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Introduction

America's embrace of same-sex marriage represents one of the fastest, most dramatic, and most important legal and political evolutions in our history. As recently as mid 2003, the Supreme Court's decision in *Bowers v. Hardwick* that gay men and lesbians could be incarcerated for private sexual acts in their own home continued to be the law of the land.[1] At that time, not one American state recognized same-sex marriage, and a substantial majority of Americans opposed it.[2]

By mid 2015, even before the Supreme Court's landmark decision in *Obergefell v. Hodges*,[3] the situation had changed in a manner that virtually no one had predicted. A wave of court rulings and democratically enacted laws brought same-sex marriage to state after state, while public opinion moved with incredible speed in favor of this once-marginal position.[4] A series of Supreme Court decisions demonstrated, both in their holdings and their tone, much greater concern for the equal rights of gays and lesbians. An issue that had recently seemed so marginal, even hopeless, suddenly seemed all but inevitable.

While many legal experts in 2015 predicted that the Supreme Court would rule in favor of same-sex marriage, there was no consensus about what the Court's reasoning would be. When the Court did rule, it adopted the theory advocated in the first edition of this book in 2003*: there is a fundamental constitutional right to marry that is broad enough to include same-sex marriage*.

[1] *Bowers v. Hardwick*, 478 US 186 (1986).
[2] www.gallup.com/poll/117328/marriage.aspx.
[3] 135 S. Ct. 2584 (2015).
[4] See Gallup polls from 1999 to 2015, note 2, supra.

This book is about same-sex marriage as a fundamental constitutional right. It is also about the role of law and courts in society and what our society's promise of equal protection of the law really means. Same-sex marriage is important even beyond those whom it directly affects because it is one of the issues that most directly challenges our commitment to genuine legal equality. Although people disagree about the specifics, there is broad agreement within the American legal and academic communities that all persons should have the same legal rights regardless of their race, ethnicity, national origin, gender, or religion. But in the last decades of the twentieth century, and even thereafter, when the subject turned to gays and lesbians, many people grew more confused and hesitant. Is being gay or lesbian really the same as being a racial or ethnic or religious minority? Are sexual orientation and gender really comparable? Are gays and lesbians seeking special rights rather than equal rights? Are they seeking more than toleration and demanding governmental endorsement of homosexuality? These questions troubled, and continue to trouble, many people who are genuinely committed to legal equality for all persons.

Moving Past "Gay Rights"

This book argues that the *Obergefell* Court took the correct path in deciding that the fundamental right to marry protects same-sex couples' right to wed. Several other paths were open to the Supreme Court. It could have held that gays and lesbians are a protected class, similar to racial minorities. This is the position that the Obama administration urged.[5] The Court could have ruled that the ban on same-sex marriage is really a disguised or indirect form of gender discrimination or that the ban so lacks any rational basis that it is unconstitutional. We will see in the next two chapters that there are credible arguments to support these positions, but this book argues that these approaches would not have been the best because they lack the clarity and unifying force of the fundamental rights approach.

This book argues we must leave behind the debate over "gay rights" and move on to the far more productive and illuminating question of what legal rights all people in America share and what the contours of those rights should be. In truth, there is no such thing as gay rights. There are

[5] http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/US-amicus-brief-SCt-same-sex-marriage-3-6-15.pdf.

only legal and constitutional rights that must be applied and protected equally for all people.

This being so leads to many further questions. What are those rights, and where do they come from? How are they defined, and who defines them? If they are defined and protected by politically insulated courts, how do we reconcile this with a democratic society? Are courts really capable of, or inclined toward, the kind of principled decision making that would truly protect these rights for the most marginalized Americans? Do legal rights actually make a difference in the real world? One of the reasons that same-sex marriage is such an important issue is that until very recently, many people answered these questions quite skeptically. The willingness of the courts to hear gay and lesbian equality claims with an open mind, and the impact these decisions had in the real world, surprised many and has changed the character of our national conversation about the importance of reasoned argument and constitutional rights.[6]

