature passed a bill providing for equal marriage in May. Governor John Lynch, a Democrat who had earlier announced that while he supported civil unions, he was not in favor of same-sex marriage, said that he would veto the bill unless it contained explicit language exempting not only clergy from having to officiate at same-sex weddings but also stating that religious organizations would not be forced to participate in ceremonies celebrating same-sex marriages.

The Senate quickly amended the bill to include the language Governor Lynch demanded. However, the House demurred, defeating the new bill by two votes, raising questions as to whether the state would adopt same-sex marriage in 2009.

After further deliberation, the House and Senate agreed on compromise language that was acceptable to the Governor. On a 14-10 vote in the Senate and a 198-176 vote in the House, the legislature approved the bill, which was quickly signed by Governor Lynch.

In signing the bill, Lynch remarked that he had changed his previous position opposing same-sex marriage because he had come to the conclusion that "a separate system is not an equal system."

"Today," he said, "we are standing up for the liberties of same-sex couples by making clear that they will receive the same rights, responsibilities--and respect--under New Hampshire law."

Domestic Partnership in Wisconsin

In a very low-key development in 2009, Wisconsin became the first state with a constitutional ban on same-sex marriage and civil unions to adopt domestic partnerships.

Under the budget signed into law on July 1, 2009 by Democratic Governor Jim Doyle, same-sex couples are offered 43 of the more than 200 state rights and benefits extended to married couples, such as allowing domestic partners to take family and medical leave to care for a seriously ill partner, make end-of-life decisions, and have hospital visitation rights. In addition, domestic partners will be presumed to have joint tenancy rights, be able to transfer real estate without fee, and enjoy rights related to power of attorney and finances.

The domestic partnership law also allows state government workers as well as University of Wisconsin employees to include domestic partners in their group health insurance and retirement survivor benefits.

Although the domestic partnership provisions were adopted with little legislative opposition, they were challenged by the proponents of the constitutional ban on same-sex marriage in an appeal to the state supreme court. On November 4, 2009, the day after the disastrous defeat in Maine, the Wisconsin Supreme Court announced that it had declined to hear the challenge to domestic partnerships.

Veto in Hawaii / Civil Unions Finally Passed

In 2010, a civil unions bill was passed with comfortable but not veto-proof margins by Hawaii's House of Representative and Senate. The bill would have conferred on partners in civil unions all the rights and responsibilities of marriage.

After a long period of consulting with opponents and proponents of the bill, Governor Linda Lingle announced on July 6 that she would exercise her right of veto to prevent the bill from becoming law.

In vetoing the bill, the Governor called for a referendum on the issue, declaring "I have become convinced that this issue is of such significant societal importance that it deserves to be decided directly by all the people of Hawaii."

The veto of the civil unions bill sparked a call to action on the part of gay rights groups in Hawaii and on the mainland. The Human Rights Campaign, Equality Hawaii, and the lesbian-gay-transgendered caucus of the Democratic Party worked hard to register voters and to campaign for the election of former Representative Neil Abercrombie as Governor of Hawaii in the 2010 election.

In 2011, the legislature fast-tracked the civil unions bill that Governor Lingle had vetoed. In February, the state House of Representatives passed the bill by a vote of 31 to 18; in the Senate it was passed by a vote of 18 to 5.

When the law went into effect on January 1, 2012, Hawaii became the seventh state to provide same-sex couples civil unions or domestic partnerships with all the rights and responsibilities of marriage.

Upon the announcement of the Senate's vote on February 16th 2011, Governor Abercrombie issued a statement declaring that civil unions "respect our diversity, protect people's privacy, and reinforce our core values of equality and aloha. . . . this bill represents equal rights for all the people of Hawaii."

Civil Unions in Illinois

The question of whether Illinois should adopt civil unions was a campaign issue in the 2010 race for governor. Incumbent Governor Pat Quinn came out unequivocally in favor of enacting civil unions, while his Republican opponent was adamantly opposed, promising to veto any legislation that authorized civil unions unless it was submitted to the voters via referendum.

When Governor Quinn narrowly won reelection, the Democratic majorities in both houses of the Illinois legislature quickly moved to introduce legislation creating civil unions that provided all the rights and responsibilities of marriage for both heterosexual and homosexual couples.

The legislation was vigorously opposed by the Illinois Catholic Conference, but on November 30, 2010, the House voted 62-51 in favor of civil unions, and on December 1, the Senate followed suit on a vote of 32-24. When the civil union law took effect on June 1, 2011, Illinois became the twelfth jurisdiction in the United States to extend marriage, domestic partnerships, or civil unions to same-sex couples.

Setback in Maryland

With the triumph of many candidates who pledged to support marriage equality in the 2010 elections for the Maryland legislature, it was widely believed that Maryland would become the sixth U. S. state to legalize same-sex marriage.

At first, all seemed to be going according to schedule. On February 24, 2011, the state Senate passed the marriage equality bill on a 25-21 vote.

Inasmuch as passage in the Senate was believed to be the most difficult hurdle for the bill to overcome, most observers expected the bill to become law. However, passage of the bill in the Senate galvanized opponents of marriage equality--especially the Mormon Church, various African-American Churches, the Roman Catholic hierarchy, and the National Organization of Marriage--and many members of the House of Delegates were pressured to vote against the measure. Even some Delegates who had campaigned in favor

of marriage equality began to waver.

Although the bill was reported out of the House Judiciary Committee, and several "killer amendments" were defeated, the bill was unable to muster sufficient votes on the floor of the House. On March 11, the marriage equality bill, on a voice vote, was recommitted to the Judiciary Committee, apparently dead, at least until 2012.

In response to the defeat, *Washington Post* columnist Jonathan Capehart denounced the "cowards in the state legislature who talked out of both sides of their mouths to the gay community and who refused to heed the call of leadership." He particularly called out "African Americans who can't or refuse to see that one's civil rights should not be encumbered by race or sexual orientation."

Delaware Civil Unions

On April 14, 2011, the Delaware state House, on a bipartisan 26-15 vote, passed a robust civil unions bill that accords gay and lesbian couples all the rights and responsibilities of marriage except for the name. The bill also provides that comparable same-sex unions including marriages from other jurisdictions will be recognized as civil unions in Delaware. The bill passed the state senate on April 6 on a 13-6 vote. Governor Jack Markell, a Democrat and a supporter of the bill, signed it to make Delaware the eighth state to enact robust civil unions or domestic partnerships.

"Today, we celebrate a victory for all Delaware families who will have the tools to protect themselves in good times and in bad," said Human Rights Campaign president Joe Solmonese.

Victory in New York

In 2009, marriage equality advocates suffered a humiliating defeat when a bill legalizing same-sex marriage in New York was rejected by the Democratic-controlled Senate after easily winning approval in the Assembly. Despite the strong support of Governor Patterson, several Democrats and all Republicans voted against the bill.

In response, gay rights groups, including Fight Back New York, targeted for defeat several Democratic legislators who did not support same-sex marriage, and in the 2010 election, many of those so targeted lost their seats, though the Republicans took control of the Senate when 32 Republicans were elected to the 62-seat chamber.

In 2010, however, Andrew Cuomo was elected governor by a large margin. He pledged to make marriage equality a priority of his administration.

In March 2011, Governor Cuomo met with representatives of the state's leading gay rights organizations, including the Empire State Pride Agenda, Freedom to Marry, Human Rights Campaign, Log Cabin Republicans, and New York Marriage Equality, and devised a highly disciplined campaign to build support in the state for marriage equality. By the summer of 2011, polls showed a solid majority of New Yorkers in favor of legalizing same-sex marriage.

Advocates moved aggressively to capitalize on that shift in public opinion, flooding the offices of lawmakers with phone calls, e-mails, and postcards and letters from constituents who favored same-sex marriage. In addition, high-profile supporters of marriage equality, such as New York City's Mayor Bloomberg and its openly gay Speaker of the City Council Christine Quinn, and both United States Senators from New York, as well as celebrities from Lady Gaga to Cynthia Nixon, lobbied wavering legislators.

Finally, on June 24, 2011, after a tense week of negotiations over religious exemptions and uncertainty as to whether the Republican majority in the Senate would even allow a vote, the bill was brought to the

Senate floor and approved by a tally of 33 in favor to 29 opposed. The majority vote included all but one of the Democrats plus four Republicans.

The victory was widely seen as attributable to the strong and decisive leadership of Governor Cuomo and to the effectiveness of the campaign strategy he and the gay rights groups had devised in March.

Governor Cuomo signed the bill the very night it was passed. It went into effect on July 24, 2011.

New York thus became the sixth, and by far the largest, state to permit same-sex marriage. It was hoped that the victory in New York would build momentum for victories in other states.

