

# Same Sex Redux

How did same sex marriage re-emerge as one of the most vexing social issues facing lawmakers?



BY CHRISTINE NELSON

**W**hen President Bill Clinton signed the Defense of Marriage Act in 1996, defining marriage as between one man and one woman, it seemed inconceivable that same sex couples would ever be allowed to marry.

In the 12 years following the federal act, more than 40 state legislatures enacted similar statutes. Fearing judicial intervention, 30 of the states went a step further and placed “one man, one woman” marriage laws in their state constitutions. In addition, no constitutional amendment placed on a ballot and put before voters has ever failed.

So, how is it that same sex marriage is quickly becoming one of the most challenging states’ rights issues of our time?

The tug of war between judicial decisions, which in some cases have forced states to legalize same sex marriage, and public opinion, which has routinely disapproved of same sex marriage, has left legislators squarely in the middle of a divisive political hot potato.

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issue for 20 years,” says New York Senator Ruben Diaz Sr., “and of course, it will continue.”

## PLENTY OF ACTION

In the last seven years, both the judiciary and state legislatures have played key roles in the fight to recognize same sex marriage. Massachusetts and Connecticut began performing same sex marriages as the result of judicial decisions in 2003 and 2008, respectively. And just last year, the Iowa Supreme Court upheld a lower court decision that ruled denying same sex couples the right to marry was a violation of the equal protection clause in the state constitution.

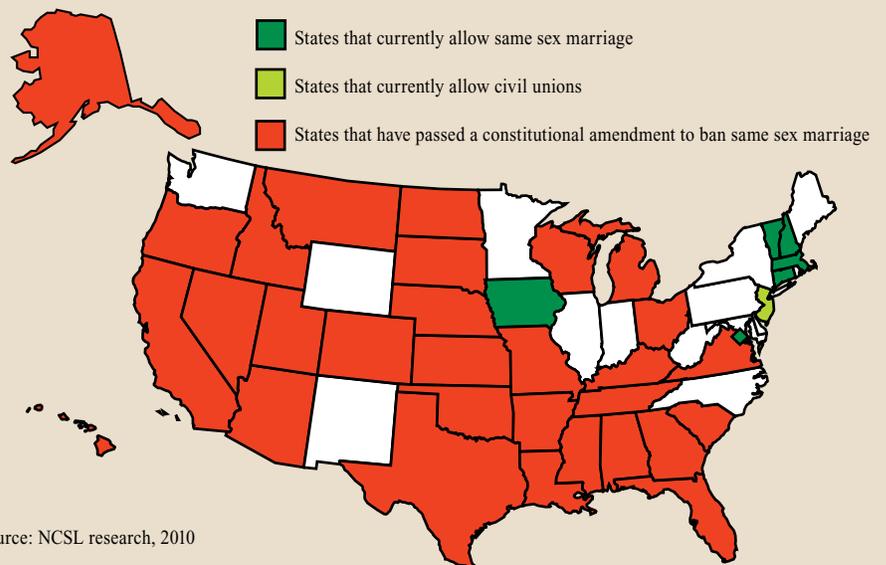
In addition to Iowa, three other states—Vermont, Maine and New Hampshire—enacted same sex marriage in 2009 as a result of legislative action without a judicial mandate.



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Christine Nelson tracks same sex civil unions and marriage for NCSL.

## SAME SEX MARRIAGE LAWS



Source: NCSL research, 2010

## MONEY TALKS IN MASSACHUSETTS AND NEW JERSEY

In an era of tough budget decisions, some advocates of same sex marriage are finding success by sidestepping the moral questions surrounding the issue and talking money.

A 2008 study from The Williams Institute at UCLA estimated money spent on wedding-related expenses—travel, ceremonies, meals, parties, transportation, flowers and photographs—in Massachusetts by same sex couples from outside the state would be a \$111 million boost to the state's economy over three years. This study helped legislators repeal a 1910 Massachusetts law prohibiting marriage if the couple did not intend to reside in the state. The law made it impossible for same sex, nonresidents to marry.

Today, gay and lesbian couples are encouraged to visit the state in order to marry, largely for the economic benefit. More than 9,000 gay marriages have been performed in Massachusetts so far, and that number is expected to rise dramatically in coming years.