The Road to Same-Sex Marriage

This book addresses each of the above questions within the context of a particular right – the fundamental constitutional "right to marry," and the application of that right to gays and lesbians who want to wed the person they love. Same-sex couples have been litigating the issue since the early 1970s, but in 1993 the Hawaii Supreme Court stunned the nation, and perhaps the plaintiffs themselves, when it ruled that the ban on same-sex marriage most likely violated the equal protection guarantee of the state constitution. As a result of that decision, the issue of same-sex marriage "exploded onto the American political landscape,"[7] and by the mid 1990s it came to play "a central role in the public debate in America over the legal status of gays and lesbians."[8]

The voters in Hawaii were taken aback by that decision and voted to amend the state constitution to allow the legislature to keep marriage exclusively heterosexual. In 2000, the Supreme Court of Vermont added

[6] While political movements also played a vital role, there is no question that it was the courts that led the way. The first three states to have same-sex marriage, Massachusetts, Connecticut, and Iowa, were all responding to judicial rulings.

[7] Andrew Koppelman, "Forum: Sexuality and the Possibility of Same-Sex Marriage: Is Marriage Inherently Heterosexual?" *American Journal of Jurisprudence* 42 (1997): 51–95, 51.

[8] Andrew Koppelman, "1997 Survey of Books Relating to the Law: II Sex, Law, and Equality: Three Arguments for Gay Rights." *Michigan Law Review* 95(1997): 1636–1667, 1639.

new complexity and momentum to the issue when it held that same-sex couples are entitled to all of the legal benefits of marriage if not access to the institution of marriage itself. The state legislature responded by creating the institution of "civil unions," which are open to both same- and opposite-sex couples and allowed Vermont gays and lesbians to enter into a legal relationship that many believe is a marriage in all but name. The civil union includes the right to adopt children together, collect alimony upon severance of the relationship, become the legal guardian of the partner's children, qualify for family health insurance, and many other benefits.

In June 2003, the US Supreme Court dramatically altered the legal landscape when it overruled *Bowers v. Hardwick* and struck down Texas's homosexual sodomy statute in *Lawrence v. Texas*.[9] Although that decision, as we will see, is difficult to interpret precisely, three justices argued in dissent that it left bans on same-sex marriage on "pretty shaky grounds."[10]

From that point on, the issue moved ahead with a speed and momentum that stunned even the most prescient observers. A few months later, in November 2003, the highest court of the State of Massachusetts, citing the *Lawrence* decision, ruled that there is no "constitutionally adequate reason for denying civil marriage to same-sex couples."[11] The decision, *Goodridge v. Department of Public Health*, became effective in May 2004, and for the first time in one of the United States of America, same-sex couples were allowed to legally marry. The response was overwhelming. In the first year after *Goodridge* took effect, some six thousand same-sex couples got married, with same-sex marriage licenses being issued in every Massachusetts county.[12] In March 2004, New York State's attorney general issued an opinion that New York State had an obligation to recognize those marriages.[13]

The issue received even more national attention in February 2004, when then-mayor Gavin Newsom ordered the San Francisco city clerk to issue marriage licenses to same-sex couples. More than nine hundred couples were married in one day, with hundreds of new marriage licenses issued every day thereafter. Nearly four thousand same-sex

[9] 539 US 558 (2003). [10] 539 US at 601.
[11] *Goodridge v. Department of Public Health*, 798 N.E. 941, 948 (2003).
[12] Elizabeth Mehren, "More Backlash Than Bliss 1 Year after Marriage Law," *Los Angeles Times* (May 17, 2005), A1.
[13] Marc Santoro, "Spritzer's Opinion Mixed on Status of Gay Marriage," *New York Times* (March 4, 2004), A1.

marriage licenses were issued until the Supreme Court of California voided those marriages in August 2004.[14] Although the marriages were voided, they received tremendous national attention and became a high-visibility issue in the 2004 presidential elections. Other local mayors and government officials followed Newsom's lead and issued same-sex marriage licenses in Multnomah County, Oregon, New Paltz, New York, Asbury Park, New Jersey, and Sandoval County, New Mexico. The depth of the longing same-sex couples had for access to marriage, so out of sight for long, was becoming increasingly clear.

