Record: 1

Title: How Gay Marriage Won.

Authors: Von Drehle, David

Source: TIME Magazine. 4/8/2013, Vol. 181 Issue 13, p16. 1p.

Document Type: Article

Subject Terms: *SAME-sex marriage -- Lawsuits & claims
*MARRIAGE law
*LEGAL status of gay couples
*CHILDREN of gay parents
*EQUALITY
*POLITICAL attitudes
UNITED States

Company/Entity: UNITED States. Defense of Marriage Act
UNITED States. Supreme Court

NAICS/Industry Codes: 541910 Marketing Research and Public Opinion Polling

People: KENNEDY, Anthony M., 1936-

Abstract: The article discusses a reported victory for the same-sex marriage movement in America, focusing on marriage rights, equality, and the presentation of oral arguments before the justices of the U.S. Supreme Court (USSC) on March 26, 2013 in two cases involving the U.S. Defense of Marriage Act and gay marriage in California. USSC Justice Anthony Kennedy's views on the children of gay couples in California are addressed, along with an examination of the extension of marriage rights to gay couples in places such as the Netherlands, Argentina, and nine U.S. states. The religious opposition to same-sex marriage is also mentioned.

ISSN: 0040-781X

Accession Number: 86453907

Database: Academic Search Complete

How Gay Marriage Won

The gay and lesbian community has gone from stonewall to the altar in two generations

Eager to be eyewitnesses to history, people camped for days in the dismal cold, shivering in the slanting shadow of the Capitol dome, to claim tickets for the Supreme Court's historic oral arguments on same-sex marriage. Some hoped that the Justices would extend marriage rights; others prayed that they would not. When at last the doors of the white marble temple swung open on March 26 for the first of two sessions devoted to the subject, the lucky ones found seats in time to hear Justice Anthony Kennedy--author of two important earlier decisions in favor of gay rights and likely a key vote this time as well--turn the tables on the attorney defending the traditionalist view. Charles Cooper was extolling heterosexual marriage as the best arrangement in which to raise children when Kennedy interjected: What about the roughly 40,000 children of gay and lesbian couples living in California? "They want their parents to have full recognition and full status," Kennedy said. "The voice of those children is important in this case, don't you think?" Nearly as ominous for the folks against change was the fact that Chief Justice John Roberts plunged into a discussion of simply dismissing the California case. That would let stand a lower-court ruling, and same-sex couples could add America's most populous state to the growing list of jurisdictions where they can be lawfully hitched.

A court still stinging from controversies over Obamacare, campaign financing and the 2000 presidential election may be leery of removing an issue from voters' control. Yet no matter what the Justices decide after withdrawing behind their velvet curtain, the courtroom debate--and the period leading up to it--made clear that we have all been eyewitnesses to history. In recent days, weeks and months, the verdict on same-sex marriage has been rendered by rapidly shifting public opinion and by the spectacle of swing-vote politicians scrambling to keep up with it. With stunning speed, a concept dismissed even by most gay-rights leaders just 20 years ago is now embraced by half or more of all Americans, with support among young voters running as high as 4 to 1. Beginning with the Netherlands in 2001, countries from Argentina to Belgium to Canada--along with nine states and the District of Columbia--have extended marriage rights to lesbian and gay couples.

True, most of the remaining states have passed laws or constitutional amendments reserving marriage for opposite-sex partners. And

Brian Brown, president of the National Organization for Marriage, declares that the fight to defend the traditional definition is only beginning. "Our opponents know this, which is why they are hoping the Supreme Court will cut short a debate they know they will ultimately lose if the political process and democracy are allowed to run their course," he said.

But that confidence is rare even among the traditionalists. Exit polls in November showed that 83% of voters believe that same-sex marriage will be legal nationwide in the next five to 10 years, according to a bipartisan analysis of the data. Like a dam that springs a little leak that turns into a trickle and then bursts into a flood, the wall of public opinion is crumbling. That's not to say we've reached the end of shunning, homophobia or anti-gay violence. It does, however, suggest that Americans who are allowed by law to fall in love, share their lives and raise children together will, in the not too distant future, be allowed to get married.

