

Marriage Equality and the 2008 Presidential Election

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- Gay couples in the US fight for the right to marry to receive the same tax benefits, protections, and rights that are granted to heterosexual couples. Civil unions are – from their perspective – not an adequate alternative to marriage because they do not offer any of the more than 1,138 federal benefits and protections of marriage.
- The conventional wisdom that court cases recognizing gay rights affected the 2004 U.S. elections does not hold up to scrutiny.
- Ballot initiatives and proposed amendments to limit marriage are not expected to have influenced the 2008 election either. Pre-election polls showed that support for Barack Obama or John McCain did not waver as a result of the marriage amendment on the ballot in California, or the state's Supreme Court decision from May 15, 2008 recognizing the right of lesbian and gay couples to marry.
- California's successful ballot initiative eliminating gay and lesbian couples' right to marry is a major setback for the marriage equality movement. The narrowly approved constitutional amendment had overwhelming support among African-American and religious voters.
- Support for legal recognition for gay partnerships has generally swelled in recent years. A majority of the public believes that lesbian and gay couples should have the right to marry or to form civil unions. Relationship recognition has also been embraced by many candidates running for office.

Why Do Gays and Lesbians Fight for Marriage Equality?

As a minority, gays and lesbians in America were inspired by the African-American civil rights movement, and began to organize in the 1960s to fight for equal social and political treatment. The success of Dr. Martin Luther King, Jr. was a key element for the sudden rise of the gay rights movement only several years

later. It is rooted in the so-called “Stonewall Riots” in New York City’s Greenwich Village. In the summer of 1969, police started to raid unlicensed bars, among them *The Stonewall Inn*, and, while arresting and escorting employees and customers, faced an unexpectedly angry and violent mob outside. The protests against the discrimination of gay bars lasted three nights and resulted in the establishment of gay rights groups all across the United States.

A first major success of the gay rights movement was the decision of the American Psychiatric Association in 1974 to remove homosexuality from the list of mental disorders. As homosexuality became more and more socially accepted in the following decades, gay rights groups started to shift their campaigns towards equal political treatment. Two of the most controversial political issues today are: the service of gay soldiers in the military – gay soldiers are only allowed to serve as long as they do not publicly reveal their sexual orientation – and second, the right of same-sex couples to marry.

The first marriage lawsuit for same-sex couples was filed in 1972. But why do gays and lesbians fight for the right to marry? Same-sex couples in long-term, committed relationships pay higher taxes and are denied the basic protections and rights granted to married couples, such as hospital visits of the partner, social security survivor benefits, health insurance for spouses or immigration rights for non-American partners.

Given the fact that some states – Vermont, Connecticut, New Hampshire, and New Jersey – allow same-sex couples to enter into civil unions, why are these unions not seen as an adequate alternative to marriage? Civil unions grant same-sex couples all the state-level benefits of marriage, however, they do not receive any of the federal benefits and protections of marriage. What is more, these civil unions are not recognized by other states.

The debate about marriage equality is focused on the legal dimension of marriage, not the religious one. The churches in the US are free to establish their own teachings on the religious aspect of marriage while the government should uphold equality under law.

The Political Role of Court Cases

Widespread media reports have suggested that success for the lesbian, gay, bisexual, and transgender (“LGBT”) community in court cases such as *Lawrence v. Texas*² (2003) and *Goodridge v. Dept. of Public Health*³ (2003) created a backlash against the community during the 2004 elec-

tion, and that the recent ruling of *In re Marriage Cases*⁴, affirming the right of lesbian and gay couples to marry in California, could have had a similar effect on the 2008 election. However, there is significant evidence that neither the cases nor the ballot initiatives had an impact on the outcome of the 2004 elections. In fact, Matthew Dowd, chief campaign strategist for Bush-Cheney 2004 and director of polling and media planning for Bush-Cheney 2000, as well as Mark Mellman, president of The Mellman Group and consultant for Senator John Kerry in 2004, both reject the idea that the ballot initiatives influenced the outcome of the presidential race. The only “swing” state in the 2004 Presidential election to have a marriage amendment at play was Ohio, but statistics show that the ballot initiative did not have an impact on the outcome.⁵ There is no data available at this point for the 2008 elections but it is expected that voter attitudes toward LGBT rights did not affect this year’s presidential election either.