While same-sex marriage picked up a shocking degree of momentum, it also triggered a powerful backlash, with eleven states, mostly by large margins, passing same-sex marriage bans by popular referendum in the 2004 elections, and seven more states in 2006. This brought the number of states with explicit bans on same-sex marriage written into their constitutions to twenty-seven, with many other states having statutory bans.

Yet the same-sex marriage movement would not go away, and it was state courts that continued to give hope and momentum to the movement. In 2008, the highest state courts of Connecticut and California both held that their state constitutions protected the right of same-sex couples to marry.[15] The Supreme Court of Iowa followed suit the next year.[16] While California voters passed an anti-same-sex marriage amendment that effectively overruled the court, the Iowa and Connecticut decisions held firm. Suddenly, same-sex marriage existed in multiple states.

In Massachusetts, the birthplace of same-sex marriage in America, the public was embracing marriage equality. By 2008, more than ten thousand same-sex couples had wed, and the legislature had rejected attempts to amend the state constitution in order to ban same-sex marriage.[17] Rather than seeing a disintegration of the state's moral fabric, Massachusetts voters were seeing many of their children and grandchildren receiving the protections and benefits of marriage for the first time. As one state legislator put it when he explained his switch in voting for a constitutional amendment to later voting against it: "I can't tell you how many calls I got from people saying, 'I called you before and now my grandson is

[14] Robert Egelko, "Top State Court Voids San Francisco's Gay Marriages," *San Francisco Chronicle* (August 13, 2004), A1.
[15] *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 43 Cal.4th 757 (2008).
[16] *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).
[17] www.cnn.com/2008/US/06/16/feyerick.samesex.marriage/index.html?iref=newssearch.

gay – now they're a couple – now I've changed my mind and I want you to vote the other way.'"[18]

Same-sex marriage also emerged as a global issue. On April 1, 2001, the Netherlands became the first country to legalize same-sex marriage, with Belgium following suit in 2003. In 2005, Canada recognized same-sex marriage across the country, as did Spain.[19] In 2006 the Constitutional Court of South Africa held the country's Marriage Act unconstitutional, in *Minister of Home Affairs v. Fourie*, because it defines marriage as a union between a man and a woman.[20] As of 2015, twenty-two countries, mostly from the European Union, allowed same-sex marriage.[21]

At the federal level, however, the United States was hardly a leader on the issue. In 1996 Congress passed the Defense of Marriage Act (DOMA), which prevented same-sex couples from receiving any of the federal rights or benefits of marriage even though no state allowed same-sex marriage at that time. President Bill Clinton enthusiastically signed the bill, stating, "I have long opposed governmental recognition of same-gender marriages and this legislation is consistent with that position."[22] Hillary Clinton not only supported DOMA as First Lady but continued to oppose same-sex marriage during her campaign for Senate and during her 2008 campaign for president, and continued to do so up until shortly before her presidential campaign for the 2016 election.[23] While President Barak Obama famously "evolved" on the issue, he also opposed same-sex marriage until at least throughout the 2008 presidential election, stating, "I believe that marriage is the union between a man and a woman . . . Now, for me as a Christian – for me – for me as a Christian, it is also a sacred union. God's in the mix."[24] The Defense of Marriage Act remained the law of the land until 2013, when it was struck down by the Supreme Court in *United States v. Windsor*.[25]

At the state level, though, the battle over same-sex marriage continued, with victories beginning to outweigh defeats, through a mixture of court

[18] Ibid.
[19] For an excellent summary of the status of same-sex marriage and civil unions in the European Union as of June 2015, see www.pewresearch.org/fact-tank/2015/06/09/where-europe-stands-on-gay-marriage-and-civil-unions/.
[20] 2006 (3) BCLR (cc) at 27 (S. Afr.).
[21] www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/.
[22] www.cs.cmu.edu/afs/cs/usr/scotts/ftp/wpaf2mc/clinton.html.
[23] Connor Friedersdorf, "Hillary Clinton's Gay Marriage Problem," *The Atlantic Monthly* (June 13, 2014).
[24] Zeke Miller, "Obama Says He Didn't Mislead on Gay Marriage," *Time* (February 11, 2015).
[25] 133 S. Ct. 2675 (2013).