Rhode Island Civil Unions

Soon after New York adopted equal marriage, the Rhode Island legislature passed a civil unions bill that accords gay and lesbian couples all the rights and responsibilities of marriage except the name. The law was adopted as a compromise after a same-sex marriage bill stalled in the state senate. Because the civil unions bill contained expansive religious exemptions, many glbtq activists urged Rhode Island Governor Lincoln Chafee to veto the legislation.

However, on July 2, 2011, Governor Chafee, a supporter of same-sex marriage, signed the civil unions bill into law, defending it as an incremental step toward the goal of marriage equality.

Victory in Washington

On January 4, 2012, Washington Governor Chris Gregoire announced her intention to introduce marriage equality legislation. In doing so, the Governor also explained the evolution of her personal views of the issue.

In 2004, when she first ran for governor, she endorsed equal rights for gay and lesbian couples, but declared that Washington state was not ready for same-sex marriage. In 2008, when she ran for re-election, she again declined to endorse marriage equality: "To me, the state's responsibility is to absolutely ensure equality. The other is a religious issue, and I leave it to the churches to make that call about marriage."

Now, she said, her views have evolved: "I have been on my own journey. I will admit that. It has been a battle for me with my religion," the Catholic governor said. "I have always been uncomfortable with the position that I have taken publicly. And then I came to realize the religions can decide what they want to do, but it is not ok for the state to discriminate."

Governor Gregoire's bill was passed by both houses of the legislature after several hours of debate. The debate in the House on February 9, 2012 was especially interesting, for several of the legislators referenced their children.

Openly gay Rep. Jamie Pedersen began the debate by saying that he and his partner are grateful for the protections provided by their domestic partnership, but that it is a "pale and inadequate substitute" for marriage.

Pedersen added, "I would like for our four children to grow up understanding that their daddy and their poppa have made that kind of a lifelong commitment to each other. Marriage is the word that we use in our society to convey that idea."

Rep. Phyllis Gutierrez Kenney said she has two sons who are gay. "Both have been subjected to harassment and rejection. This hurt cannot be erased, and some will last with them forever," she said.

Rep. Maureen Walsh, one of only two Republicans to support the bill, told a story about how her daughter stood up for a kid who was being bullied in school because it was the right thing to do. As an adult, her daughter came out of the closet.

At an elaborate signing ceremony on February 13, 2012, Governor Gregoire signed the bill into law. She said today "is a proud day that historians will mark as a milestone for equal rights." She told stories of several people who had contacted her during the debate about same-sex marriage, including a teenage girl who had considered suicide because of the way she was treated because of her sexual orientation, but said the debate had changed her mind.

"With the signing of this bill, Washington is the first state to repeal a so-called Defense of Marriage Act and make marriage available to gay and lesbian families," Pedersen said.

However, opponents of same-sex marriage quickly announced that they would attempt to qualify a referendum to repeal the law. When they turned in sufficient valid signatures in June 2012, the law was suspended pending the outcome of a referendum to be held during the November 2012 general election.

Victory in Maryland

In February 2012, the Maryland legislature returned to the question of same-sex marriage. After the disappointment in 2011, Governor Martin O'Malley agreed to sponsor the marriage equality bill and to make it a top priority of his legislative agenda.

On February 17, 2012, after hours of tense and emotional debate, Maryland's Assembly reversed the action taken the previous year and passed the bill on a 72 to 67 vote. During the debate, Maryland's seven openly gay delegates urged their fellow legislators to pass the bill. "We should extend to families, same-sex loving couples, the right to marry in a civil ceremony," Del. Maggie McIntosh said in a hushed chamber after relaying her experience coming out as a lesbian. "I'm going to ask you today, my colleagues, to make history."

Two Republicans joined 70 Democrats in voting for the bill. One of them, Del. Wade Kach, said that his views on the issue changed after a hearing last week when he heard testimony from loving same-sex couples, including some with children. "My constituents did not send me here to judge people," Kach said.

Kach, who voted against the bill last year, was allegedly lobbied by high-profile Republicans, including former Republican National Committee chair Ken Mehlman, New York City Mayor Michael Bloomberg and former Vice President Dick Cheney.

On February 23, 2012, the Maryland Senate, as expected, passed the marriage equality bill. The vote was 25-22. Governor O'Malley announced that he would sign the legislation within a week.

Passage of the bill was regarded as a signal victory for Governor Martin O'Malley. In an interview before the Senate vote, Governor O'Malley explained to Michelangelo Signorile that after the failure of the bill last year he attempted to create a consensus in the state.

"I encouraged people to look at it through the eyes of children of gay and lesbian couples," he explained. "And it is not right, and it is not just, that children of gay and lesbian parents should have lesser protections. It was about equal rights for all."

Opponents soon gathered sufficient signatures to force a referendum on the bill in November 2012.

Ninth Circuit Decision on California's Proposition 8

Finally, on February 7, 2012, eighteen months after Judge Walker's eloquent decision that found California's Proposition 8 unconstitutional, the Ninth Circuit Court of Appeal ruled on the appeal of that decision. In a narrowly focused ruling, the three-judge panel found on a 2-1 vote that Proposition 8 is unconstitutional.

In the majority opinion written by Judge Stephen Reinhardt, the Court declared, "All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the term 'marriage,' which symbolizes societal and state recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for 'laws of this sort.'"

The Court rejected the claim that Judge Vaughn Walker should have recused himself because he is a gay man in a relationship and held that ProtectMarriage had standing to defend Proposition 8 when the Attorney General and Governor of California declined to do so.

The decision on the merits of the case relied heavily on *Romer v. Evans*, the landmark United States Supreme Court ruling in 1996 that invalidated a Colorado constitutional amendment that prohibited municipalities and state agencies from granting lesbians and gay men "protected status." In the decision written by Justice Anthony Kennedy, the Supreme Court concluded that the Colorado amendment "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."

Justice Reinhardt's decision in the Proposition 8 case stressed the similarity between Proposition 8 and the Colorado amendment struck down by *Romer v. Evans*: both "single out a certain class of citizens for disfavored legal status" and both withdraw from that class of citizens an existing legal right.

His decision emphasized the importance of the name "marriage" and concluded that the entire purpose of Proposition 8 was to deny same-sex couples the right to use that term to describe their relationships. Since Proposition 8 accomplished none of the ex post facto rationalizations of the initiative, such as encouraging childrearing and responsible procreation by heterosexuals, or even "proceeding with caution" in making marriage law or preventing children from being taught about same-sex marriage in school, it was enacted, the Court inferred, to express disapproval of homosexuals and their relationships.

The decision evaded the question of whether same-sex couples have a fundamental right to marry and purposely declined to address many of the questions raised by Judge Walker's more expansive decision. Rather, it focused narrowly on the unique legal situation in California in which the right of same-sex partners was extended by the California Supreme Court and then rescinded by a plebiscite.

Judge Reinhardt framed the issue this way: "The Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason. . . . Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place. . . . The action of changing something suggests a more deliberate [invidious] purpose than does the inaction of leaving it as it is."

Judge Reinhardt made explicit the fact that the Court did not address the question of a right to marriage: "We therefore need not and do not consider whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so. Further, we express no view on those questions."

By relying on the *Romer v. Evans* precedent, the Court was able to reach its decision by applying a "rational basis" analysis. In doing so, it evaded the question of whether sexual orientation discrimination requires "heightened scrutiny."

The biggest disappointment in the long-awaited ruling was that it was not unanimous. Although he

concurrent with the two judges in the majority on the questions regarding standing and the recusal of Judge Walker, Judge N. Randy Smith, one of the most conservative judges in the circuit, dissented from the ruling on the merits of the case.

Judge Smith's dissent was weak and vacuous, saying in effect that almost any possible reason, no matter how implausible, would satisfy the "rational basis" standard.

However, same-sex weddings did not resume in California immediately. The proponents of Proposition 8 sought an en banc review by the Ninth Circuit. When that was denied, they then sought review by the Supreme Court of the United States and the Ninth Circuit stayed its decision pending a final resolution of the case.

Veto in New Jersey

In response to the mandate of the 2006 New Jersey Supreme Court, the New Jersey legislature adopted civil unions that purported to offer all the benefits and responsibilities of marriage to same-sex couples. In 2010, however, a state commission concluded that the civil unions law had been a failure, primarily because many people did not understand what they were.

To remedy the failure, some couples filed suit, asking the courts to redress the injustice. In addition, the state legislature revisited the question of same-sex marriage.

On February 13, 2012, the New Jersey Senate passed, on a vote of 28-16, legislation authorizing same-sex marriage. On February 16, the Assembly, on a vote of 42 to 33, followed suit. The legislation proceeded to the desk of Republican Governor Chris Christie, who promptly vetoed the bill.

In his veto message, Christie called for a referendum on whether to change the definition of marriage in New Jersey and proposed creating an ombudsman to oversee compliance with the state's civil union law.