Through 2008, no major presidential nominee favored same-sex marriage. But in 2012, the newly converted supporter Barack Obama sailed to an easy victory over Mitt Romney, himself an avowed fan of Modern Family--a hit TV show in which a devoted gay couple negotiates the perils of parenthood with deadpan hilarity. When even a conservative Mormon Republican can delight in a sympathetic portrayal of same-sex parenthood, a working consensus is likely at hand.

Down the ballot, elected leaders who once faithfully pledged to protect tradition have lined up to announce their conversions. Republican Senator Rob Portman of Ohio said he changed his mind after learning that his son is gay. Red-state Democrats Claire McCaskill of Missouri and Jon Tester of Montana, both skilled political tightrope walkers, also switched, as did Virginia's Mark Warner. They joined Hillary Clinton and her husband, the former President who signed the Defense of Marriage Act into law during his 1996 re-election bid but is now calling on the Supreme Court to undo his mistake.

Such switchers have plenty of company among their fellow citizens. According to a recent survey by the Pew Research Center, 1 in 7 American adults say their initial opposition to same-sex marriage has turned to support. The picture of a nation of immovable factions dug into ideological trenches is belied by this increasingly uncontroversial controversy. Yesterday's impossible now looks like tomorrow's inevitable. The marriage license is the last defensible distinction between the rights of gay and straight couples, Cooper told the Justices as he steeled himself to defend that line. But most generals will tell you that when you're down to your last trench, you are likely to lose the battle.

What's most striking about this seismic social shift--as rapid and unpredictable as any turn in public opinion on record--is that it happened with very little planning. In fact, there was a lot of resistance from the top. Neither political party gave a hint of support before last year, nor was marriage part of the so-called homosexual agenda so worrisome to social-conservative leaders. For decades, prominent gay-rights activists dismissed the right to marry as a quixotic, even dangerous, cause and gave no support to the men and women at the grassroots who launched the uphill movement.

Instead, the impetus has come from disparate forces in seemingly unconnected realms: courtrooms, yes, but also hospitals, nurseries, libraries and soundstages. The rise of same-sex marriage from joke to commonplace is a story of converging strands of history. Changes in law and politics, medicine and demographics, popular culture and ivory-tower scholarship all added momentum to produce widespread changes of heart.

The Beginning

you could start the story as far back as Adam and Eve, tracing the twists and turns of society's struggle to order and regulate the natural imperatives of sex. For some social conservatives, it would be a tale as simple as the old line that God didn't make Adam and Steve. But subtler Bible scholars--the sort who wonder why Saul was so miffed at David for "choosing" Jonathan for a love "more wonderful than the love of women"--would say these matters have always been complicated.

Instead, start on May 18, 1970, when a young Air Force veteran named Jack Baker visited the Hennepin County clerk's office in Minneapolis with his boyfriend of three years, librarian Michael McConnell. Neatly dressed in coats and ties--"neither is a limp-wristed sissy," Look magazine noted--they filed an application for a marriage license, which was promptly denied. The episode was generally dismissed as a stunt, another strange happening in those days of hippies, riots and Woodstock. Homosexuality was still classified as a mental illness by the American Psychiatric Association, and even University of Minnesota professor Allan Spear, a gay-rights pioneer, called Baker and McConnell "the lunatic fringe." The publicity cost McConnell his job, while Baker, a law student, filed suit.

In an opinion that cited the Book of Genesis, among other authorities, the Minnesota supreme court rejected his claim, and his appeal to the U.S. Supreme Court was turned down "for want of a substantial federal question." But Baker was onto something. His suit, for the first time, linked the idea of same-sex marriage to an emerging line of high-court precedents establishing a right to privacy in matters of sexual intimacy.