A similar 2009 report estimated that extending marriage to same sex couples would boost the New Jersey economy by almost \$200 million during the next three years, creating approximately 1,400 jobs and generating more than \$15 million in revenues for the state budget. Nearly \$14 million would come from estimated state and local tax revenues, and an additional \$1.3 million would be generated from marriage license fees.

Maryland, New York and Rhode Island now recognize same sex marriages performed in other states and that could mean an even larger fiscal impact in New Jersey.

These estimates do not include spending by family members and friends on gifts or by those traveling within New Jersey to attend weddings. The estimate also does not include the standard multiplier for tourism spending: each \$1 spent in the state generates more than \$2 in additional spending. According to UCLA, if these factors are taken into account, the total gain for New Jersey could be close to half a billion dollars.

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The Vermont legislature was the first of the three to pass same sex marriage, overriding the veto of Governor Jim Douglas. The District of Columbia Council passed same sex marriage and the measure took effect in March.

And lawmakers in New York and New Jersey recently passed legislation in one chamber to allow it, but failed to do so in the other.

As a result of these developments, an important secondary question has emerged: Are states without same sex marriage obligated to recognize same sex marriages performed in other states?

In New York, Rhode Island and Maryland, the answer is yes. New York Governor David Patterson issued an executive order in 2008 directing all state agencies to recognize same sex marriages from other states. Attorneys general in Maryland and Rhode Island have issued opinions on the matter, drawing parallels between the recognition of common law marriage, which can only be established in a handful of states, but is recognized as a legal marriage in all states. And, just prior to legalizing same sex marriage, the District of Columbia Council also passed a resolution to recognize same sex marriages performed elsewhere.

### COORDINATED CAMPAIGNS

It's not a coincidence that Northeastern states are a hotbed of activity. Six by Twelve is a coordinated campaign led by same sex marriage advocates to change the laws in six Northeastern states by 2012.

The campaign was started because the Northeast was seen as fertile ground for reform. Three states in the region had previously allowed civil unions, viewed by many as an intermediate step toward same sex marriage. Public opinion polling showed that a majority of New England residents favored

some form of relationship recognition for same sex couples. Trinity College in Hartford, Conn., reported Northeastern residents as the least religious in the country, which is significant given that opposition to same sex marriage is often based on religious beliefs. Higher education levels in the region also correlate well to surveys showing those with college educations tend to favor same sex marriage.

Most important, however, is that Northeastern states for the most part do not have initiative and referendum processes that could allow voters to overturn legislative actions.

There are exceptions, however, one of which is Maine.

### BATTLE FOR PUBLIC OPINION

Though used infrequently, the state of Maine does allow for a “People’s Veto” of legislative referenda. Despite the success of the Six by Twelve campaign, Maine’s voters rejected same sex marriage by ballot initiative in November 2009. Question 1 passed with 53 percent of voters agreeing to overturn the Act to Promote Marriage Equality and Affirm Religious Freedom, passed in May 2009. Because the ballot measure was certified before the law took effect, no same sex marriages were ever performed.

Public opinion has been a huge stumbling block for same sex marriage advocates. In addition to Maine, opponents have successfully led campaigns to restrict marriage and limit domestic partnerships in Arizona, California and Colorado. In the last 10 years, when voters have been asked to cast a vote expanding relationship recognition for same sex couples, the answer has always been a resounding “no.”

Yet a recent survey by the Pew Forum on Religion and Public Life reports a clear majority favors allowing gay and lesbian couples to enter into legal agreements with each other that would give them many of the same rights as married couples: civil unions. When the survey was first conducted in 2003, only 45 percent of respondents favored civil unions;



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today, that number is 57 percent.

Although support for civil unions has grown, the majority of Americans continues to oppose same sex marriage by a margin of 53 percent to 39 percent, numbers that remain unchanged in the last year. Diving into these percentages, Pew reports 72 percent of liberal Democrats favor same sex marriage, while 81 percent of conservative Republicans oppose it. Whites and Hispanics are more supportive than African Americans, women are more supportive than men, and young people under the age of 29 are more supportive than any other age group. Most Southerners and Midwesterners oppose same sex marriage, 60 percent and 54 percent, respectively.