Christie said, "I am adhering to what I've said since this bill was first introduced--an issue of this magnitude and importance, which requires a constitutional amendment, should be left to the people of New Jersey to decide."

"I have been just as adamant that same-sex couples in a civil union deserve the very same rights and benefits enjoyed by married couples--as well as the strict enforcement of those rights and benefits," the statement continued.

"Discrimination should not be tolerated and any complaint alleging a violation of a citizen's right should be investigated and, if appropriate, remedied. To that end, I include in my conditional veto the creation of a strong Ombudsman for Civil Unions to carry on New Jersey's strong tradition of tolerance and fairness."

The legislature had until the end of the legislative session in January 2014 to override Christie's veto. Meanwhile, the lawsuit seeking a mandate for marriage continued to make its way through the state court system.

Historic Election, November 6, 2012: Victories in Maine, Maryland, Washington, Minnesota, and Iowa

The general election of November 2012 was historic for a number of reasons, including the fact that it may mark a turning point for marriage equality.

Days after the voters of North Carolina overwhelmingly approved a constitutional ban on same-sex marriage

and civil unions in May 2012, President Obama endorsed marriage equality, effectively placing the issue front and center in the 2012 presidential campaign. The Democratic and Republican parties took polar opposite positions on marriage equality in their platforms and conventions. Hence, in a real sense the 2012 campaign itself was a referendum on marriage equality.

Not only was the first sitting President of the United States who endorsed the right of gay and lesbian couples to marry handily re-elected, but his success was almost certainly helped rather than hindered by his endorsement of marriage equality. Indeed, the President's support for equal rights energized his base and served as a stark contrast to the position of his opponent, Mitt Romney, who had signed a pledge to support a federal constitutional amendment to ban same-sex marriage.

In addition, voters in Maine, Maryland, and Washington state voted in favor of marriage equality, while voters in Minnesota rejected a ban on same-sex marriage and voters in Iowa refused to recall a member of the state's supreme court because he joined the opinion that established marriage equality in the state.

Despite their disappointment in the outcome of the 2009 "people's veto" of the marriage equality bill that had been passed by the Maine legislature, the state's marriage equality proponents did not give up in their quest for equal rights. They decided to attempt to persuade Maine voters to change their minds. In 2011, they announced plans to return to the ballot, this time with a proactive proposition to authorize same-sex marriage.

Supporters delivered more than 105,000 petition signatures for the initiative to the Secretary of State's office on January 26, 2012, exceeding the minimum of 57,277 signatures requirement.

On November 6, 2012, Maine voters made history by being the first in the nation to approve same-sex marriage by popular vote. Question 1, a voter referendum on a citizen-initiated state statute, asked: "Do you want to allow the State of Maine to issue marriage licenses to same-sex couples?" By a 54-46 margin, voters said yes.

In a victory speech in Portland, Matt McTighe, campaign manager of Mainers United for Marriage, said, "Supporters from Portland to Presque Isle thought that truth and love are more powerful than fear and deception."

In early January 2013, gay and lesbian couples in Maine were able to marry legally.

Maryland's Question 6 asked voters to vote "For" or "Against" the law that the legislature had passed and Governor O'Malley had signed authorizing marriage equality. The law was approved by the voters on November 6 by a 52-48 margin.

Same-sex marriages in Maryland became legal on January 1, 2013.

The success in Maryland, with its large cadre of African-American voters, suggests that there may have been a considerable shift in attitudes toward same-sex marriage on the part of African Americans. Question 6 benefited greatly from the endorsement of the NAACP, civil rights icons such as Julian Bond, and African-American clergy, as well as President Obama.

Washington state's Referendum 74 asked voters whether they approved or rejected the marriage equality legislation passed by the legislature earlier in the year. It was approved by a margin of 53-47.

As the returns came in on election night, state Senator Ed Murray, a primary sponsor of Washington's marriage equality legislation, said, "We celebrate tonight not the victory of one set of Washingtonians over another; instead, we celebrate the belief that all families should be treated fairly.

"We celebrate those who over the decades, despite scorn and discrimination, built this movement and made this day possible," he added.

Same-sex couples in Washington state began marrying legally on December 6, 2012.

In addition, Minnesota voters were faced with a proposed constitutional amendment that, if passed, would have limited marriage to opposite-sex couples: "only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota."

The amendment received only 47% of the vote and thus failed.

The election result did not authorize marriage equality in Minnesota but it rejected the attempt to inject discrimination into the state constitution. Moreover, the election of supporters of marriage equality to the Minnesota legislature meant that following the election it was possible to envision a realistic path to same-sex marriage in the state.

Finally, in Iowa, Judge David Wiggins, who joined the unanimous decision by the Iowa Supreme Court in 2009 that mandated marriage equality in the state, survived an attempt to remove him from the bench.

Iowa voters, by a 54-46 margin, elected to retain him on the court, thus delivering a blow to anti-gay activists and signalling increased support for same-sex marriage in Iowa.

The results in these races indicate increased support for marriage equality, at least in so-called "blue" states. Voters rejected the tired arguments that had worked in previous elections: that children will be indoctrinated in public schools, that bigots would be persecuted and stifled, and that churches would be forced to sanctify gay marriages.

In rejecting such arguments, voters dealt a blow to the National Organization for Marriage and other anti-gay groups that have had no scruples about defaming gay people and lying about the effects of equal rights. At the very least, opponents of same-sex marriage would no longer be able to say that marriage equality has never won a popular vote.

Colorado Civil Unions

The historic election of 2012 not only resulted in victories for marriage equality, but it also created momentum for further progress. As 2013 dawned, nine states--Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, Maine, Maryland, and Washington--and the District of Columbia allowed same-sex marriage. In a number of other states, relationship recognition also quickly came to the fore.

In May 2012, Colorado Republicans in the state's House of Representatives had filibustered a civil unions bill, causing great frustration in the state's glbtq community. However, activists targeted for defeat a number of opponents of civil unions and made the civil unions defeat a major issue in the 2012 legislative campaign. The tactic was successful: on November 6, 2012, Democrats swept to control of both houses of the legislature. Even more delicious, openly gay Democrat Mark Ferrandino, who was a chief sponsor of the civil unions measure, was elected Speaker of the House, replacing Republican Frank McNulty who had killed the civil unions bill.

With Ferrandino as Speaker, Democratic majorities in both the House and Senate, and a governor who has been an outspoken advocate for civil unions, the twice-failed legislation was quickly adopted by the legislature.

On March 23, 2013, the Colorado House of Representatives approved a bill that authorizes civil unions for

same-sex couples on a 39 to 26 vote, with two Republicans joining 37 Democrats. The bill, which provides all the rights and responsibilities of marriage, was previously passed by the Senate on a 21-14 vote, with one Republican joining 20 Democrats. Governor John Hickenlooper quickly signed the bill into law. It took effect on May 1, 2013.

While the passage of civil unions is the fulfillment of years of struggle by Colorado's glbtq community, it is regarded as a temporary measure until marriage equality is achieved. That cannot happen until Colorado's constitutional amendment banning same-sex marriage, which was adopted in 2006, is nullified by a judicial ruling or through a referendum.

Marriage in Rhode Island

Although Rhode Island adopted civil unions in 2011, they were not popular, especially since same-sex marriage was available in neighboring states. Large majorities of the state's voters had been in favor of marriage equality for some time, but it had been repeatedly blocked by Roman Catholic legislators, including most crucially the president of the state Senate, Teresa Pavia Weed. However, in 2012, under increasing pressure from her constituents and colleagues, Pavia Weed agreed not to block the legislation if it was reintroduced in 2013.

In January 2013, the state's House of Representatives adopted marriage equality legislation by a 51-19 margin. On April 24, 2013, on a 26-12 vote, the Rhode Island Senate passed the legislation with some minor amendments. The bill then returned to the House, where it was again passed by a lopsided margin. Immediately after the final vote, Governor Lincoln Chafee signed it into law. It took effect in August 2013.

Openly gay Speaker of the House Gordon Fox and openly gay Senator Donna Nesselbush took leadership roles in making Rhode Island the tenth U.S. state to extend equal marriage rights to same-sex couples. In addition, all five Republican Senators voted in favor of marriage equality, undoubtedly the first time that a marriage equality bill received unanimous support from a state's Republican caucus.

Marriage in Minnesota

In the historic election of November 2012, Minnesota voters rejected a constitutional amendment that would have banned same-sex marriage. The ill-fated amendment represented a political miscalculation by the state Republican Party, which attempted to use same-sex marriage as a wedge issue to energize its base. However, it had the opposite effect, serving to energize the supporters of marriage equality. Not only did the amendment fail, but Democrats took control of both houses of the legislature by large margins.

