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# Verdict

November 13, 2012

Joanna L. Grossman

## **An Historic First: Voters Support Same-Sex Marriage at the Polls**



The November 2012 election brought in many noteworthy results—the re-election of America’s first black president, Barack Obama, with a surprising sweep of the swing states; the consigning of Mitt Romney to the ashcan of political history after a debate-win-fueled, strong final run; the losses by two Republican Senate candidates who were favored to win before making offensive comments about rape; and the election of Tammy Baldwin, the first openly gay U.S. senator.

In addition to the federal election results, the voter referendums in various states were noteworthy as well. Two states, Colorado and Washington, legalized the sale and use of recreational marijuana. (Sober Oregon turned back a similar referendum.) California voters did not vote to end the state’s death penalty. Three states, Maryland, Oregon, and Rhode Island, approved or expanded casino gambling. Florida voters did not ban public funding for abortion, while Montana voters added a parental-notification requirement prior to abortion for a minor. Massachusetts voters rejected doctor-assisted suicide, but embraced medical marijuana.

Arguably, the most significant referenda results of all relate to same-sex marriage. For the first time, same-sex marriage was legalized by voters. In Maryland, Maine, and Washington State, voters passed such referendums. The referendums in Maryland and Washington cleared the way for same-sex marriage to take effect after the respective state legislatures passed bills to authorize it. The referendum in Maine is perhaps more surprising, since voters there used a “people’s veto” just a few years ago to override legislative authorization of same-sex marriage. But now, they’ve reversed themselves and made Maine the ninth state to allow same-sex marriage. And Minnesota voters did not approve a referendum to make same-sex marriage unconstitutional. This was, interestingly, the very type of measure that thirty other states have passed, most by overwhelming majorities, in the last decade or so.

### **The Ballot Measures in Each State, Regarding Same-Sex Marriage,**

#### *Maine*

In 2009, Maine voters vetoed an effort by the state legislature to legalize same-sex marriage. But last week, they approved Question 1, which read, simply, “Do you want to allow the State of Maine to issue marriage licenses to same-sex couples?” The measure was approved by a vote of 53% v. 47%, in a state that went for Obama by a vote of 56% to 41%. According to exit polls, 61% of female voters supported the measure, as well as 68% of

voters ages 18-29.

### *Maryland*

Question 6 on the Maryland ballot asked voters to approve or disapprove the Civil Marriage Protection Act, which had been passed by the state legislature in March 2012. The governor signed the bill into law, but the final version had been amended to delay its effect until voters had the opportunity to override it at the polls if they so chose. Residents were asked to vote “for” or “against” the “referred law,” which the ballot described as an Act that:

Establishes that Maryland’s civil marriage laws allow gay and lesbian couples to obtain a civil marriage license, provided they are not otherwise prohibited from marrying; protects clergy from having to perform any particular marriage ceremony in violation of their religious beliefs; affirms that each religious faith has exclusive control over its own theological doctrine regarding who may marry within that faith; and provides that religious organizations and certain related entities are not required to provide goods, services, or benefits to an individual related to the celebration or promotion of marriage in violation of their religious beliefs.

The referendum passed by a margin of 52% to 48%, in a state that voted 62% for Obama and 36% for Romney.

### *Washington State*

Referendum 74 was, like Maryland’s Question 6, a veto referendum. The state legislature passed a bill to legalize same-sex marriage in February 2012, which the governor signed immediately. The referendum asked voters to approve or reject the following:

The legislature passed Engrossed Substitute Senate Bill 6239 concerning marriage for same-sex couples, modified domestic-partnership law, and religious freedom, and voters have filed a sufficient referendum petition on this bill.

This bill would allow same-sex couples to marry, preserve domestic partnerships only for seniors, and preserve the right of clergy or religious organizations to refuse to perform, recognize, or accommodate any marriage ceremony.

Washington State voters approved this measure by a vote of 53% to 47%, a narrower margin than the one by which it gave the state’s electoral votes to Obama (56% v. 42%) and by which it legalized recreational marijuana (55% v. 45%). One interesting fact revealed by exit polls is that young people—specifically, voters ages 18-29—support gay marriage in higher numbers than they support the sale and use of marijuana. In every older age group, the numbers are reversed.

### *Minnesota*

Unlike in Maine, Maryland and Washington State, the Minnesota measure was not an up-or-down vote on same-sex marriage. Current law in the state bans same-sex marriage by statute. The ballot measure, Amendment 1, would have memorialized that ban in the state constitution, making it impossible for a court to rule the statutory ban unconstitutional, as has happened in several other states. Constitutional measures like this one have been adopted in thirty other states. But Amendment 1 failed at the polls, by a vote that is remarkably similar to the ones in the other three states considering the same-sex marriage issue—52% against to 48% in favor. The state went for Obama by only a slightly bigger margin—53% to 45%. The effect of this vote is to leave in place the statutory ban on same-sex marriage, but not to add the ban to the state constitution.