These precedents were both product and fuel of the sexual revolution and gunpowder for the resulting culture wars. In 1965 the court held that married couples have a right to use contraception. The Justices extended the principle in 1967 as part of a decision to strike down state laws against interracial marriage. By the time Baker was making his appeal, the zone of privacy had been extended to unmarried couples using contraception, and a year later, in 1973, Roe v. Wade invoked the right to privacy in legalizing abortion.

By the mid-1980s, the American Civil Liberties Union believed the concept had advanced far enough to shield the intimate behavior of gay men and lesbians. The group offered to help a Georgia man named Michael Hardwick challenge his conviction on sodomy charges. But the gamble failed. By a vote of 5-4, the high court held in 1986 that states were allowed to enforce age-old sexual taboos. Writing in dissent, Justice Harry Blackmun, author of Roe v. Wade, argued that traditional moral condemnation of sexual behavior between consenting adults is not sufficient reason to infringe on privacy. True, some "religious groups condemn the behavior" of homosexuals, he wrote. But that "gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends, instead, on whether the State can advance some justification for its law beyond its conformity to religious doctrine."

Although few recognized it at the time, this concept--that something more than traditional morals is needed to justify laws governing intimate relationships--was a lever awaiting the right moment to pry open the door for same-sex marriage. Yet at the time, marriage seemed impossibly remote to most gay-rights leaders. They had no appetite for such a pie-in-the-sky project when same-sex intimacy could still be prosecuted as a crime.

For that matter, many gay activists weren't interested in getting married. In the 1970s and early 1980s, the reigning model of liberated gay culture was found in meccas like San Francisco's Castro Street and New York City's Greenwich Village, where people scoffed at the idea of coming out of the closet only to enter the confines of wedlock.

But then another seemingly separate strand of history was woven in: the AIDS epidemic. Burning outward from the bathhouses, this deadly scourge offered a painful education in the advantages of marriage. AIDS patients and their partners discovered that they weren't covered by each other's medical insurance, weren't entitled to enter the doctors' offices and hospital rooms of their loved ones, weren't authorized to claim remains or plan funerals or inherit estates. Grieving survivors were barred from collecting Social Security and pension benefits. Marriage began to be seen as the portal to a wide array of privileges and protections. The bourgeois ideal of stable monogamy could be a lifesaver.

Meanwhile, in other hospital rooms, another thread was emerging as doctors tinkered with the mechanics of procreation. With the arrival of the first so-called test-tube baby in 1978, the age-old business of one mom and one dad making and raising babies the old-fashioned way was quickly joined by a dizzying array of reproductive strategies. With donor sperm, donor eggs, surrogate wombs and so on, lesbian couples created their own baby boomlet, which spread quietly among gay men. Add adoptions and stepkids from earlier opposite-sex relationships, and today there are enough children of lesbian and gay couples in America to fill a couple of football stadiums. Of the roughly 600,000 U.S. households headed by same-sex pairs in 2010, the Census Bureau reports that some 115,000 are raising children.

And so the law was primed for a change, and the value of marriage was made clear by the tragedies and joys of life. What was needed next was for someone to get a serious discussion going--to advance the idea of same-sex marriage as something more than a joke or curiosity. That's another thread of the story.

The Battle of Ideas

John Boswell was a dashing young member of Yale's all-star history faculty in 1980 when he published Christianity, Social Tolerance, and Homosexuality, which went on to win the National Book Award. Copiously documented and densely argued, the book was no one's idea of casual reading. In it, Boswell employed his knowledge of classical and medieval languages to investigate the history of Christian attitudes toward same-sex couples. He concluded that it was not all hellfire and brimstone. In fact, Boswell found scant evidence that the early church condemned homosexuality before the Middle Ages. Most provocatively, Boswell ventured that some Christian churches actually blessed same-sex unions during the first millennium of Catholicism.