decisions, legislative victories, and electoral wins. In 2009 the Vermont General Assembly overrode a gubernatorial veto and became the first state to enact same-sex marriage legislatively. Shortly thereafter the governors of Maine and New Hampshire became the first governors in the nation to sign legislation recognizing same-sex marriage in their states.[26] New York State followed suit in 2011.[27]

While same-sex marriage was making advances at the state level, the federal government was deeply divided. In 2011, President Obama sharply changed course and declared that he believed the Defense of Marriage Act to be unconstitutional and that he would not defend it in Court.[28] The Speaker of the House took the opposite position and took steps to defend the law.[29]

During this period, a prominent federal judge, Vaughn Walker, took a novel approach and ordered a full-scale trial on the constitutionality of Proposition 8, the voter referendum banning same-sex marriage in California. Judge Walker allowed witnesses to testify and evidence to be presented on, among other things, the alleged harms caused by same-sex marriage. As will be discussed in the next chapter, opponents of same-sex marriage struggled to demonstrate any such harm. The trial, which resulted in Judge Walker striking down the state constitutional amendment that resulted from Proposition 8, generated enormous publicity, with both a widely produced play and a documentary movie based on it. Subsequently, both the governor and attorney general of California refused to appeal Walker's decision, and in *Hollingsworth v. Perry*, in 2013, the Supreme Court held that no private party had standing to defend the Proposition 8 amendment, effectively allowing same-sex marriage in the nation's largest state.[30]

On the same day as the Court announced *Hollingsworth*, it also announced its decision in *Windsor v. US*, striking down the Defense of Marriage Act. The *Windsor* decision had all of the strengths and weaknesses associated with its author, Justice Anthony Kennedy. The decision was groundbreaking in its acknowledgment of the humanity and desires of same-sex couples, often in passionate, even poetic terms. Kennedy wrote that Edith Windsor and Thea Spyer "longed to marry" and were one of many "same-sex couples who wish to define themselves by their

[26] www.nytimes.com/2009/05/07/us/07marriage.html.
[27] www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html.
[28] www.nytimes.com/2011/02/24/us/24marriage.html.
[29] www.nytimes.com/2011/03/05/us/politics/05marriage.html.
[30] *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

commitment to one another" and "wanted to affirm their commitment to one another before their children, their family, their friends, and their community."[31] However, the decision was difficult to interpret because Justice Kennedy sounded many themes, and it was unclear which were central to the holding. Chief Justice John Roberts characterized the decision as a defense of states' rights and federalism (a theory of the proper balance between state and federal power):

> The dominant theme of the majority opinion is that the Federal Government's intrusion into an area "central to state domestic relations law applicable to its residents and citizens" is sufficiently "unusual" to set off alarm bells. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.[32]

If Roberts's interpretation had been widely accepted, then the *Windsor* decision would have been useless as precedent to challenge state bans on same-sex marriage; the same rights that protected some states' choice to recognize same-sex marriage would protect the rights of other states to make the opposite choice. A federal judge in Louisiana held precisely that in upholding that state's ban on same-sex marriage, writing, "Louisiana is acting squarely within the scope of its traditional authority, as underscored by Justice Kennedy [in *Windsor*]."[33]

However, there were other ways to understand Kennedy's decision. In his dissenting opinion, the late Justice Antonin Scalia averred that the decision, looking past its "legalistic argle-bargle," had essentially declared that opposition to same-sex marriage was a form of discrimination, and the decision had all but assured that all state bans on same-sex marriage would be struck down:

> In my opinion, however, the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.[34]

Whether he intended the result or not, Scalia's interpretation of the majority opinion in *Windsor* influenced a number of federal judges to hold that

[31] Windsor, 133 S.Ct. at 2689.
[32] Windsor, 133 S.Ct. at 2697 (Roberts, C. J., dissenting).
[33] *Robicheaux v. Caldwell*, Order and Reasons, September 3, 2014, at 10.
[34] *Windsor*, 133 S. Ct at 2709 (Scalia, dissenting).