Soon after the new legislature convened in 2013, a bill to authorize same-sex marriage was introduced.

On May 9, 2013, after a three-hour debate, the Minnesota House of Representatives passed the marriage equality bill on a vote of 75 to 59. During the debate, an amendment was adopted that added the word "civil" in front of marriage to emphasize that the legislation affects civil marriage, not religious marriage.

Four of the House's 61 Republicans voted in favor of the bill, while two of the House's 73 Democrats voted against the bill.

Openly gay Representative Karen Clark was the lead sponsor of the bill in the House. During the debate she said, "My family knew firsthand that same sex couples pay our taxes, we vote, we serve in the military, we take care of our kids and our elders and we run businesses in Minnesota. . . . Same-sex couples should be treated fairly under the law, including the freedom to marry the person we love."

She also paid tribute to her partner of 24 years and to the late Allen Spear, who was the first openly gay member of the Minnesota legislature and a tireless supporter of equal rights.

Following the bill's passage in the House, it was considered in the Senate, where it was passed on a 37-30 vote on May 13, 2013, after a low-key but occasionally moving four-hour debate.

Opponents attempted to amend the bill to extend religious exemptions to individuals and organizations. The amendment, which would have seriously weakened the state's Human Rights Act, which forbids discrimination on the basis of sexual orientation, was rejected on a 26-41 vote.

On May 14, Governor Mark Dayton signed the bill into law during a ceremony held on the steps of the capitol building. The law, which took effect on August 1, 2013, made Minnesota the twelfth U.S. state to extend equal marriage rights to gay and lesbian couples.

Historic Supreme Court Decisions of 2013

On June 26, 2013, the final day of its term, the United States Supreme Court announced decisions in two cases involving marriage equality. One, *Hollingsworth v. Perry*, was an appeal of the Ninth Circuit Court of Appeals' decision declaring California's Proposition 8 unconstitutional.

In a 5-4 decision written by Chief Justice John Roberts, the Court found that the appellants, ProtectMarriage, who sponsored the Proposition and who stepped in after California's governor and attorney general had refused to defend Proposition 8, lacked standing to appeal. The result of the decision was that the Ninth Circuit's decision was vacated, which allowed Judge Vaughn Walker's district court decision to prevail.

In consequence of the Supreme Court decision in *Hollingsworth v. Perry*, marriage equality finally returned to the nation's largest state following almost five years of litigation.

The other major decision released on June 26, 2013 will likely lead to marriage equality throughout the nation. Though the ruling itself concerned a challenge to the national Defense of Marriage Act (DOMA), which prohibited federal recognition of same-sex marriage, the decision is sweeping enough to insure that it may well be decisive in forthcoming suits seeking the right of same-sex couples to marry across the nation.

The case challenging DOMA was brought by Edith Windsor, who sued the U.S. government after she was presented with a bill for more than \$350,000 for estate taxes following the death of her wife, Thea Spyer. Had the couple been heterosexual, the survivor would have owed no taxes.

Windsor v. U.S. reached the Supreme Court after the Defense of Marriage Act (DOMA) had been found unconstitutional by New York District Court Judge Barbara S. Jones. Using the lowest level of judicial scrutiny, "rational basis," Jones found that DOMA violated both equal protection and federalist principles and therefore "does not pass constitutional muster."

The *Windsor* case was next heard by a three-judge panel of the Second Circuit. On October 18, 2012, the Court issued its ruling. Applying "heightened" or "intermediate" scrutiny, a two-judge majority found that DOMA violates the Fifth Amendment's equal protection guarantee. One member of the three-judge panel dissented from the ruling, arguing that the law would be constitutional if reviewed under the "rational basis" standard.

In its 5-4 decision authored by Justice Anthony Kennedy, the Supreme Court did not explicitly resolve the question of the proper level of scrutiny, but it resoundingly struck down Section 3 of DOMA. The Court ruled that Section 3, which forbids federal recognition of same-sex marriages, is unconstitutional under equal protection principles.

Finessing the question of whether the law should be reviewed under strict scrutiny, the Court announced that was using a "careful" review of laws that are suspicious, thus inching close toward placing sexual orientation classifications in a "suspect class."

The decision declared that DOMA was enacted simply to injure same-sex couples. "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."

The Court cited the House of Representatives' Report on the law as proof of Congress' desire to harm gays and lesbians. Kennedy added pointedly, "Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage."

The decision described DOMA's principal effect as "to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality. . . ."

The law, the majority declared, "undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, . . . and whose relationship the State has sought to dignify.

Moreover, Justice Kennedy added, DOMA also "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Echoing the opinion he wrote in the landmark *Romer v. Evans* case in 1996, Justice Kennedy concluded, "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."

Although the opinion is a carefully tailored one from a bitterly divided Court, it had immediate beneficial consequences. The Obama administration moved quickly to provide access of a wide range of federal benefits and recognitions that married same-sex couples had previously been deemed ineligible to obtain.

New Mexico as Epicenter of Marriage Equality Debate

Soon after the U.S. Supreme Court's landmark rulings of June 26, 2013, New Mexico became the epicenter of the nation's marriage equality debate. In a matter of days in the third week of August 2013, the New Mexico Supreme Court issued a major ruling upholding the state's nondiscrimination statute that prohibits discrimination on the basis of sexual orientation; a courageous Las Cruces clerk of court began issuing marriage licenses to same-sex couples, and the Attorney General announced that he would not oppose the action; and then, on August 22, a district judge ordered the clerk of court of Sante Fe County to issue marriage licenses to same-sex couples, and on August 23, the clerk announced that she would happily comply.

Soon the largest counties in New Mexico were issuing marriage licenses to same-sex couples. Since New Mexico law permits a marriage license issued by one county to be used throughout the state, New Mexico

had achieved de facto marriage equality.

Because of the confusion the situation could cause with some county clerks issuing marriage licenses and others not doing so, the New Mexico Association of Counties joined an ongoing case, *Griego v. Oliver*, concerning marriage equality and requested that the Supreme Court clarify the constitutional obligations of county clerks and establish a state-wide policy.

In a unanimous decision issued on December 19, 2013, the New Mexico Supreme Court ruled that the state constitution requires same-sex couples be permitted to marry. The decision, authored by Justice Edward L. Chavez, extended marriage equality to the entire state.

In the decision, the Supreme Court rejected the arguments of those opposed to same-sex marriage that marriage should be reserved to heterosexual couples because of the government's interest in promoting "responsible procreation and child-rearing." The Court pointed out that procreation has never been a requirement for marriage and that depriving gay and lesbian couples, many of whom also raise children, of the right to marry does nothing to promote procreation and child-rearing among heterosexual couples.

The Court concluded that "although none of New Mexico's marriage statutes specifically prohibit same-gender marriages, when read as a whole, the statutes have the effect of precluding same-gender couples from marrying and benefiting from the rights, protections, and responsibilities that flow from a civil marriage. Same-gender couples who wish to enter into a civil marriage with another person of their choice and to the exclusion of all others are similarly situated to opposite-gender couples who want to do the same, yet they are treated differently."

Applying "intermediate scrutiny" because same-gender couples (whether lesbian, gay, bisexual, or transgender, hereinafter "LGBT") are a discrete group which has been subjected to a history of discrimination and violence, and which has inadequate political power to protect itself from such treatment, the Court found that "New Mexico may neither constitutionally deny same-gender couples the right to marry nor deprive them of the rights, protections, and responsibilities of marriage laws."

The Court concluded, "Denying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution."

Having declared the New Mexico marriage laws unconstitutional, the Court outlined its remedy. Declining to strike down the marriage laws because "doing so would be wholly inconsistent with the historical legislative commitment to fostering stable families," the Court ordered instead that "civil marriage shall be construed to mean the voluntary union of two persons to the exclusion of all others."

In addition, the Court ordered that "all rights, protections, and responsibilities that result from the marital relationship shall apply equally to both same-gender and opposite-gender married couples."

The decision became effective immediately, and since it was based on the New Mexico constitution, it was not subject to a stay or to an appeal to the U.S. Supreme Court.

Victory in New Jersey

Although Governor Chris Christie had vetoed the bill passed by the New Jersey Legislature that authorized same-sex marriage, Lambda Legal continued its legal challenge on behalf of Garden State Equality and other plaintiffs to the state's civil unions law. In *Garden State Equality v. Dow*, Lambda Legal argued that New Jersey's civil unions have not been effective in providing "all the rights and benefits that married heterosexual couples enjoy." That lawsuit, originally filed in 2011, was given new life by the U.S. Supreme Court's ruling in *Windsor v. U.S.*

On September 27, 2013, New Jersey Superior Court Judge Mary C. Jacobson ruled that the state must allow same-sex couples to marry. Relying on *Windsor*, she said that New Jersey's ban on same-sex marriage violated the state's equal protection guarantees since it prevents same-sex couples from obtaining federal benefits.