Boswell's ideas transformed a Harvard Law School student named Evan Wolfson. "That book changed my life," Wolfson has said, because it convinced him that discrimination against homosexuals was "not part of the natural order." It was the arbitrary invention of a particular time and place--the factious and violent medieval church. Wolfson decided to make a study of marriage laws with an eye to challenging them in court. His 1983 law-school thesis became a road map for the lawsuits to come.

But it was a journalist, Andrew Sullivan, who shoved the issue out of academia and onto the liberal agenda with a 1989 essay for the New Republic framed, arrestingly, as "A (Conservative) Case for Gay Marriage." Noting that cities and states across the country were

crafting elaborate "domestic partnership" laws to answer the problems laid bare by the AIDS crisis, Sullivan argued that this parallel system of almost marriage would do more harm than good. "The concept of domestic partnership could open a Pandora's box of litigation and subjective judicial decisionmaking about who qualifies," Sullivan ventured. Were fraternity brothers domestic partners? What about an elderly woman and her live-in nurse?

Domestic-partner laws would further weaken the ideal of marriage in a world already rife with divorce, cohabitation and single parents. Marriage, by contrast, is crystal clear: "You either are or are not married; it's not a complex question," he wrote. If conservatives truly care about traditional relationships, Sullivan argued, they should welcome same-sex couples seeking to honor an ancient tradition. What could be more traditional, more conservative, than wanting to be married?

Fits and Starts

Still, gay-rights organizations remained leery of the marriage issue, preferring to attack less formidable barriers like the ban on homosexuals in the military. When Wolfson graduated from Harvard and later went to work for Lambda Legal, the leading gay-rights legal organization, he says his bosses advised him to pursue his marriage strategy on his own time.

So he did--with what seemed at first to be disastrous consequences for his cause. With Wolfson's quiet assistance, an attorney in Hawaii filed suit on behalf of three same-sex couples, arguing that it was a violation of the state constitution to limit marriage to opposite-sex partners. When, in 1993, the court found potential merit in the complaint and ordered a hearing, the backlash long feared by gay leaders erupted.

Traditionalists worried that Hawaii would set off a chain reaction. Under the "full faith and credit" clause of the U.S. Constitution, other states would be expected to honor Hawaii's same-sex marriages. And the federal government made a practice of relying on state decisions in determining who is married. To head off the possibility that same-sex marriage in one state might quickly lead to married gay and lesbian couples everywhere, the Defense of Marriage Act (DOMA) was introduced. Passed by large bipartisan margins, DOMA relieved states of the obligation to recognize same-sex marriages performed elsewhere and adopted the traditional definition of marriage for federal purposes.

This setback, coming on the heels of the Pentagon's "Don't ask, don't tell" policy, demoralized Elizabeth Birch, then executive director of the leading gay advocacy group, the Human Rights Campaign. Sullivan tells of crossing paths with Birch at congressional hearings on DOMA. "She called the hearings hell week," Sullivan recalled. "I said, 'No, it isn't. This is our chance to put this in the middle of the public debate.'"

The more she thought about it, however, the more Birch began to see the long-run value of the marriage movement. Maybe it was a mistake to build a protected enclave of antidiscrimination laws apart from straight society. Maybe the more potent message was simply to ask society to recognize the loves and families of same-sex couples.

It was at this moment of setback and soul-searching that the U.S. Supreme Court weighed in again with its first major gay-rights decision in a decade. Romer v. Evans, in 1996, struck down a ballot measure in Colorado that would have barred cities and towns from including homosexuals in their antidiscrimination statutes. Writing for himself and five of his colleagues, Kennedy held that the measure was "a denial of equal protection of the laws in the most literal sense."

Justice Antonin Scalia dissented, maintaining that "moral disapproval" was sufficient reason to sustain the challenged law. But in the decade since Bowers v. Hardwick, the majority had come around to Blackmun's view that traditional scruples cannot justify discrimination. It was this principle that Kennedy applied again seven years later, when he wrote the opinion in Lawrence v. Texas that overturned the Bowers precedent. Gays and lesbians enjoy the same right to privacy in their intimate lives as heterosexuals, Kennedy declared, while in a separate concurring opinion, Justice Sandra Day O'Connor added plainly, "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause."