The Federal Marriage Amendment

In 2004 and 2006, the Republican-led Congress, with George W. Bush’s encouragement, held hearings and votes on the Federal Marriage Amendment (“FMA”). The FMA aimed to write discrimination into the U.S. Constitution by defining marriage as solely between a man and a woman. This discriminatory position is already encapsulated in the Defense of Marriage Act (“DOMA”), a 1996 law that created a federal definition of “marriage” and “spouse” for the first time in U.S. history. Although very few members of Congress, and a minority of the public, supported marriage equality, the FMA failed to garner the 2/3 vote needed to send it to the states.⁶ Since the failure of the FMA, one of the leading proponents of the amendment, Rick Santorum (R-PA), lost his Senate seat, demonstrating that denying marriage equality was not a priority of the electorate.

Increasing Public Support

Also significant since the defeat of the FMA was the effort to reverse Massachusetts’s marriage equality as affirmed in *Goodridge*. In March of

2004, the Massachusetts legislature gave preliminary approval for a constitutional amendment to ban lesbian and gay marriage and create civil unions. In November, all pro-equality candidates who voted against the measure easily won their reelection campaigns. From the 2003 *Goodridge* decision through the primary and general elections of 2004 and 2006, pro-equality candidates consistently won all of their races, while five anti-equality legislators lost. In 2007 the anti-marriage amendment resurfaced and the state legislature voted 151 to 24 against the proposed constitutional amendment that would have ended marriage equality, and eliminated any chance of the proposed amendment being on the November 2008 ballot.

Also notable is that since the establishment of civil unions in Vermont in 2000, support for legal recognition for LGBT families has swelled. Now, the moderate, mainstream, majority position is for support of legalized relationship recognition of some kind. A May 2008 national poll by CBS found that 30% of the public believes that lesbian and gay couples should have the right to marry, 28% supported civil unions but not marriage, and 36% supported no relationship recognition.⁷ This poll indicates that a full 58% of the public is supportive of legal relationship recognition.

Many candidates have also embraced relationship recognition. In fact, in the 2008 Democratic Primary, every candidate supported civil unions, and one Republican, Rudy Giuliani, appeared to support civil unions before he entered the contest, although his support wavered as he pursued the nomination. Civil unions are not equal to marriage, but the fact that the majority of Americans embrace some form of relationship recognition shows the significant progress in public opinion over the past decade, and the increasing support for lesbian and gay families. This general increase in public support is also reflected in a winning trend among pro-equality candidates and more recently, an increase in support for civil unions by Democratic candidates.

Progressive California?

While public opinion, and in some cases, state law, has progressed, federal law has lagged behind. Because of DOMA, lesbian and gay relationships are not recognized under Federal law, nor are other states obligated to recognize the marriages. Therefore, if a gay couple were to travel from their home state of Nebraska to get married in California, Nebraska and the Federal Government would not recognize their marriage. DOMA has many tangible repercussions. Most notably, lesbian and gay couples are denied access to the more than 1,138 federal rights⁸, protections and responsibilities automatically granted to married heterosexual couples, which limits their ability to care for and support their families. Although DOMA passed overwhelmingly, President elect Obama favors its repeal, and supports legislation such as the Domestic Partner Benefits and Obligations Act (“DPBO”) which would provide equal family benefits, including health insurance, to lesbian and gay federal civilian employees.⁹ DPBO is widely supported, with 22 cosponsors in the Senate and 90 in the House as of October 7, 2008.

