Advancing the Freedom to Marry in America

By Mary L. Bonauto and Evan Wolfson

The year 2009 marks the fortieth anniversary of the Stonewall rebellion, the defining event celebrated as the beginning of the modern lesbian, gay, bisexual, and transgender (LGBT) rights movement. Those forty momentous years could be divided into two basic periods. The first constitutes the twenty “premarriage” years, from 1969 to 1989, when gay people were primarily fighting to be left alone—that is, not criminalized, not pathologized, and not attacked. This was followed by the nearly twenty years of struggle and progress framed by the family and freedom to marry efforts, including the Hawaii and Washington, D.C., marriage cases launched in 1990–91.

Of course, dividing the movement’s history into those two periods oversimplifies, even as to marriage. Gay people have been fighting for their families and challenging the exclusion from marriage since Stonewall. In fact, the first marriage cases brought by couples in three states were underway by 1971.

The significant difference between the first marriage cases and those that came later was that in the 1980s the HIV/AIDS epidemic shattered the silence about gay people’s lives. AIDS forced society to see LGBT people as human beings—partnered, grieving, and injured by discrimination—and prompted LGBT people to better understand their vulnerability and power. The LGBT movement began prioritizing the need to protect our families and children. It had become imperative to fight for the freedom to marry and the protections, security, and respect that LGBT people, like others, deserve and need.

During the second period, the years shaped by the crucible of HIV/AIDS and framed by the freedom to marry, the LGBT justice movement expanded its focus, claiming not just the human right to be left alone, but also the right to be let in. For LGBT people, the history of civil rights is, in the words of Supreme Court Justice Ruth Bader Ginsburg, the “story of the extension of constitutional rights and protections to people once ignored or excluded.” United States v. Virginia, 116 S. Ct. 2264, 2287 (1996).

In the 1990s, same-sex couples in Hawaii, the District of Columbia, Alaska, and Vermont brought challenges to their exclusion from marriage and effectively launched an ongoing national—indeed, international—conversation about the reality and diversity of LGBT people’s lives and families, the meaning of equality in society and under the law, and why marriage itself matters. While the District of Columbia case fell short, the Hawaii and Alaska victories were stripped away by political assaults that changed the constitutional rules for same-sex couples. The Vermont case did not at first lead to marriage but instead led to the nonmarriage marital status of “civil union.” These cases propelled an ongoing growth in public support, bringing acceptance of marriage equality to a near majority nationwide. They also furthered a willingness on the part of judges, elected officials, clergy and civic leaders, and ordinary Americans to ask what reason does the government have for denying same-sex couples doing the work of marriage day to day, and who have made a commitment in life, the equal commitment under the law that is marriage?

Freedom to marry victories came in the new millennium, as Canada’s courts and then its Parliament ended marriage discrimination just across the border. (This made Canada the fourth country to treat same-sex couples equally, after the Netherlands, Belgium, and Spain.) Then marriage equality came to our shores with the Gay & Lesbian Advocates & Defenders’ (GLAD) historic triumph in Massachusetts.

Building to 2009

In 2003, the Massachusetts Supreme Judicial Court ruled in Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass 2003), that state constitutional guarantees of equality forbid the exclusion of same-sex couples from marriage. A few months later that court reaffirmed its decision in a follow-up opinion that only the freedom to marry—not separate mechanisms such as civil unions—satisfies the constitutional command. On May 17, 2004, the fiftieth anniversary of Brown v. Board of Education, Massachusetts began issuing marriage licenses to same-sex couples. As the majority of the state embraced marriage equality, the legislature in 2007 ratified the historic breakthrough in a three-quarters supermajority vote rejecting a proposed constitutional amendment that would have undone marriage equality.

