

Same-Sex Marriage and the Constitution

In 2015 the Supreme Court made history by ruling that the Constitution protects the right of same-sex couples to get married. The third edition of perhaps the most influential book on the subject explains the Court's reasoning and what the consequences of the decision have been. The book also explains why the Supreme Court declined to rule that a ban on same-sex marriage was irrational or hateful or that the ban was an indirect form of gender discrimination. Instead, the Court ruled that there is a fundamental constitutional right to marry that covers same-sex couples. The book discusses the dissent's claims that the decision will lead to constitutional protection for polygamy. It also covers the controversy over whether there should be special laws that allow religious business owners not to serve same-sex couples who are married. This book is free of jargon and is accessible to anyone interested in same-sex equality, the Supreme Court, or constitutional law generally.

Evan Gerstmann is a Professor of Political Science at Loyola Marymount University. He is a widely cited scholar on the issues of same-sex equality and other timely legal issues. He has frequently appeared as an expert in both academic and popular media venues. His scholarship has covered issues ranging from same-sex marriage to the use of racially motivated force by police to sexual assault on the American university campus.

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*To my wife, Lauren, and to Inga and Henry Lurie – the most
constant stars in our children’s constellation.*

*And to all of the lawyers, activists, government officials, writers,
thinkers, journalists, and everyone else who helped bring about
this peaceful revolution. Sometimes the truth is enough.*

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Preface to the Third Edition

When the first edition of this book was published in late 2002, same-sex marriage was a marginal issue. *Bowers v. Hardwick* was still the law of the land. That odious Supreme Court case upheld criminal homosexual sodomy laws and dismissed the constitutional rights claims of the gay defendant as “at best facetious.” The only Supreme Court ruling on same-sex marriage was a one-line dismissal of a case brought by a same-sex couple. The Supreme Court of Hawaii gave a glimmer of hope when it ruled that the state’s same-sex marriage ban was subject to a high level of judicial scrutiny, but the voters amended the state constitution to effectively annul that decision before any final ruling could be issued. After the Hawaii decision, Congress passed the Defense of Marriage Act, which, among other things, denied federal recognition of same-sex marriages should any states legalize them. President Clinton signed the law without objection. Same-sex marriage was not legal in any state.¹

By the time of the second edition of this book in late 2007, things were changing rapidly. The Supreme Court overruled *Bowers* in 2003. Justice Anthony Kennedy’s language in that decision, *Lawrence v. Texas*, implied

¹ I should include a few words about terminology. I choose usually to use the term *same-sex marriage* rather than *marriage equality*. The latter term was a perfect evolution in terminology from a political perspective. It made clear that same-sex couples were merely seeking the same rights as everyone else, which is exactly the argument of this book. However, from a legal point of view, *same-sex marriage* is more precise. There are other forms of nontraditional marriage, such as polygamy and plural marriage, that are also attempting to claim the mantle of marriage equality, and I argue in this book that the fundamental right to marriage includes same-sex marriage but not those other types of marriage.

an understanding of the broad and gratuitous damage inflicted by sodomy laws on gay men and lesbians and also, for the first time, a concern for their dignity as individuals and for their intimate bonds as couples. While the *Lawrence* case dealt with sodomy, not marriage, the late Justice Scalia opined in dissent that the decision could spell the end of laws banning not only same-sex marriage but also bigamy, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity. Just a few months later, the Supreme Judicial Court of Massachusetts ruled that there is a state constitutional right to same-sex marriage, transforming what had so recently seemed a faraway daydream into a flesh-and-blood reality, albeit in a single state.

There was also the specter of backlash. The movement for same-sex marriage arguably hit its low point in 2004, when many prominent Democrats blamed the issue for John Kerry's defeat in the 2004 presidential elections and President George W. Bush called for a constitutional amendment "protecting" marriage as a union of a man and woman as husband and wife. Voters in many states amended their constitutions to proactively prohibit same-sex marriage.

Around this time it was popular to argue that courts were not institutionally equipped or inclined to protect minority rights and that the same-sex marriage movement should settle for civil unions rather than risk further backlash and more Republican electoral victories. The issue was seen as a liability for the Democrats and as a "hollow hope" for the courts.

But the issue would not die. Many political, academic, and media analysts underestimated the depth of longing that same-sex couples had for this basic human right. They also underestimated both the willingness of courts to respond thoughtfully to constitutional arguments and the resilience of the rising political movement to change the American people's minds and hearts. In 2005, a judge in Nebraska became the first federal judge in the nation to hold that there is a constitutional right to same-sex marriage. While that decision was overruled by the Federal Appellate Court, that case would turn out to be one of the last federal appellate decisions that *didn't* hold that there is a constitutional right to same-sex marriage. A decade later, the Federal Appellate Court for the Sixth Circuit (which has jurisdiction over Ohio and certain other Midwestern states) also held that there is not a constitutional right to same-sex marriage. By that time, the Sixth Circuit's opinion was an aberration, and it was that decision that the Supreme Court overruled in its historic 2015 decision *Obergefell v. Hodges*. During that decade, grassroots campaigns began to

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have greater success as well, and more states began to recognize same-sex marriages through the democratic process.