Declaring that "The ineligibility of same-sex couples for federal benefits is currently harming same-sex couples in New Jersey in a wide range of contexts," Judge Jacobson ruled that "Same-sex couples must be allowed to marry in order to obtain equal protection of the law under the New Jersey Constitution."

The motion for summary judgment filed by Lambda Legal claimed that the Supreme Court's invalidation of DOMA had made starkly clear how unequal New Jersey's civil unions are in comparison to marriage. Same-sex couples can be equal to heterosexual couples only when both are able to marry. The invalidation of DOMA means that New Jersey's civil unions are an impediment to equality rather than a road to it.

In her carefully considered and clearly articulated decision, Judge Jacobson agreed. She patiently rejected the state's arguments that the time was not "ripe," that Garden State Equality and the individual plaintiffs lacked standing, and that the problem was the federal government's refusal to recognize civil unions rather than the state's refusal to permit same-sex marriage. The state's action in creating civil unions, Judge Jacobson concluded, was responsible for not treating same-sex couples equally.

She said "the current inequality visited upon same-sex civil union couples offends the New Jersey Constitution, creates an incomplete set of rights that *Lewis* sought to prevent, and is not compatible with 'a reasonable conception of basic human dignity.'"

Judge Jacobson stipulated that her decision become effective on October 21 so that the state could prepare issuing marriage licenses or decide to appeal the decision. Soon after the ruling was released, Governor Christie announced that he would appeal the decision to the New Jersey Supreme Court and asked for a stay of Judge Jacobson's ruling.

On October 10, 2013, however, Judge Jacobson denied Governor Christie's request to stay her order that same-sex marriages be allowed beginning on October 21, 2013.

Governor Christie then requested a stay of Judge Jacobson's decision from the New Jersey Supreme Court, which announced that it would consider both the marriage equality case and the question of a stay.

On October 18, 2013, despite advice from the state Health Department, some New Jersey cities, including Asbury Park, Jersey City, and Newark, began issuing marriage licenses to same-sex couples. The cities decided to issue the licenses so that gay and lesbian couples could marry at the earliest possible moment if the New Jersey Supreme Court decided not to stay the order of Judge Mary Jacobson that same-sex couples be allowed to wed beginning on October 21, 2013.

On the afternoon of October 18, the Supreme Court announced that it would not issue the stay requested by Governor Christie and that the marriages could begin on October 21. It also made clear that Christie's appeal would not succeed.

At 12:01 a.m. on October 21, 2013, marriage equality dawned in New Jersey. Throughout the Garden State, gay and lesbian couples exchanged vows shortly after midnight as New Jersey became the 15th American state to permit same-sex marriage.

At 9:00 a.m., the Christie administration announced that it was withdrawing its appeal of the court decision that led to the midnight marriages, thus removing any doubt as to whether marriage equality would triumph in the state.

Christie instructed the Attorney General to submit a formal letter to the high court announcing its intent to cease the fight.

"Chief Justice Stuart Rabner left no ambiguity about the unanimous court's view on the ultimate decision in this matter when he wrote, 'same-sex couples who cannot marry are not treated equally under the law today,'" the administration's announcement stated.

It added: "Although the Governor strongly disagrees with the Court substituting its judgment for the constitutional process of the elected branches or a vote of the people, the Court has now spoken clearly as to their view of the New Jersey Constitution and, therefore, same-sex marriage is the law. The Governor will do his constitutional duty and ensure his Administration enforces the law as dictated by the New Jersey Supreme Court."

Marriage Victories in Illinois and Hawaii

As 2013 come to a close two more states--Illinois and Hawaii--adopted marriage equality legislatively.

On November 5, 2013, the Illinois House of Representatives passed on a 61-54 vote Senate Bill 10, the Religious Freedom and Marriage Fairness Act. The bill, amended earlier with a new effective date, then returned to the Senate, which concurred on a 32-21 vote. It then went to Governor Pat Quinn, who signed it at an elaborate ceremony in Chicago.

Despite the comfortable margin of passage in both houses, the struggle for marriage equality in Illinois was difficult and took place over several months. Because the bill was passed in a special session, it did not officially go into effect until June 1, 2014. However, marriage equality was actually achieved earlier, on February 21, 2014, when U.S. District Judge Sharon Johnson Coleman, ruling in a suit brought by Lambda Legal and the ACLU of Illinois, ordered that Cook County must allow same-sex couples to marry immediately. While the ruling applied specifically to Cook County, it was soon extended to many other counties.

Hawaii's legislature passed marriage equality legislation in November 2013. After almost twelve hours of debate on November 8, 2013, the House of Representatives passed a bill authorizing same-sex marriage by a vote of 30 to 19, with 2 absences. Because the House amended a bill originally passed by the Senate, it then returned to the Senate for a reconciliation vote, which took place on November 12, when it was passed on a 19-4 vote. It was signed into law by Governor Neal Abercrombie on November 13.

Despite the comfortable margins of victory in both the House and the Senate, however, the marriage bill was bitterly contested, especially in the House. Anti-gay churches and organizations bussed in demonstrators to protest the bill and to spread lies and fear about its consequences. Moreover, the bipartisan opposition in the legislature used every delaying tactic at its disposal to attempt to derail or at least slow the march toward equal rights for glbtq citizens.

More than 20 amendments, some nearly identical to ones that had previously been defeated, were offered by the opponents. Most of them were attempts to expand the religious exemptions in the bill and to authorize discrimination against same-sex couples by business owners and others who oppose same-sex marriage on religious grounds.

Many of the legislators simply lied as they stoked fears and misrepresented the experience in other states that have permitted same-sex marriage. Moreover, some also distorted Hawaiian history, as they attempted to portray homosexuality as something imported from the mainland, notably omitting the fact that what actually was imposed on native Hawaiians by colonists in the nineteenth century was not homosexuality (which was widely practiced and accepted) but a fundamentalist version of Christianity that deems

homosexuality immoral.

At times the debate was more theological than political as legislators on both sides evoked religion to justify their positions.

At one point, Representative Tom Brower told his colleagues, "I urge Christians to be more concerned with the actions of people calling themselves 'Christians' than with gay people calling themselves 'married.'"

Representative Chris Lee, after comparing marriage equality to women's suffrage, racial equality, and interracial marriage, said, "I choose to err on the side of fairness, on the side of freedom, on the side of aloha, on the side of love."

In the most moving speech of the debate, freshman Representative Kaniela Ing, after evoking the stories of Matthew Shepard, and of others who have struggled under inequality, asked, "How many more gay people must God create until we realize he wants them here?"

Following the vote, Governor Abercrombie issued a statement commending the House of Representatives "for taking this historic vote to move justice and equality forward. After more than 50 hours of public testimony from thousands of testifiers on both sides of the issue, evaluating dozens of amendments, and deliberating procedures through hours of floor debates, the House passed this significant bill, which directly creates a balance between marriage equity for same-sex couples and protects our First Amendment freedoms for religious organizations."

The law took effect on December 2, 2013.

Post-Windsor Judicial Rulings

As federal and state judges absorbed the meaning of the Supreme Court's ruling on June 26, 2013 in *Windsor*, challenges to state bans on the performance and recognition of same-sex marriages proliferated and the bans began to fall like dominoes, at least at the District Court level.

The first domino came in an unlikely and highly dramatic case. On July 22, 2013, federal district judge Timothy S. Black issued a temporary restraining order requiring Ohio to recognize the marriage of John Arthur and Jim Obergefell, long-time partners who were married in Maryland on June 11 in an air ambulance on an airport tarmac because Arthur, who was suffering from ALS, was bed-ridden. The order applied only to the marriage of Arthur and Obergefell, but had wide implications for all legally-married same-sex couples who live in states that refuse to recognize same-sex marriages performed elsewhere.

The dramatic story of Arthur and Obergefell's marriage vividly illustrated the injustice posed by state bans on same-sex marriage. Obergefell and his terminally ill partner Arthur traveled at great expense and inconvenience via air ambulance to be married in Maryland, but returned to their home state, Ohio, which refused to recognize their legal marriage. Thus, on July 19, the couple filed suit in federal court asking that the state of Ohio be compelled to acknowledge their marriage. In particular, the lawsuit requested that the Ohio Registrar of death certificates be required to record Arthur's status at death as "married" and Obergefell be listed as his "surviving spouse."

Judge Black's restraining order against the state of Ohio not only granted the request of the couple in regard to the death certificate (which is important because without recognition of their marriage, the couple would not be able to be interred side by side in Arthur's family's cemetery plots), but also suggested strongly that Ohio's state constitutional ban on recognition of same-sex marriage violates the United States Constitution and its guarantee of equal protection of the laws.