"This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples," Scalia wrote in reply, because state laws designed to "preserve the traditional institution of marriage" were in fact rooted in "moral disapproval of same-sex couples." And by then, the ground was shaky indeed.

The court had simply ratified what Americans were discovering daily: that gay men and lesbians were not aliens from society, somehow set apart. Their number included Olympic gold medalists like Greg Louganis, billionaires like David Geffen, entertainers like Ellen DeGeneres. A gay rugby player, Mark Bingham, was among the bold passengers who thwarted the hijackers of Flight 93 on 9/11. The Archbishop of Milwaukee, Rembert Weakland, was gay. The person next door, in the next office cubicle, the person seated next to you

at Thanksgiving dinner or Passover seder or in the pew in church could be gay. Thus did the other begin to shade into the ordinary.

Though polls have continued to show resistance to same-sex marriage among Americans over 65, the ones born after 1980 are stoutly in favor. They are the cultural vanguard, more libertarian than the generation before, who made mainstream hits of Queer Eye for the Straight Guy and Glee. And every day there are more of them and fewer of the old folks, a fact of nature even older than marriage.

Same-sex marriage soon became a reality in America--first by court and legislative action in such states as Massachusetts, New York and Iowa, and more recently by popular vote in such states as Washington and Maine. Tens of thousands of couples have been lawfully joined, and the sky has yet to fall. Nor have churches been forced to recognize civil marriages of which they disapprove.

For Wolfson, who founded the advocacy group Freedom to Marry in 2003, these two factors, "lived experience and generational change," have moved same-sex marriage from the lunatic fringe toward a surging consensus. Though traditionalists called a March for Marriage in Washington to coincide with the Supreme Court hearings, Michael May of Cleveland was badly outnumbered as he silently raised his placard: EVERY CHILD DESERVES A MOM & DAD. He said he was hopeful that the movement could be stopped. But then he added, "I don't know."

Before the Justices

The cases now before the Supreme Court may tie the threads up neatly, or they may be another step on a longer path. In Hollingsworth v. Perry, four California voters are seeking to reverse a lower-court ruling that threw out a ban on same-sex marriage. U.S. v. Windsor, meanwhile, challenges the use of DOMA to deny federal benefits to legally married same-sex couples. Edith Schlain Windsor is an elderly New York lesbian who married her longtime partner in Canada in 2007. After her partner's death in 2009, Windsor sued the federal government over having to pay $363,000 in estate taxes that an opposite-sex spouse would not be required to pay.

In both cases, Kennedy, the author of Romer and Lawrence, sits at the fulcrum between liberal and conservative blocs. And a decisive outcome is by no means certain. Perhaps the only Justice who fully tipped his hand was Scalia, still plainly in dissent from earlier gay-rights decisions. "When," he demanded of former solicitor general Theodore Olson, "did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the 14th Amendment was adopted?"

Olson, the conservative lawyer who argued for George W. Bush in 2000, is yet another of the Americans whose opposition to same-sex marriage has turned to solid support. But he had trouble satisfying Scalia's demand for the particular moment.

"When?" Scalia repeated. "When did that happen?"

At last, Olson had to give the only answer possible--the true answer in a country where people are free to change their minds. "There's no specific date in time," he said of the many-threaded story. "This is an evolutionary cycle."

Commitment Elaine Harley, left, and Mignon R. Moore were married last year

Wedding rites Couples eager to tie the knot flock to places where same-sex marriage is legal, including, clockwise from top left, New York (Brooklyn and Manhattan), Vermont, D.C., Massachusetts and Maryland. Many got married at the stroke of midnight when the laws took effect

Bond issue David Boies, center left, and Theodore Olson lead the legal push for same-sex marriage

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By David Von Drehle
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