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978-0-521-88250-7 - Same-Sex Marriage and the Constitution, Second Edition

Evan Gerstmann

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## Same-Sex Marriage and the Constitution, Second Edition

Following the widely reviewed success of the first edition, the updated and expanded second edition of *Same-Sex Marriage and the Constitution* argues that there is a long-standing constitutional protection of the right to marry that applies to same-sex couples. Balancing strong advocacy of this position with respectful engagement with those who oppose same-sex marriage, Evan Gerstmann concludes not only that the Constitution protects same-sex marriage but that it is the proper role of the courts to enforce this right. The book also takes on many of the same-sex marriage myths: that it will lead down that “slippery slope” to such things as polygamy, that same-sex marriage has been a political albatross for liberals and progressives, and that courts are “usurping” the democratic process. Without overheated rhetoric or legal jargon, Gerstmann makes the case for same-sex marriage as a constitutional guarantee.

Evan Gerstmann is Associate Professor and Chair of Political Science at Loyola Marymount University in Los Angeles. He holds a Ph.D. from the University of Wisconsin–Madison (1996) and a J.D. from the University of Michigan Law School (cum laude, 1986). He is the author of two books on constitutional law: *Same-Sex Marriage and the Constitution* (2003) and *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (1999), and he has co-edited a third book, *Academic Freedom at the Dawn of a New Century: How Terrorism, Governments, and Culture Wars Impact Free Speech* (2006). His other publications have appeared in *PS: Political Science and Politics*, *The Election Law Journal*, and *The Journal of International Law and International Relations*, and his works have been reviewed in numerous periodicals, including *The New Republic*, *The Washington Post*, *The Nation*, and *The Chronicle of Higher Education*.

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*Second Edition*

EVAN GERSTMANN

*Loyola Marymount University*



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CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9780521709132](http://www.cambridge.org/9780521709132)

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First edition published 2003

Reprinted 2004

Second edition published 2008

Printed in the United States of America

*A catalog record for this publication is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

Gerstmann, Evan.

Same-sex marriage and the Constitution / Evan Gerstmann. – 2nd ed.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-88250-7 (hardback) – ISBN 978-0-521-70913-2 (pbk.)

1. Same-sex marriage – Law and legislation – United States. 2. Constitutional law – United States.

I. Title.

KF539.G47 2008

346.7301'68–dc22 2007014375

ISBN 978-0-521-88250-7 hardback

ISBN 978-0-521-70913-2 paperback

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*For Lauren, who reaffirms my faith in marriage every day,  
and, of course, for Isaac and for Sam.*

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## Acknowledgments

My first acknowledgment goes to Michael Gauger, who edited many of the chapters before I sent them to Cambridge. A better friend or a more talented editor would be hard to find.

I am, as always, indebted to Donald A. Downs, who mentored me through graduate school and led me to Cambridge, and to Lewis Bateman, Cambridge's political science editor, who has supported this project from its inception through this second edition.

Many thanks are due to my colleagues and the administration at Loyola Marymount University. Joseph Jabbra, Kenyon Chan, Michael Engh, and Seth Thompson all helped provide me with various forms of support for this book. Thanks also to Ronald Kahn for his support and critique of this project and for introducing me to the wonderful subject of constitutional law when I was an undergraduate at Oberlin College. My undergraduate research assistants, Paula Angulo, Tanaz Mashafatemi, and especially Nick Stahl, did a great deal of hard work with diligence, intelligence, and good spirits. I often looked for help from the library staff, including Neil Bethke and Glenn Johnson-Grau, and my thanks go to them as well. Finally, my thanks to Ngoc Nguyen for all of her help on this project.

My love and thanks go to my wife, Lauren; my father, Kurt; my brother, Elan; and my friends Robert Knopf and Matthew Bosworth, who have been my debate partners and sounding boards for many of the ideas in this book.

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## Preface to the Second Edition

So much has changed since I wrote the first edition of this book in 2002 and early 2003. At that time same-sex marriage was a subject very much at the margins of the mainstream legal and political debate. Then, in 2003, the United States Supreme Court struck down the sodomy laws of Texas and the highest court in Massachusetts ruled that there is a right to same-sex marriage. From a constitutional point of view, these cases represented a sea change in the debate over same-sex marriage. The U.S. Supreme Court case overruled *Bowers v. Hardwick*, the legal bête noire of gay men and lesbians. That 1986 decision, which upheld Georgia's antisodomy laws, had held that supposed millennia of civilized disapproval was a sufficient basis for criminal punishment of gays and lesbians for private sexual acts. In overruling that decision, the Court dramatically changed the tone of the legal debate.

The Massachusetts court took that ball and ran further with it than anyone would have imagined at that time. By holding, under the Massachusetts Constitution, that same-sex marriage is a legal right, the court turned something that had so recently seemed a distant possibility into a flesh-and-blood reality.