In his order, Judge Black cited the landmark Supreme Court rulings in *Romer* and *Windsor*. Perhaps most

deliciously, Judge Black even cited Justice Antonin Scalia's intemperate dissent in *Windsor*, in which he exasperatingly predicted that the decision will open the flood-gates to same-sex marriage across the country.

Judge Black pointed out that Ohio law from its inception recognized as valid marriages that were legal where they were performed even if they could not have been performed in Ohio. For example, Ohio does not perform marriages between first cousins, but if first cousins are married in a state that does perform such marriages, they are recognized as married in Ohio. In other words, "a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized."

Citing the reasoning in *Windsor*, Judge Black said that the only purpose of the Ohio ban on recognizing same-sex marriage is "to impose a disadvantage, a separate status, and so a stigma" on married same-sex couples. He asserted that "It is beyond cavil that it is constitutionally prohibited to single out and disadvantage an unpopular group," and concluded that "Plaintiffs have demonstrated a strong likelihood of success on the merits."

Ohio's attorney general announced that he would appeal the order to the U.S. Court of Appeals for the Sixth Circuit. John Arthur died on October 22, 2013. His death certificate listed Jim Obergefell as his surviving spouse.

On December 23, 2013, Judge Black issued a permanent order requiring the state to permit death certificates to include information about same-sex spouses.

In a lawsuit brought by three married lesbian couples expecting to give birth soon and a gay male couple seeking to adopt, Judge Black in April 2014 again declared Ohio's ban on recognition of same-sex marriages unconstitutional.

The suit, *Henry v. Wymyslo*, sought a court order to force the state to put the names of both parents on the birth certificates of their children-to-be.

Again, Ohio Attorney General Mike DeWine said that he will appeal the ruling to the Sixth Circuit Court of Appeals.

Other States

A few other states offer a handful of rights to same-sex couples, but fall short of the rights conferred by domestic partnerships, civil unions, or marriage.

In addition, a number of cities and counties offer domestic partner registries through which gay and lesbian couples may qualify for a limited number of benefits.

Defense of Marriage Acts

When Mayor Newsom created a firestorm by permitting same-sex marriage in San Francisco in 2004, some gay advocates expressed concern that his actions may have hurt the cause of marriage equality. Indeed, President Bush referred to San Francisco and Massachusetts when he announced his decision to support a

constitutional amendment banning same-sex marriage.

But the sight of thousands of loving couples, many of whom had been together for decades, sharing vows and joining in marriage also did much to energize the proponents of same-sex marriage. San Francisco's decision to issue licenses to same-sex couples in 2004, while perhaps not of lasting legal significance, provided huge symbolic support for marriage equality and eventually resulted in the historic California Supreme Court ruling of 2008.

Recently there have been encouraging signs of the increasing acceptance of same-sex marriage. Indeed, in 2011, three separate polls have shown that a bare majority of Americans support marriage equality.

But the achievement of marriage equality has been made more difficult by the Republican Party's routine use of same-sex marriage as a "wedge issue" by which to energize its base. Following the Hawaii decision in 1993, for example, states rushed to pass so-called "Defense of Marriage" Acts, which limit marriage to opposite-sex couples and bar recognition of any same-sex marriage or civil union from another state. Currently, more than 40 states have ordinances or constitutional amendments that limit marriage (and the recognition of out-of-state marriages) to opposite-sex couples.

The federal government passed its own Defense of Marriage Act in 1996, signed by President Clinton at midnight symbolically, if feebly, to express his disapproval. The Act defines marriage as the union of one man and one woman for all federal marital benefits and allows states to ignore the Full Faith and Credit Clause when dealing with same-sex marriages and civil unions licensed elsewhere. The constitutionality of the federal and state Defense of Marriage Acts is open to challenge, although given the conservatism of the current federal courts, such a challenge may be doomed to failure.

In the 2004 general election, 13 states passed constitutional amendments banning same-sex marriage. In the 2006 general election, another seven states adopted constitutional amendments banning same-sex marriage. However, in some of these states--Virginia and Wisconsin, for example--the 2006 amendments only barely passed, and in one state, Arizona, it failed, while in Colorado an amendment creating domestic partnerships almost passed.

What is especially disturbing about these amendments is that many of them ban not just same-sex marriage, but all forms of state recognition of same-sex couples. The Michigan amendment, for example, was interpreted by the Michigan Attorney General to mean that municipalities may not extend domestic partnership health care benefits to same-sex couples, an interpretation upheld by the state's conservative Supreme Court.

Amendments this sweeping may, however, be subject to attack under the United States Supreme Court's decision in *Romer v. Evans*. A federal district court in Nebraska struck down that state's extreme anti-marriage amendment under *Romer v. Evans*, though it was reinstated by a federal appeals court, and is now being appealed to the U. S. Supreme Court.

As more liberal judges are appointed to the federal judiciary by President Obama, and as more states permit same-sex marriage, an appeal to the U. S. Supreme Court challenging the Defense of Marriage Act is likely.

Two significant decisions from Massachusetts in July 2010 may provide the vehicle for invalidating DOMA in the United States Supreme Court. In these cases, brought respectively by Gay & Lesbian Advocates & Defenders on behalf of individual plaintiffs who had suffered loss of benefits because of DOMA and by the Office of the Attorney General of the Commonwealth of Massachusetts, Judge Joseph L. Tauro, a federal district judge, declared Section 3 of the Defense of Marriage Act unconstitutional.

This section of the 1996 law defines marriage as exclusively heterosexual for federal purposes. Judge Tauro,

relying heavily on such Supreme Court rulings as *Romer v. Evans* and *Lawrence v. Texas*, ruled that this section violates the Fifth Amendment's equal protection principles and the Tenth Amendment's reservation of unenumerated powers to the states.

These rulings, if upheld on appeal to the First Circuit and then accepted for review by the Supreme Court, could well lead to the invalidation of DOMA. Significantly for the prospects of success in the federal courts, in 2011 the Obama administration announced that the Justice Department will no longer defend the constitutionality of DOMA.

European Registered Partnerships

The United States lags a good deal behind many other countries with regard to recognizing same-sex unions. Denmark was the first country in the world to enact a registered partnership law for same-sex couples in 1989. Norway was next in 1993, and then Sweden (1995), Iceland (1996), and the Netherlands (1998). The Danish, Norwegian, Icelandic, and Swedish partnership acts are available to same-sex couples only, while the Dutch law is available to same-sex and opposite sex couples.

In November 2000, the German Parliament (Bundestag) authorized "Life Partnerships." This action extended to gay and lesbian couples many of the rights that heterosexual couples enjoy, including the right to the same surnames, hospital visitation rights, rights as next of kin in medical decisions, some parental rights over the other partner's children, inheritance rights regarding health insurance and pensions, and so on. Subsequently, the Federal Constitutional Court of Germany has increased the rights enjoyed by same-sex couples, ruling in 2009 that registered partnerships should grant all the rights extended by marriage. A 2012 ruling extended tax exemptions to same-sex couples. Currently, registered partnerships grant virtually all the rights of marriage except the right of joint adoption.

Although some cantons had offered registered partnerships to same-sex couples since 2000, in 2005, Swiss voters were asked to decide if gay and lesbian couples should have equal legal rights as married couples.

The Swiss government and most political parties supported the measure, as did the Federation of Protestant Churches. Predictably, the Roman Catholic Church opposed it.

On June 5, 2005, Swiss voters approved, by a 58 percent majority, the national registered partnership law. It grants same-sex couples the same rights and protections as legally married couples, including next of kin status, taxation, and social security benefits.

The Swiss Registered Partnership law went into effect on January 1, 2007.

The European registered partnership acts essentially treat partners as if they were married, but with some exceptions, the most important of which being that none of them allow for joint adoption.

In 2005, Great Britain permitted same-sex couples to enter into civil partnerships that confer all the rights and responsibilities of marriage but that cannot be called marriage.

British Prime Minister Tony Blair hailed the civil partnership law as a "landmark measure" that "gives gay and lesbian couples who register their relationship the same safeguards over inheritance, insurance and employment and pension benefits as married couples. . . . No longer will same sex couples who have decided to share their lives fear that they will be denied a say over the partner's medical treatment or find themselves denied a home if their partner dies."

The French Civil Solidarity Pact

The French partnership law, which was passed in 1999 and is known as the "civil solidarity pact" or "*pacte*

civile," is open to same-sex and opposite-sex couples and grants marriage-like rights in the areas of inheritance, housing, and social welfare. A civil solidarity pact can be terminated unilaterally by a partner, and no obligations follow on dissolution. The law does not confer inheritance rights, nor does it allow for adoption. The law is therefore more akin to a limited domestic partnership law than it is to the European registered partnership acts or to the civil union law. Still, it has proven popular with many French couples.