the decision was based primarily on the rights of the plaintiffs rather than the rights of states. In *Kitchen v. Herbert*, a federal judge struck down Utah's ban on same-sex marriage, writing,

> The court agrees with Justice Scalia's interpretation of Windsor and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.[35]

Another federal judge struck down a Virginia ban on same-sex marriage, also citing Scalia's interpretation of *Windsor*:

> In *Windsor*, our Constitution was invoked to protect the individual rights of gay and lesbian citizens, and the propriety of such protection led to the upholding state law against conflicting federal law. The propriety of invoking such protections remains compelling when faced with the task of evaluating the constitutionality of *state* laws. This propriety is described eloquently in a dissenting opinion authored by the Honorable Antonin Scalia.[36]

In Pennsylvania, another federal judge cited Scalia for the proposition that *Windsor* was simply "confusing" but that it clearly applied some sort of heightened scrutiny.[37] Ironically, Scalia's dissenting opinion helped set off a major wave of litigation victories for same-sex marriage!

Not only did *Windsor* have a major impact on same-sex marriage litigation but it also resulted in significant executive branch action. The Obama administration moved swiftly to change its visa policy, and only two days after the *Windsor* ruling, the husband of an American man became the first same-sex partner to be issued a permanent visa.[38] The following year, 2014, the federal government expanded recognition of same-sex marriages in numerous other federal legal matters, including bankruptcies, prison visits, and survivor benefits.[39]

By the time the Supreme Court heard oral arguments in *Obergefell* in April 2015, thirty-three states recognized same-sex marriage as a result of either litigation or the democratic process. The question of what the Court actually said in *Obergefell*, and the consequences of that decision, will be discussed throughout this book.

[35] 961 F. Supp. 2d 1181, 1194 (D. Utah).
[36] *Bostic v. Rainey*, 970 F. Supp. 456, 466 (E.D. VA. 2014).
[37] *Whitewood v. Wolf*, 992 F. Supp. 410, 426 (M.D. PA. 2014).
[38] www.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html?_r=0.
[39] http://edition.cnn.com/2014/02/08/politics/holder-same-sex-marriage-rights/.

The *Obergefell* Decision

Obergefell was decided by a bare five-justice majority, written over the separate dissents of Justices Roberts, Scalia, Thomas, and Alito. Various aspects of the dissents are also discussed throughout this book. The majority decision was authored by Justice Anthony Kennedy, who is known for soaring yet often legally imprecise language that inspires his admirers and antagonizes his detractors.

After very briefly summarizing the procedural history of the case, Kennedy began by noting the "transcendent" importance of marriage. He described the various same-sex couples who were parties to the case and wrote about why marriage was so important to each of them. Kennedy noted that one petitioner was a veteran of the war in Afghanistan who was stripped of his marriage rights when he moved from New York to Tennessee, serving in the Army Reserve. Another couple had adopted special needs children who lacked important legal protections because their parents could not marry. The named plaintiff, James Obergefell, could not be listed as the surviving spouse on his late husband's death certificate because Ohio would not recognize his Maryland marriage. In Kennedy's empathetic words, "By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems 'hurtful for the rest of time.'"[40]

Then, after a brief description of how marriage had evolved over time and an even briefer history of the discrimination faced by gays and lesbians in this country, Kennedy got to the heart of the matter: the idea that the due process clause of the Fourteenth Amendment protects certain fundamental rights, including the right to marry. He also demonstrated that the reasons the Court has given over the years for why marriage is a fundamental right are as applicable to same-sex marriage as they are to traditional marriage.

Next, in what might be the most important and least appreciated part of the opinion, Kennedy discussed the view that fundamental rights are defined and limited by this nation's history and tradition. He argues that the due process clause works in "synergy" with another part of the Fourteenth Amendment, the equal protection clause. While history and tradition define the parameters of certain fundamental rights, they cannot take rights away from minorities simply because those minorities have historically been unpopular or powerless. "If rights were defined by who

[40] 135 S. Ct. at 2594–2595.