Today, California is the most visible front in the struggle for marriage equality. On May 15, 2008, the California Supreme Court ruled in *In re Marriage Cases* that the state’s constitution guarantees lesbian and gay couples the right to marry. Anticipating this ruling, opponents of marriage equality collected enough signatures to put a state constitutional amendment on the November ballot that aimed to define marriage as between a man and a woman, eliminating lesbian and gay couples’ right to marry. The initiative was called Proposition 8, or “Prop 8”, and has been approved by 52 percent of the electorate in California. There were also similar anti-marriage equality measures on the ballot in Arizona (Prop 102) and Florida (Amendment 2) that won approval. There are 30 states in the US today that have defined marriage in their constitutions as between a man and a woman. However, California is the most high-profile of these states

because Arizona and Florida have never had marriage equality, while California did. Polling in Senator McCain's home state of Arizona before the elections illustrated that the ballot initiative there did not give the anti-LGBT candidate a boost. Although there has been some progress in legislation that gives more rights to lesbian and gay couples (such as the DPBO), the narrowly approved Prop 8 as well as the constitutional amendments in Arizona and Florida constitute a major setback for the marriage equality movement. This is particularly true in the case of California, which has a history of supporting marriage equality, and marks the first case, where the right to marry has been taken away from lesbian and gay couples.

The 2008 Presidential Candidates' Positions

McCain's and Obama's positions on Prop 8, Prop 102, Amendment 2, and LGBT rights in general, were as distinct as the George W. Bush and John Kerry positions of the last presidential election. McCain supported these ballot initiatives and has consistently voted against LGBT-rights legislation. He is also on the record in opposition to permitting lesbian and gay parents to adopt children. In contrast with McCain, Obama was against amendments to limit marriage, supported the repeal of the Defense of Marriage Act, favored protections for the LGBT community, and agreed that children can find secure and loving homes with LGBT parents. The Human Rights Campaign scores Senate actions on LGBT rights. McCain scored 33 out of 100 on the Congressional Scorecard for the 109th Congress and has never sponsored a pro-LGBT equality bill; Obama scored an 89.¹⁰

Despite their drastically different beliefs surrounding LGBT equality and the ballot measures in California, Arizona, and Florida, the topic of LGBT rights has not been a focus during the presidential campaigns. In fact, the Connecticut Supreme Court decision on October 10, 2008 in *Kerrigan et al. v. Commissioner of Public Health et al.*, which affirmed lesbian and gay couples' right to marry under the state constitution, did not make many top news headlines, and a ques-

tion regarding the decision was not asked of either candidate that day.

The existence of ballot initiatives and the court decisions in favor of marriage equality were not driving the campaign, nor are they expected to have influenced the outcome, as we can reasonably expect from 2004 and from pre-election polling. Polling showing support for both candidates was not affected by the May 15th ruling in California, or by McCain's statements of support and Obama's disagreement with the initiative.

However, some conservative groups tried to make marriage equality a wedge issue in the campaign, and misled the public about the role that the anti-marriage initiatives would play. Nationally, neither presidential candidate received a spike or dip in their ratings in relation to the amendments. Pre-election polls had consistently shown that voters were much more concerned with factors such as the economy, the war in Iraq and healthcare, and that they would vote according to these interests and not social issues such as lesbian and gay marriage. In a CNN/Opinion Research Poll conducted October 30-November 1, 2008, 57% of respondents said that the economy will be most important in determining who they vote for.¹¹

Ballot Amendments

Although political experts agree that the marriage amendments themselves did not have an impact on the outcome of the November election, the ban of same-sex marriages in California will have long-lasting implications for the fight for marriage equality. Prop 8 in California was by far the most publicized and hotly debated of the marriage amendments, largely because of the state Supreme Court's recent decision recognizing the right to marry. It was also the most expensive social-issue initiative in history, with the two sides spending more than \$70 million. Religious groups that included Catholics, Evangelical Christians, and Mormons played a decisive role in helping to pass Prop 8. Among them, the Mormons contributed the largest number of funds and volunteers: they raised about half of

the \$40 million on behalf of the amendment and made up 80 percent of early volunteers walking door-to-door. Exit polls showed that ethnic minorities, who overwhelmingly voted for Barack Obama, also supported the ban: nearly seven out of ten African-American voters and 53 percent of Latino voters backed Prop 8. For many of these voters, same-sex marriages are not a civil rights issue but a moral issue.

With the passage of Prop 8, it is unclear what status the 18,000 marriage licenses issued between May and November 2008 will have. Opponents of the measure are challenging its constitutionality and argue that the state constitution's equal protection clause prohibits a majority of voters from revoking equal rights intended for everybody. The California Supreme Court has to decide now whether Prop 8 qualifies as an amendment that can be approved by popular vote or whether it is a revision of the constitution. In that case, it would require a two-thirds approval in the state legislature before it can be put before the voters.