Dutch, Belgian, and Spanish Marriage

On April 1, 2001, the Netherlands became the first country in the world to legalize same-sex marriage, with the "Act on the Opening up of Marriage." The Act simply yet boldly proclaims, "A marriage can be contracted by two persons of different sex or of the same sex."

Couples in a registered partnership can convert their partnership into a marriage. But those who prefer not to can remain in their registered partnership, and couples can continue to enter registered partnerships rather than marriage if they so choose. According to the legislative findings, "the interest in registered partnerships in the Netherlands is relatively high" Interestingly, the government acknowledged that the popularity of registered partnerships "make[s] it plausible that there is a need for a marriage-like institution devoid of the symbolism attached to marriage."

Belgium became the second country in the world to recognize same-sex marriage, with a law that took effect in May 2003. However, unlike in the Netherlands, same-sex married couples in Belgium are still not allowed to adopt.

In June 2005, Spain became the third country to legalize same-sex marriage. The Spanish law allows same-sex couples to adopt. Upon the law's passage, Socialist Prime Minister Jose Luis Rodriguez Zapatero said, "We are not legislating . . . for remote unknown people. We are expanding opportunities for the happiness of our neighbors, our work colleagues, our friends, our relatives." Noting the developments in the Netherlands and Belgium, Prime Minister Zapatero proclaimed, "We were not the first, but I am sure we will not be the last. After us will come many other countries, driven . . . by two unstoppable forces: freedom and equality."

Canada

After a protracted struggle, Canada became the fourth country to allow same-sex marriage. The drive for marriage in Canada achieved a significant victory with the Canadian Supreme Court's 1999 decision in *M. v. H.* The Court ruled 8-1 that the exclusion of same-sex partners from the definition of spouse in the Ontario Family Law Act for purposes of spousal support violated the Canadian Charter of Rights and Freedoms. The court stopped short of declaring that same-sex couples have the right to marry, but the sentiment of the opinion seemed to suggest that such a step was soon to follow.

Activists quickly filed same-sex marriage lawsuits in Ontario, Quebec, and British Columbia. Appeals courts in all three of these provinces declared that prohibiting same-sex couples from marrying violates the Charter of Rights and Freedoms. The Ontario Appeal Court ordered the government to begin issuing marriage licenses to same-sex couples immediately.

In June 2003, Prime Minister Chretien's cabinet announced that the government would not appeal the ruling of the court. They agreed on a measure that would open marriage to same-sex couples throughout the country. A vote on the measure in the House of Commons was expected in the fall of 2003 but was postponed because of a change of prime ministers. The Canadian Parliament finally approved this measure in July 2005. The law does not require either party of the marriage to be a Canadian citizen.

After the favorable opinion in Ontario in 2003, thousands of lesbian and gay couples, including many same-sex couples from the United States, received their marriage licenses in Ontario, Quebec, and other

provinces that subsequently legalized same-sex marriage through court action. Since parliament's action in 2005, same-sex marriage is legal throughout the country.

However, the Conservative minority government that took power in 2006 pledged to reopen the question of same-sex marriage, despite the fact that constitutional experts predicted legal chaos if the same-sex marriage bill were repealed and despite the fact that polls have consistently shown that a healthy majority of Canadians are in favor of same-sex marriage.

In December 2006, Prime Minister Stephen Harper fulfilled his campaign promise to reopen the question of same-sex marriage by introducing a bill that would have authorized the government to repeal the same-sex marriage law while respecting the same-sex marriages that had already been performed and instituting civil unions. Widely perceived as a sop to the evangelical Christian supporters of the Conservative Alliance party, the bill was soundly defeated. Afterward, the Prime Minister declared the question settled and promised not to revisit the issue.

South Africa

In 2005, South Africa's Constitutional Court found that the denial of the rights of marriage to same-sex couples violated the country's constitution, which prohibits discrimination on the basis of sexual orientation. The Court did not specify a remedy, but gave Parliament until December 2006 to adopt legislation rectifying the injustice.

Despite opposition from church groups and traditional leaders, the Parliament adopted legislation that both created civil unions and legalized same-sex marriage. On December 1, 2006, South Africa became the fifth nation to legalize same-sex marriage.

Norway

On June 11, 2008 the Norwegian Parliament approved legislation that permits homosexual couples to marry and adopt children and permits lesbians to be artificially inseminated.

Although the legislation was bitterly opposed by the Christian Democrats and a small far-right party, it was supported by the governing left-of-center coalition and individual members of other parties. After a heated debate, the legislation was adopted by a vote of 84 to 41.

The new marriage law replaces the partnership law of 1993, which provided homosexuals the right to form civil unions. Norway became the sixth country to grant same-sex couples the right to marry.

Sweden

On April 1, 2009, the Swedish Parliament followed Norway's lead and approved legislation permitting gay and lesbian couples to be married, thus making Sweden the seventh country in which marriage equality has been achieved.

Supported by six of the seven parties in Parliament, and on a vote of 262 to 22, the new law replaces the partnership law of 1995. It does not compel churches to perform same-sex weddings, but it is believed that many churches will do so.

Portugal

Although Portugal has a reputation as a socially conservative country, on May 17, 2010, it became the eighth country to embrace marriage equality.

The decision was the culmination of a long battle for recognition of same-sex couples. In 2001, Portuguese glbtq activists won an important victory when Parliament, over the vociferous protests of the Catholic church, voted to extend to gay and lesbian couples living together for at least two years the same limited rights of common-law marriage that they had granted to similar heterosexual couples two years before.

In 2004, protection against discrimination on the basis of sexual orientation was incorporated into the Portuguese Constitution, thus setting the stage for the terms of debate about same-sex marriage, which increased in intensity after Spain achieved marriage equality in 2005.

Same-sex marriage was debated in the 2005 legislative elections, but the Socialist Party, which won the election, failed to clearly endorse marriage equality. Although the new Prime Minister José Sócrates refused to include same-sex marriage in his government's agenda, he promised to revisit the issue were his government re-elected to a second term.

Accordingly, after being re-elected in October 2009, the Prime Minister announced that his party, with the support of the Left Bloc, would propose a bill that permitted same-sex marriage but that would not include adoption rights (though gay men and lesbians are allowed to adopt as individuals).

Right-wing parties called for a referendum on the issue, but this proposal was rejected by the government.

On January 8, 2010, after a lengthy and impassioned debate, the Portuguese Parliament passed the bill establishing same-sex marriage in its first reading. During this debate the Prime Minister declared that passage of the bill would put right an injustice that caused unnecessary pain. The final parliamentary vote took place on February 11.

On February 24, the Constitutional Affairs Committee sent the bill to conservative Portuguese President Aníbal Cavaco Silva. Amid calls from right-wing parties and Catholic bishops for him to veto the legislation, the President asked the Constitutional Court to rule on the bill's constitutionality.

On April 8, 2010, the Portuguese Constitutional Court ruled 11-2 that the bill is constitutional, with three members concluding that the Constitution not only permitted but actually required the recognition of same-sex marriages.

On May 17, 2010, the President reluctantly signed the bill, acknowledging that if he vetoed it the veto would be overturned by Parliament. "I feel I should not contribute to a pointless extension of this debate, which would only serve to deepen the divisions," he said.

The achievement of marriage equality in Portugal was seen as a stinging rebuff to Pope Benedict XVI, who on a visit to Portugal days before the President signed the bill into law, bitterly denounced same-sex marriage.

Iceland

In contrast to the bitter political battles waged to achieve marriage equality in many countries, the decision to permit same-sex marriage in Iceland was made without controversy, perhaps because the Prime Minister of Iceland, Johanna Sigurdardottir, is a lesbian who entered a civil partnership in 2002.

On June 11, 2010, the Althing, Iceland's parliament, voted 49 to 0 to amend its marriage laws to permit the marriage of same-sex couples. The legislation does not require the state church to sanction same-sex marriage, but does permit ministers to perform same-sex marriages at their discretion.

Iceland thus became the ninth country to permit same-sex marriage.

Hungarian Life Partnership

In 2009, Hungary adopted a life partnership law similar to other European registered partnerships. The Hungarian law confers most of the legal rights of marriage on same-sex couples, including tax, employment, immigration, and inheritance benefits; but it does not permit partners to adopt or allow a spouse to take his or her partner's name.

Austrian Civil Partnership

In December 2009, Austria's Parliament passed legislation permitting homosexual couples to enter into civil partnerships. The legislation, effective January 1, 2010, was adopted on a 110-64 vote. It confers many of the legal rights enjoyed by heterosexual couples, but denies access to artificial insemination and the right to adopt children.

Ireland Civil Partnership

The climate for recognition of same-sex couples in traditionally conservative Ireland was vastly improved by the scandals involving Roman Catholic priests and nuns in the first decade of the twenty-first century. These scandals weakened the moral authority of the Church and enabled politicians to work for social justice without worrying about political pushback from the Church.