These legal decisions unleashed a previously (almost) invisible swelling of anger, hope, and longing in the mainstream gay and lesbian community. Committed same-sex couples flew to the marriage altar in numbers that astounded both progressive and conservative political elites. This fierce desire for marriage quickly swept over other parts of the country. Even in states without legal same-sex marriage, gay

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and lesbian couples lined up to take their wedding vows, especially in San Francisco, but also in New Mexico, Oregon, New York, and New Jersey.

Much has been written about whether the courts actually have much power to influence society. (The fact that America's schools remain remarkably segregated more than a half-century after *Brown v. Board of Education* has generated a virtual cottage industry of books and articles questioning whether courts can protect equal rights for minorities.) What these events have shown, though, is that the courts can exert a powerful influence when they breathe life into a deep yearning that seems so far from fulfillment that it feels more like a dull ache, too submerged to be identified. These cases made the impossible seem possible, and the reaction was explosive.

As is well known, the conservative counterreaction to same-sex marriage was just as fierce. The federal government passed the Defense of Marriage Act to block any federal recognition of same-sex marriage or even civil unions. President George W. Bush called for an amendment to the United States Constitution to prevent same-sex marriage. Voters in many states swarmed to the polls to pass state constitutional amendments and other laws forbidding legal recognition of same-sex relationships.

While much has been said about this counterreaction, what is more remarkable is how dramatically the political and social landscape has shifted *in favor of* same-sex marriage. Most obviously, same-sex marriage legally exists in America today, albeit in a single state. Perhaps even more importantly, public attitudes toward some sort of legal recognition for same-sex couples has changed dramatically. A majority of Americans nationally are now in favor of same-sex marriage or civil unions for same-sex partners. Even George W. Bush has publicly disagreed with the Republican Party Platform and has stated that states should be able to pass same-sex civil union laws if they want to. And several states have indeed wanted to: Connecticut, New Jersey, and Vermont all recognize civil unions, and California has passed domestic partner legislation that is quite similar to civil unions. More than 52 million Americans now live in states where same-sex couples can enter into a legal relationship such as marriage, civil union, or domestic partnership. Support for same-sex marriage is becoming a mainstream position in the largest "blue states." In 2006, the state of New York

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elected an openly pro-same-sex-marriage governor and the California legislature passed a pro-same-sex-marriage bill that was vetoed by Governor Arnold Schwarzenegger.

While much has changed, the core argument of this book remains the same: there is a right to same-sex marriage under the equal-protection clause of the United States Constitution. The argument is straightforward. The Constitution has long been held to protect a fundamental right to get married. This right protects everyone, from interracial couples, to “deadbeat dads,” to felons who are still in prison. It also protects the right to get divorced and is not limited to protecting the “traditional family structure.” I argue that any fair reading of these decisions shows that this right extends to same-sex couples. The majority of this book lays out that argument and also shows why this right does not extend, for example, to polygamy and incest, the twin taboos most often invoked to warn of the dangerous, slippery slope same-sex marriage would lead us down. The last part of the book examines issues such as whether courts ought to play a major role in this debate and takes a careful look at claims that the courts have only generated a backlash against gays and lesbians.

I believe that without the help of the courts, the prospect of equal marriage rights for gays and lesbians would be far dimmer. Despite the many state referendums against same-sex marriage, hundreds of thousands of same-sex couples enjoy legal protections today that they would not have dreamed of even in the recent past. Rather than usurping the democratic process, the courts have ignited genuine debate on this issue for the first time. Courts, legislators, academics, and the press are taking hard looks at what the data really say about the advantages and disadvantages of being raised by same-sex parents and about the impact of same-sex marriages in the growing number of nations that have legally recognized such relationships.

None of this is to say that there are no good-faith arguments against same-sex marriage. Many people have genuine concerns about the declining number of families headed by married couples, and no small number of well-meaning people worry that equal marriage rights for gays and lesbians will damage an already vulnerable institution. Past changes in marriage laws – especially making marriage more equal between men and women and loosening the requirements for divorce – have had a substantial impact on society. I argue in this book, though,

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that same-sex marriage is actually a rather modest change compared to these past changes. Gender equality and no-fault divorce altered the legal rules for *everyone's* marriage, as would, for example, legalization of polygamy. By contrast, same-sex marriage affects only the legal rights for same-sex couples and has no legal effect whatsoever on heterosexual married couples. Of course, there is the issue of the social impact of same-sex marriage and its effect on children. But, as noted earlier, the new legal climate has prompted decision makers finally to take a harder look at the empirical basis for claims that same-sex marriage will harm society or its children. As readers of this book will see, the evidence for such claims is quite slim.

This is an exciting time. The issue of same-sex marriage has engaged the legal and political community, and the American public, in a way that few issues do. This book argues that advocates of same-sex marriage should be bold. There is a constitutional right to not just civil unions but full marriage for same-sex couples, not just in one state or several states, but in every state in the union. Many of the United States's closest allies, nations with whom we share many values, have come to this conclusion as well. I hope that this book is stimulating for those who might embrace this optimism, engaging for those who do not, and challenging for those who oppose same-sex marriage altogether.

Los Angeles, 2007