The legal ruling in Massachusetts—and the lived experience of thousands of married same-sex couples and their loved ones and neighbors—helped refute the fears, questions, and attacks, and spurred more and more conversation and public support for the freedom to marry.
From 2004 to 2008, thanks to Massachusetts, Canada, and other countries such as South Africa, Americans saw that the sky did not fall when same-sex couples joined in marriage—and that gay people didn’t even use up all the marriage licenses! Even the ferocious campaigns orchestrated by various antigay groups, some religious organizations, and political opportunists that foisted antigay constitutional amendments on more than half the states did not stop the national discussion about marriage and loving same-sex couples. Nor did they prevent new legislative and judicial victories for the freedom to marry.

More court cases followed Massachusetts. In 2006, the Washington and New York state high courts considered marriage equality, but in closely divided decisions neither was ready to affirm the freedom to marry. Later that year, the New Jersey Supreme Court unanimously ordered equal responsibilities and protections for same-sex couples but fell short of ordering the direct remedy of equality in marriage. The state legislature promptly enacted a civil union law. In 2007, Maryland’s high court handed same-sex couples a split decision loss.

These losses in court and at the ballot box mattered, threatening the few legal protections couples had in some states. But setbacks proved to be opportunities for more conversation, more organizing, more reflection by people of good will struggling to resolve their conflicted feelings of both discomfort with LGBT equality and marriage and the desire to be fair. Advocates in Oregon rebounded from the 2004 ballot loss, which wrote marriage discrimination into the state constitution, and secured passage of a broad “all but marriage” partnership law. Official government commissions and panels of experts in New Jersey and Vermont reported that the states’ civil union laws were failing to protect families and ensure equal treatment, underscoring that separate regimes and mechanisms such as partnership and civil union are no substitute for the freedom to marry itself.

**2008-09: Momentum**

In May 2008, the California Supreme Court ruled in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), that excluding loving, committed couples from marriage harms them and their families and helps no one. Exclusion also violates the constitution’s command of equality for all, said the highest court in our nation’s biggest state, and lacks any real justification.

Just five months later, the Connecticut Supreme Court also ruled in favor of the freedom to marry in another case brought by GLAD. As in California, the court noted that civil unions are separate from and unequal to marriage. Couples began marrying in Connecticut in November 2008, and the following spring the legislature voted to codify marriage equality and phase out civil union.

Even as most Americans, gay and nongay, celebrated the election of the nation’s first African American president and the dawn of a new political era, Election Day 2008 also brought passage of California’s Proposition 8 by a slim 52–48 percent margin. This changed the state constitution so as to strip away, for now, same-sex couples’ freedom to marry. The significant shift in public opinion in just eight years—a 2000 ballot measure barring couples from marrying had passed by a margin of almost 60–40 percent—showed progress, but the loss was real and painful. Going into 2009, Prop 8 proved to be a wake-up call, energizing gay and nongay people across the country, many of whom repented of their complacency and inaction. The people organized, rallied, and pledged to be more engaged in the battles to win the freedom to marry in other states and in Congress, as well as to restore marriage in California in 2012.

As state legislative sessions opened in 2009, a record number of freedom to marry bills were filed in states from Washington to New Jersey. And refuting the pundits who had, after Prop 8, pronounced marriage unattainable or not worth the fight, on April 3 the Iowa Supreme Court handed down a unanimous decision bringing marriage equality to America’s heartland. Days later, the Vermont legislature passed a marriage bill, overriding the governor’s veto with a two-thirds majority in each chamber. The Vermont vote had particular significance because the first state to create civil union as an alternative to marriage itself resoundingly affirmed that civil union was not good enough. Years of work had made numerous states ready to affirm the freedom to marry through the legislative process, but Vermont was the first state to do so, and others were soon to follow. The momentous strides definitively established that the freedom to marry cause is not just advancing on the coasts, not just moving in the courts, and certainly not just going away.

One month later, Maine’s Governor John Baldacci signed into law a freedom to marry bill overwhelmingly approved by the state Senate and House. Upon signing the bill, Baldacci stated, “I have come to believe that this is a question of fairness and of equal protection under the law, and that a civil union is not equal to civil marriage.” News Release, State of Maine, Office of the Governor (May 6, 2009).