In 2009 and 2010, concrete proposals for a civil partnership bill were developed and refined. The bill that was finally signed into law on July 19, 2010, provides a wide range of protections, rights, and obligations for same-sex couples in areas such as pensions, taxes, social welfare, domestic violence, inheritance, and joint tenancy. It grants all the rights and responsibilities of marriage except the right to adopt children.

The bill, modeled on the U.K.'s civil partnership legislation, was, despite opposition from the Roman Catholic Church, passed without a vote in the Dáil and with an overwhelming majority in the Seanad at the beginning of July. It went into effect on January 1, 2011.

After it was signed into law by the President of Ireland, Mary McAleese, Minister for Justice Dermot Ahern described the civil partnership bill as "one of the most important pieces of civil rights legislation to be enacted since independence," adding that "Ireland will be a better place for its enactment."

Latin America

Although a popular perception is that the countries of Latin America lag behind the United States in granting rights to gay and lesbian couples, that perception is belied by recent developments. In 2000, the Brazilian government extended de facto legal recognition to same-sex relationships by allowing gay and lesbian couples the right to inherit each other's pension and social security benefits. The Brazilian policy requires applicants to prove a "stable union."

In 2002, the city of Buenos Aires adopted a domestic partnership ordinance that granted legal status to same-sex couples and a handful of rights such as hospital visits and pension benefits. Similarly, a bill was recently introduced in Chile's Congress to recognize same-sex couples.

In 2006, Mexico City's legislative assembly adopted a domestic partnership ordinance that provides same-sex couples many of the rights of marriage, including inheritance rights and pension benefits, though not adoption rights.

A series of rulings, beginning in 2007, by Colombia's Constitutional Court, have granted same-sex couples many of the property, inheritance, health, and pension rights enjoyed by married heterosexual couples in that country.

In 2011, the Court gave Congress two years to extend marriage rights to gay couples. Finding that that Columbia's gay and lesbian citizens currently lack the full set of rights afforded to heterosexual married couples in Columbia, the Court instructed Congress to pass a remedy through "comprehensive, systematic, and orderly legislation" by June 20, 2013 to address the imbalance. Should the country's lawmakers fail to pass legislation within that time, gay and lesbian couples will be permitted to go before a notary or a court to have their partnership officially recognized.

In 2008, Uruguay became the first Latin American country to adopt a national civil union law, the Ley de Unión Concubinaria. The law permits both same-sex and opposite-sex couples to enter into a civil union after living together for at least five years. Couples in civil unions are entitled to most of the benefits that married couples are afforded, including social security entitlements, inheritance rights, and joint ownership of goods and property. In addition, same-sex couple are permitted joint adoption rights.

In December 2009, Mexico City's legislature passed a bill permitting same-sex marriage. The bill, which defines marriage as "the free uniting of two people," was quickly signed into law by Mayor Marcelo Ebrard. The law permits same-sex couples to adopt children, apply for bank loans together, and be included in the insurance policies of their spouse, as well as the rights that were provided in the domestic partnership law.

The law was bitterly denounced by the Roman Catholic hierarchy and challenged as unconstitutional by Mexico's federal government, but after the nation's highest court refused to intervene to stay the law, the city began issuing marriage licenses to same-sex couples in March 2010.

On August 4, 2010, Mexico's supreme court announced that it had upheld the constitutionality of the law on an 8-2 vote. On August 10, 2010, the court further ruled, on a 9-2 vote, that same-sex marriages performed in Mexico City must be honored as legal in all 31 Mexican states, although they are not obligated to perform same-sex marriages themselves.

Victory in Argentina

Also in 2009, a judge in Buenos Aires granted a gay couple permission to be married. The couple, Alex Freyre and José María Bello, became the first same-sex couple to be legally married in Argentina. The ruling permitting that marriage applied only to that couple, though subsequently eight other couples were also married as a result of separate judicial rulings.

Meanwhile, legislation that would legalize same-sex marriage nationally advanced in Congress, and a lawsuit that would legalize same-sex marriage was filed for review by Argentina's Supreme Court.

In May 2010, at the urging of President Cristina Fernández, Argentina's House of Representatives approved a marriage equality law. On July 15, after an impassioned debate that lasted almost 16 hours, the law was ratified by the Senate.

The victory in Argentina came after strenuous efforts to derail the legislation by the Roman Catholic and Mormon churches. President Fernández criticized the tone taken by the religious groups, saying that they "recall the times of the Inquisition."

Marriage equality advocate Evan Wolfson issued a statement hailing the historic vote as a measure of how far Catholic Argentina has come, "from dictatorship to true democratic values."

Brazilian Civil Unions

On May 4, 2011, Brazil's highest court, on a 10-0 vote, with one abstention, ruled that partners in a "stable " same-sex union had the same legal rights as a heterosexual married couple. "Discrimination generates

hatred," wrote Justice Carlos Ayres Britto.

The ruling in effect extends the Brazilian government's 2000 grant of certain inheritance and retirement rights to same-sex couples to cover all the rights and responsibilities enjoyed by married couples, including the right to adopt children. The lawsuit that resulted in the landmark decision was initiated by Rio state Governor Sergio Cabral and supported by President Dilma Rousseff and Attorney General Roberto Gurgel.

The ruling does not mandate same-sex marriage, but it is expected to further the movement for marriage equality in Brazil.

Conclusion

While progress abroad has been steady, efforts to achieve same-sex marriage in the United States continue to face well-organized opposition from conservative churches and the religious right. Lesbian and gay couples continue to press their case in court and before the public. In time this country may catch up to where other countries already are.

Bibliography

Baird, Robert M., and Stuart E. Rosenbaum, eds. *Same-Sex Marriage: The Moral and Legal Debate*. Amherst, N. Y.: Prometheus Books, 1996.

Capehart, Jonathan. "Maryland Gay Marriage Debacle Reveals Cowards and Civil Rights Myopia." *Washington Post* (March 15, 2011):

http://www.washingtonpost.com/blogs/post-partisan/post/maryland-gay-marriage-debacle-reveals-cowards-and-civil-rights-myopia/2011/03/04/ABDcqxY_blog.html

Daley, Suzanne. "French Couples Take Plunge That Falls Short of Marriage." *New York Times* (April 18, 2000): A1.

Eskridge, William E. *The Case for Same-Sex Marriage*. New York: The Free Press, 1996.

Kulow, Marianne DePo. "Same-Sex Marriage: A Scandinavian Perspective." *Loyola of Los Angeles International & Comparative Law Review* 24 (2002): 419-38.

Krauss, Clifford. "Canadian Leaders Agree to Propose Marriage Law." *New York Times* (June 17, 2003): A1.

_____. "Gay Canadians' Quest for Marriage Seems Near Victory." *New York Times* (June 15, 2003): A3.

"Marriage Is a Constitutional Right." *New York Times* (August 4, 2010): <http://www.nytimes.com/2010/08/05/opinion/05thu1.html?ref=opinion>

Maxwell, Nancy G. "Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison." *Arizona Journal of International & Comparative Law* 18 (2001): 141-207.

McFadden, Robert D. "Gay Marriage Is Ruled Legal in Connecticut." *New York Times* (October 10, 2008): <http://www.nytimes.com/2008/10/11/nyregion/11marriage.html?em>

Rohter, Larry. "Brazil Recognizes Same-Sex Unions." *International Herald Tribune* (June 12, 2000): 10.

Rubenstein, William B. *Cases and Materials on Sexual Orientation and the Law*. 2nd ed. St. Paul, Minn.: West Publishing, 1997.

Sullivan, Andrew, ed. *Same-Sex Marriage: Pro and Con*. New York: Vintage Books, 1997.

Strasser, Mark. *On Same-Sex Marriage, Civil Unions, and the Rules of Law*. Westport, Conn.: Praeger, 2002.

Wardle, Lynn D., Mark Strasser, William C. Duncan, and David Orgon Coolidge, eds. *Marriage and Same-Sex Unions, A Debate*. Westport, Conn.: Praeger, 2003.

www.hrc.org/familynet.

About the Author

Gregory A. Johnson is Associate Professor at Vermont Law School, where he teaches courses in Constitutional Law, Appellate Advocacy, and Sexual Orientation and the Law. He served as co-counsel on *Brause v. Bureau of Vital Statistics*, Alaska's groundbreaking same-sex marriage case. Johnson has lectured across the country on same-sex marriage and other issues related to sexual orientation and the law. His publications include *Vermont Civil Unions: The New Language of Marriage*, and *Making History in Vermont*. He is a graduate of Cornell University and Notre Dame Law School. He serves on www.glbtc.com's board of editorial consultants.