As the issue of marriage equality in America gained traction, it was no longer possible to dismiss it out of hand. Advancing into the twenty-first century, the nature of the conversation began to change. Public and legal arguments based on “crimes against nature” became less common, and more palatable arguments about preservation of tradition, respect for the democratic process, and the role of marriage in avoiding out-of-wedlock births by heterosexual women moved to the forefront. The shift in tone was dramatic. More than one court held that gays and lesbians² didn’t need marriage since any same-sex couple with children was probably stable enough without having to get married. This was a remarkable evolution from the past portrait of promiscuity that had so often tainted same-sex couples.

By the time of the Supreme Court decision in *Obergefell*, opponents of same-sex marriage were clearly on the defensive. A majority of states allowed same-sex marriage and a majority of Americans supported marriage equality. This represented a stunning turnaround in little more than a decade.

Yet the *Obergefell* decision has generated its own backlash. It has been labeled as “lawless” and an act of judicial usurpation of the democratic process by dissenting Supreme Court justices, high-profile political figures, and the conservative media. The nature of Justice Kennedy’s opinion, which is long on abstractions and not always clear in its constitutional analysis, has added fuel to this fire.

Therefore, this third edition has a new purpose. While it was originally an argument for an unfashionable and relatively obscure constitutional theory, it has evolved into a defense and explanation of what has become the highest law of the land. With great pride, I note that the *Obergefell* decision strongly reflects the arguments this book made fourteen years ago: there is a fundamental constitutional right to marry, and there is no

² Also regarding terminology, I use the term *gays and lesbians* or *gay men and lesbians* rather than *LGBT*. This is because someone who is bisexual may not be seeking a same-sex marriage, so that person does not fit my argument that the heterosexual monopoly on marriage realistically deprived gay men and lesbians from any possibility of marriage. Transgendered people do benefit from the recognition of same-sex marriage since many courts refuse to recognize their gender identity and therefore refuse to recognize their marriage as “one man, one woman.” However, the primary goal of most transgender activists is to have the law recognize their gender identity, which would mean that they are not in a same-sex marriage. Therefore referring to same-sex marriage as a transgender issue would be disrespectful to the actual wishes and goals of the transgendered.

reason why this right should not apply to same-sex couples. This third edition can now incorporate the specifics of the majority and dissenting opinions in *Obergefell* and engage the many arguments that are being made for and against the Court's decision.

New material in this book also addresses the resistance to same-sex marriage in some deeply conservative Southern states and the controversy over bills granting religious exceptions to vendors who do not want to serve same-sex couples. It shows that, despite widespread media coverage, such resistance has been almost entirely symbolic and has not created any meaningful barriers to same-sex couples getting married.

It should be noted that as this book was going into production, Donald Trump was elected president of the United States. While it is early to discern the impact of his presidency on same-sex marriage, two things stand out. In his first televised interview after the election, with *60 Minutes*, Trump made clear that turning back the clock on same-sex marriage was not a priority to him or even something that he wanted to do:

It's irrelevant because it was already settled. It's law... It was settled in the Supreme Court. I mean it's done. These cases have gone to the Supreme Court. They've been settled. And I'm fine with that.³

If I am making an early prediction of the impact of President Trump on same-sex marriage, it is that he is likely to appoint justices and judges who will take an expansive view of legislatively mandated religious exemptions from civil rights laws that require vendors to serve same-sex couples. That would certainly seem to be the case regarding his first nominee to the Supreme Court, Neil Gorsuch, who has never ruled on a same-sex marriage case but who has taken an expansive view of the Religious Freedom Restoration Act.⁴ However, that act only applies to the federal government and would have no impact on the state civil rights laws that have so far protected same-sex couples getting wed. As I discuss in Chapter 9, given the enormous size of the wedding industry, religious exemptions are unlikely to pose a true roadblock to same-sex weddings.

Same-sex marriage is one of the great issues of our times. It forces us to think more deeply and carefully about the tension between legal tradition and moral evolution, between individual rights and majority rule, and the

³ Cited in www.nbcnews.com/feature/nbc-out/trump-says-he-s-fine-gay-marriage-60-minutes-interview-n683606.

⁴ www.washingtonpost.com/politics/trump-picks-colo-appeals-court-judge-neil-gorsuch-for-supreme-court/2017/01/31/2b08a226-e55e-11e6-a547-5fb9411d332c_story.html?utm_term=.312918474dof.

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about the role of courts and judges in American society. In today's deeply divided times, it also reminds us that the American people are still capable of moving toward greater inclusion.

While more of this book's arguments have been accepted than I ever could have imagined, I know there is still room for good faith disagreements about all of them. I hope the readers of this book will better understand what the Court actually said – and what it might have said instead – what makes opponents of the ruling so angry (one dissenting justice wrote that he would “hide [his] head in a bag” if he had to join it), and what might happen next. The last chapters, so to speak, are certainly still unwritten.

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I also want to thank my Constitutional Law students, who always give me a fresh perspective on the issues of the day and how new generations think about issues of equality.

And of course, I thank my wife, Lauren, for her patience and wisdom, and my children, Isaac and Sam, who, with each new edition of this book, have grown in their ability to contribute their own thoughts on it.