Immediately following the law’s passage, antigay forces started paying signature collectors to collect signatures in support of a November 2009 “people’s veto” vote to overturn the marriage law. The strategy in Maine had always included preparation for this possible attack, and in early July the ProtectMaineEquality.org campaign to defend the freedom to marry for all Maine families was launched with a vow never again to have rights taken away at the ballot box. No more Prop 8’s!

One month after Maine passed its marriage bill, New Hampshire became the sixth state to embrace the
Domestic Partnership Protections that marriage brings. Wisconsin’s law provides forty-three of the more than 200 legal protections Wisconsin both enacted partnership laws. Nevada and Wisconsin enacted domestic partnership laws. In Nevada, the law includes relationship between same-sex couples treated with respect in our nation’s capital. Human rights advocates in the District may now move toward a bill that would end the denial of marriage there, making it easier for District residents to enjoy the freedom to marry. Not lost in all the marriage momentum was striking progress in two more states still burdened with antigay constitutional amendments precluding the freedom to marry and other legal protections. Nevada and Wisconsin both enacted partnership laws. In Nevada, the law includes virtually all of the state-level responsibilities and rights that come with marriage, much like laws in Washington, Oregon, and California. It was enacted by the legislature, overriding a gubernatorial veto. Wisconsin’s law provides forty-three of the more than 200 legal protections that marriage brings. Wisconsin Domestic Partnership Protections Reference Guide (rev. Sept. 1, 2009), www.fairwisconsin.org/downloads/DP_Reference_Guide.pdf.

Fourteen percent of the U.S. population now lives in states that either have the freedom to marry for gay couples or honors out-of-state marriages of gay couples—and we are just two-thirds through 2009! As of this writing, marriage bills seem likely to pass in New Jersey and New York this year, and both governors have pledged to sign them into law. New York’s Assembly has already passed the bill—for the second time. The former Senate majority leader, a Republican who had single-handedly blocked the measure in 2007–08, recently declared: “Life is short, and we should all be afforded the same opportunities and rights to enjoy it. I support the freedom to marry.” Elizabeth Benjamin, Same-Sex Surprise: Joe Bruno, Former NY Senate Leader, Now Supports Gay Marriage, N.Y. DAILY NEWS, June 14, 2009. He added his voice to the many others who have announced support for marriage equality, including Republicans such as George W. Bush’s Solicitor General Ted Olson, party operative Roger Stone, and McCain campaign manager Steve Schmidt. Democrats such as former President Bill Clinton and U.S. Senators Chris Dodd and Chuck Schumer have likewise embraced the freedom to marry, as have the National Education Association and the U.S. Conference of Mayors in powerful resolutions this summer.

Religious leaders and communities, too, are key voices that have been and continue to be important allies in building support for marriage equality. Rev. Dr. Serene Jones, the president of New York City’s renowned Union Theological Seminary, and Rev. Dr. Bradford Braxton, the senior pastor of Riverside Church and one of America’s leading black preachers, recently wrote to fellow people of faith and the New York legislature supporting the freedom to marry. In July 2009, the Episcopal Church voted to authorize church celebration of marriage rites for same-sex couples, joining other denominations and clergy. More than 100 pastors and faith leaders recently voiced their support for marriage equality in Washington, D.C. Similar coalitions have spoken out in California, Maine, Vermont, New Hampshire, and across the country as the marriage conversation continues.