#### REPRESENTATIVE DEMOCRACY?

For some state lawmakers, these survey numbers matter and reflect opinions they regularly hear from constituents. Their vote on same sex marriage is based largely on public opinion, and some believe that the issue should be squarely in front of voters.

“I firmly believe that my vote against the marriage equality legislation reflects the wishes of the vast majority of my constituents,” says Senator Shirley Huntley of New York. “I also firmly believe that any decision on marriage equality should, ultimately, be made by the people of New York state, not the Legislature. I would fully support a referendum to allow the people to decide the issue.”

For others, the issue of same sex marriage is simply ill-timed. Paul Koering, a gay man serving in the Minnesota Senate, voted against two marriage equality bills that were introduced in the Legislature last year. He argues same sex marriage distracts from other more pressing issues, such as people who have lost their jobs or their homes, and leaves the Legislature open to criticism.

“You have to understand how politics works. The electorate will say, ‘My goodness, what’s wrong with these people? Why are they talking about this issue now?’ ”

Like Huntley, Koering believes that his constituents don’t want him to support same sex

marriage. Rather than legislative action, he urges advocates to work harder to “change the hearts and minds of people.”

And for legislators, their vote on same sex marriage is intensely personal—and never easy.

Maine Representative Larry Sirois and New York’s Diaz are both leaders in their hometown churches. Sirois is a deacon in Turner, Maine; Diaz is a Pentecostal minister in the Bronx. Both had to explain their positions on same sex marriage to their congregations.

Sirois told them that he was planning to support same sex marriage, despite knowing that “90 percent of them didn’t agree with me.”

He told them: “I am not trying to convince you of anything. ... It is purely an issue of fairness. I don’t agree with the gay lifestyle, but those people deserve the same rights.”

By contrast, Diaz, who has two gay brothers, says: “I love them. But I don’t believe in what they are doing. They are my brothers. They are my family. For me to accept this, I have to turn my whole value system upside down.”

He went on to say people don’t want same sex marriage. “They didn’t want it in California; they didn’t want it in Maine. And the people of upstate New York ... they sent a message they don’t want gay marriage. Forget about it. People don’t want it.”

#### POLITICAL COSTS

While it is too early to tell whether lawmakers who voted in favor of same sex marriage last year are at greater risk of losing their seats in the next midterm election, there have been political consequences in the past.

Former Vermont Representative Karen Milne voted in favor of a civil union bill in 2000. Forced by the Vermont Supreme Court to create legislation on marriage equality, Vermont became the first state in the country to offer civil unions. She—along with 17 other legislators who voted for the bill—lost their seats in the next election.

Backlash is unlikely this time around, according to Garrison Nelson, a political science professor at the University of Vermont, given

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that many other states have acted since 2000. Indeed, in addition to five states and the District of Columbia that allow same sex marriage, New Jersey allows civil unions. California, Nevada, Oregon and Washington allow domestic partnerships that include a full range of benefits for same sex couples. Hawaii, Maine and Wisconsin also offer domestic partnerships, but with a more limited set of benefits.

Although 2009 was a harbinger for same sex marriage surprises, expectations for 2010 are low. In an election year, both advocates and opponents agree that legislative activity needs to be minimal in order to avoid potential electoral backlash.

With the majority of state lawmakers seeking re-election this year, the level of legislative activity on same sex marriage, civil unions and domestic partnerships has dropped dramatically. Fewer than 10 states considered these issues in the early part of 2010, compared with more than 20 states a year ago.

Even without much legislative activity, same sex marriage will likely continue to dominate headlines. An opinion in the high profile federal case challenging Proposition 8 in California, where voters rejected the legalization of same sex marriage, could be released this year. In Massachusetts, a case challenging the Defense of Marriage Act was filed in federal court. Both cases could significantly shape the national landscape, and may end up before the U.S. Supreme Court in coming years.



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**CHECK OUT** an overview of same sex marriage and civil union legislation at [www.ncsl.org/magazine](http://www.ncsl.org/magazine).