California: Setting the Trend?

What happened in California will likely shape the discussion of marriage equality in the years to come. California has long been a progressive force leading the nation on social issues such as marriage equality. In fact, California was the first state since the Reconstruction period directly following the Civil War to strike down an anti-miscegenation law, which was done in 1948 as a result of the case *Perez v. Sharp*. After this decision, bans on interracial marriages began to fall in many states throughout the nation. In 1967, the U.S. Supreme Court ruled in *Loving v. Virginia*, and declared anti-miscegenation laws unconstitutional, therefore, erasing them nationwide. Because of this history, combined with the media attention focused on California, the outcome of Prop 8 will surely influence the course of the marriage debate. A victory for marriage equality would have been a ringing endorsement, and could have helped to encourage other states, such as New York, that seem to be on the brink of instituting marriage equality. However, the passage of Prop 8 constitutes a

large setback for marriage equality, and will without a doubt invigorate opponents of marriage equality and provide them with new fuel for their arguments in other states and nationwide.

A review of the past decade reveals that there have been many successes for the LGBT community, but there are still many challenges ahead. However, it is clear that the public and lawmakers are consistently moving in a pro-equality direction. While there were and will be discouraging attempts to restrict marriage, such as Prop 8, Prop 102 and Amendment 2, these initiatives were not a major factor in the 2008 campaign, nor do they represent a priority for the majority of the public, which does support legal relationship recognition. The election of Barack Obama, a president who supports equal rights, is a hopeful sign for the future discourse surrounding marriage equality and the momentum for expanding relationship recognition throughout the U.S.

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² *Lawrence v. Texas*, a decision by the U.S. Supreme Court on June 26, 2003, affirmed the right to privacy and overturned the sodomy laws in 13 states.

³ In *Goodridge v. The Department of Public Health*, a decision by the Massachusetts Supreme Judicial Court on Nov. 18, 2003, the court held that under the Massachusetts Constitution, it was unlawful for lesbian and gay couples to be excluded from the right to marry. The decision took effect on May 17, 2004.

⁴ In *In re Marriage Cases*, a decision by the California Supreme Court on May 15, 2008, the court held that it is unconstitutional to deny lesbian and gay couples the right to marry.

⁵ See "The Backlash Myth: Progress Toward Gay, Lesbian, Bisexual, and Transgender Equality Since May 17, 2004," by The Human Rights Campaign, released in May 2005 and available at www.hrc.org.

⁶ U.S. CONST. art. V. The FMA vote in 2004 was 227 for and 186 against in the House of Representatives, and 48 for and 50 against in the Senate. The vote in 2006 was 236 for and 187 against in the House of Representatives, and 49 for and 48 against in the Senate.

⁷ CBS Poll: Changing Views on Gay Marriage, available at <http://www.cbsnews.com/stories/2008/06/13/opinion/polls/main4180335.shtml>

⁸ *Defense of Marriage Act: Update to Prior Report*, General Accounting Office, Washington, D.C., 2004.

⁹ The Domestic Partner Benefits and Obligations Act was introduced as S. 2521 in the Senate by Senators Lieberman (D-CT) and Smith (R-OR), and as H.R. 4838 in the House of

Representatives by Representatives Baldwin (D-WI), Waxman (D-CA), T. Davis (R-VA), and Shays (R-CT).

¹⁰ *Congressional Scorecard: Measuring Support for Equality in the 109th Congress*, Human Rights Campaign, Washington, D.C. 2006, available at <http://www.hrc.org/documents/HRCscorecard2006.pdf>. For more information, please see: *Senator John McCain: A Record of Opposing the Interest of GLBT Americans*, Human Rights Campaign PAC, Washington, D.C. 2008, available at <http://www.hrc.org/equality08/264.htm>; and the *2008 Democratic Presidential Candidate Questionnaire*, available at http://a4.g.akamai.net/f/4/19675/0/newmill.download.akamai.com/19677/anon.newmediamill/pdfs/Questionnaire_ReportCard.pdf.

¹¹ CNN Poll available at <http://www.pollingreport.com/prioriti.htm>