

States influence direction of gay marriage

By Alan Greenblatt, NPR

The Supreme Court may rule on gay marriage this week. Advocates both for and against are glad the issue didn't reach the court any sooner.

They didn't want a repeat of the abortion issue. With its landmark decision in *Roe v. Wade*, the high court stepped in and guaranteed a right to abortion but also triggered a backlash that has lasted for 40 years.

With same-sex marriage, by contrast, legislators and voters in nearly every state had the chance to make their feelings known before the Supreme Court weighs in.

"People forget that durable rights don't come from courts, they come from consensus and strong support from society," says Jonathan Rauch, author of *Denial*, a recent memoir about growing up gay. "We are winning the right to marriage in a bigger, deeper way by winning it in the court of public opinion."

After losing political battles in a majority of states, gay marriage supporters have won a number of legislative victories and ballot measures in recent years. Sensing momentum is in their favor, it may not be surprising that they're glad they've had time to make their case to the public.

A Pew Research Center this month found that 72 percent of Americans believe universal gay marriage rights are "inevitable," including 59 percent of those opposed to the idea.

But supporters of traditional marriage definitions also say

that they're pleased the court has waited to rule on this issue. The number of states blocking gay marriage still outnumber those allowing same-sex marriage by 3 to 1.

"If states originate marriage laws, then state legislatures should legislate them," says Sam Schulman, a journalist who has written a number of articles critical of gay marriage. "To let the courts decide feels just as wrong as letting opinion polls decide."

In 2004, Rauch, a guest scholar at the Brookings Institution, wrote a book advocating gay marriage. That same year, Massachusetts saw its first legal same-sex marriages following the state Supreme Court's in *Goodridge v. Dept. of Public Health*.

The issue became central to the presidential campaign that year. On Election Day in 2004, voters in 11 states approved measures defining marriage as the union of one man and one woman.

If it had been the U.S. Supreme Court that issued a ruling back then, Rauch says, resistance would have been even more fierce.

States where opposition to gay marriage was strongest would have been angry not only about having had this issued decided for them in a way they didn't approve, but about federal intrusion as well.

"Gay marriage would be a legal reality, but it would have been in the crosshairs of massive resistance for two generations," Rauch says.

Thanks to federalism, each state has been able to decide for itself. Last month, Minnesota granted gay couples marriage rights, joining 11 other states and the District of Columbia.

allow civil unions. All the rest block gay marriage, although

there's still some about the law in New Mexico.

"If Goodridge had gone to the U.S. Supreme Court, we would not have been ready," says Fred Sainz, vice president for communication and marketing for the gay rights group Human Rights Campaign, referring to the Massachusetts case.

But opponents of gay marriage are also glad this issue has played out in states.

"Who has the constitutional authority in our regime to make marriage policy?" asks Ryan T. Anderson, a fellow at the Heritage Foundation who has written extensively in favor of traditional marriage. "It's not the unelected officials who sit on the federal bench."

Having this issue continue to play out politically gives opponents a fighting chance, he says.

"Obviously, it's very important that the majority of Americans do still support the description of marriage as between a man and a woman," says Caitlin Seery, director of programs at the Love and Fidelity Network, referring not to poll numbers, but to the laws enacted in most states.

Sainz is hoping the Supreme Court will find that there's a constitutional right to same-sex marriage. "There is absolutely no doubt that the best possible outcome is a finding by the court that there is a fundamental right to marry nationwide," he says.

Most observers don't expect that outcome. More likely, they say, justices will offer a split decision, striking down the Defense of Marriage Act, which blocks federal recognition of same-sex marriages, but not creating a universal right to such marriages.

Rauch says that may be for the best. He argues it would still be better to let states continue to handle the issue.

He can understand the impatience of those who want marriage rights to be sanctified nationwide. He works in a jurisdiction in which his own marriage is legal – Washington, D.C. – but lives in Virginia, where it is not.

Rauch says *Loving v. Virginia*, not *Roe v. Wade*, may be the more apt comparison.

In its 1967 ruling in *Loving*, the Supreme Court struck down bans on interracial marriage. But that decision came 19 years after a similar ruling by the California Supreme Court, during which time a number of states had decided to remove such bans themselves.

“There may well come a time, maybe not all that long from now, when the Supreme Court will be recognizing rather than imposing socially recognized marriage equality,” Rauch says. “It’s a much bigger deal doing that at the front end, before there’s a national consensus, and at the back end when you’re basically cleaning up.”