Americans are seeing people like Karen Schuster of Rochester, New York, standing up for her gay son, whom she believes should have the same rights as her daughter Jessica. Or Gail and Mark Home, parents in Vermont, who talked about how their lesbian daughter should be able to marry the person she loves. Frances Nicholson and Cynthia Allar’s daughter shared her desire for her moms to be able to marry in California. Philip Spooner, a WWII veteran and lifelong Republican, brought thousands to their feet when he testified in Maine that he did not fight in Europe to come home to a country where three of his sons were treated equally but his gay son was not. The movement has also launched public education campaigns, like Let California Ring.org and the ACLU’s Tell-Three.org, which ask people to talk with three people in their lives about what it is like to be LGBT, or care about a LGBT person, and why they support the freedom to marry.

When the Hawaii case was decided in 1996, a Gallup poll showed that only 27 percent of the U.S. public supported ending marriage discrimination. Recent polls show nationwide support reaching the high 40 percents, a near majority of the
country. In April 2009, ABC News/Washington Post showed 49 percent—a first-time-ever plurality—in support, while a December 2008 Harris Interactive poll showed 47 percent in support. There is majority support for marriage equality in several states and in several demographic groups, notably those under age 35, who support marriage equality by a powerful 63 percent (Harris Interactive, Dec. 2008). Similarly, opposition is declining across ideological groups (ABC News/Washington Post, Apr. 2009). As a result of this growing support and the continuing work of the freedom to marry movement, by July 2009 nearly 40 percent of the population lives in a state that provides at least some protections for same-sex couples.

After five years of experience with the freedom to marry in Massachusetts, public support has increased 10 percentage points. In the Lake Research Partners poll in April 2009, 74 percent of persons polled in Massachusetts stated that they think society is stronger as a result of same-sex couples marrying.

Next Steps

The dawn of a new political era, and Americans’ willingness to move past the divisive attack politics of recent years and to take a fresh look at the denial of marriage to same-sex couples, opened opportunities to make progress at the federal level alongside advances in the states. Then candidate and now President Barack Obama repeatedly has pledged support for full repeal of the federal antimarriage law, the Defense of Marriage Act (DOMA), stamped through Congress in 1996. As he marked the Stonewall anniversary, Obama again called on Congress to undo that discriminatory law. A bill to repeal DOMA and have the federal government return to treating all marriages equally under the law was introduced in September.

In a case brought by GLAD, same-sex couples married in Massachusetts filed suit seeking equal access to important federal protections in employee benefits, Social Security, and income taxation, for which they are eligible and for which they applied—but which were denied to them because of DOMA. GLAD argues there is no basis for the federal government to split the one class of marriages in Massachusetts into two, or to respect all state-licensed marriages except those of same-sex couples. Massachusetts Attorney General Martha Coakley subsequently brought the commonwealth’s own federalism challenge to DOMA’s restrictions on “marriage” and “spouse,” noting that it has always been the states who decide if people are married, not the federal government. She also invoked the Spending Clause, contending that DOMA is a string attached to federal monies that forces the commonwealth to discriminate against some of its own citizens. Other lawsuits have been brought challenging Proposition 8 and California’s targeted stripping away of the freedom to marry despite the state supreme court’s findings that there is no good reason for excluding same-sex couples from marriage.

As summed up in Evan Wolfson’s Why Marriage Matters: America, Equality, and Gay People’s Right to Marry, the human rights struggle for marriage equality follows the pattern of every other social justice cause in America: it is a patchwork. Some states advance toward equality faster while others resist and even regress. Along with good lawyering and serious organizing, the key to winning is changing hearts and minds by engaging the public in conversations about who LGBT people are and how denying marriage harms same-sex couples and helps no one.

Looking past 2009, more states and federal progress shimmer within reach. If legislatures continue to vote to end marriage discrimination; if courts continue to strike down repugnant inequality and needless exclusion; if LGBT people and others continue to talk to their circles of friends, family, and fellow citizens about the reality of gay people’s lives, the denial of the freedom to marry will soon come to an end. And as the history of America, and the history of marriage, remind us, soon thereafter people will have a hard time believing that others (including even themselves) ever believed that there was a reason to tell these loving, committed couples that they could not join, and share, in marriage.

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