### **Why Same-Sex Marriage Referenda Matter**

The referenda results discussed above are noteworthy for a variety of reasons.

First, a recurring theme in the now-twenty-year battle over same-sex marriage has been that this is an issue for

the people to decide—rather than for legislatures or, god forbid, courts to resolve. And, until the Nov. 6, 2012 election, when the people have been asked, they have overwhelmingly voted against same-sex marriage. And they've done so even when polls suggest decent levels of support for the right of gay and lesbian couples to marry. Thus, one thing voters are voting against when asked to constitutionalize bans on same-sex marriage is the possibility that courts might be left to decide the issue. The outcomes of the successful referenda in Maine, Maryland and Washington State are thus likely to be viewed as more legitimate—a position I don't share—than the outcomes in the states that have come to same-sex marriage by court ruling or legislative initiative.

Second, there is, of course, no crystal ball for such matters, but these referenda surely reveal at least some of the future of same-sex marriage. In each of the three states that legalized same-sex marriage, the support was strongest in the 18-29 age group (among whom an overwhelming majority of voters were in support), and decreased through each successive age group, with far less than majority support in the 65+ category.

For example, in Washington State, 65% of voters ages 18-29 supported the measure to allow same-sex marriage, compared with 58% of voters ages 30-44, 48% of voters ages 45-64, and 39% of voters 65 and older.

In Minnesota, support for the anti-same-sex-marriage constitutional amendment followed exactly the opposite pattern. Only 32% of voters ages 18-29 supported the amendment, compared with 64% in the 65-and-older category. Greater-than-expected young-voter turnout helped propel the three referenda to victory, but as the years go by, these voters will be joined by new classes of young voters who are likely to share their tolerance and even enthusiasm for same-sex marriage.

Third, the legalization of same-sex marriage in three new states also adds to the critical mass of states that allow full marriage equality or a marriage-equivalent status such as the civil union or a robust form of the domestic partnership. Nine states and the District of Columbia now authorize the celebration of same-sex marriage within their borders, and give effect to same-sex marriages from sister states and a growing number of foreign jurisdictions that allow it as well. Another eight states allow a marriage-equivalent status that comes with all or most of the benefits and obligations of marriage. (The National Gay and Lesbian Task Force provides a helpful and updated map as to the situation in the states here.) And given how populated many of the relevant states are—New York, Massachusetts, and California, for example—well more than half of the U.S. population lives in a state that recognizes same-sex unions. This fact will surely be important when the Supreme Court finally takes a same-sex marriage case—which it is very likely to do this Term, given several recent rulings in which federal courts have held that the federal-law provision of the Defense of Marriage Act (DOMA) is unconstitutional. (I discuss those cases [here \(http://verdict.justia.com/2012/03/06/is-the-defense-of-marriage-act-doma-indefensible\)](http://verdict.justia.com/2012/03/06/is-the-defense-of-marriage-act-doma-indefensible), [here \(http://verdict.justia.com/2012/06/12/two-more-nails-in-domas-coffin\)](http://verdict.justia.com/2012/06/12/two-more-nails-in-domas-coffin) and [here \(http://verdict.justia.com/2012/08/07/the-defense-of-marriage-act-doma-takes-another-bullet\)](http://verdict.justia.com/2012/08/07/the-defense-of-marriage-act-doma-takes-another-bullet).)

Finally, the passage of the referendum in Maine suggests that views on same-sex marriage are shifting in favor of gay rights. The same voters who just legalized same-sex marriage last week rejected it in 2009. This is consistent with changing attitudes reflected in poll data and in legislatures (such as Washington State, for example, discussed [here \(http://verdict.justia.com/2012/02/07/the-beginning-of-the-end-of-the-anti-same-sex-marriage-movement\)](http://verdict.justia.com/2012/02/07/the-beginning-of-the-end-of-the-anti-same-sex-marriage-movement)) that have shifted from an anti- to a pro-same-sex-marriage position over a relatively short period of time.

Clearly, a sea change is underway. A president who publicly announced his support for gay marriage (and eliminated the Don't Ask, Don't Tell policy requiring gays in the military to hide their sexual orientation) was re-elected. A presidential candidate who impeded access to same-sex marriage (explained [here \(http://writ.news.findlaw.com/grossman/20050301.html\)](http://writ.news.findlaw.com/grossman/20050301.html)) after the high court in his state held it was constitutionally required was defeated. Polls show that more than 50% of Americans support the legalization of same-sex marriage. The young voting bloc that most strongly supports gay marriage will only get bigger over time. And now, voters in three states have done what opponents have insisted they never would—chosen to approve same-sex marriage on their own initiative. The future is clear.



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