PART I

THE CHALLENGE OF SAME-SEX MARRIAGE

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Introduction

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 one of the most important constitutional issues facing America today. To some that might seem an overstatement in these days of concern over terrorism, civil liberties, and other pressing issues. But same-sex marriage is one of the issues that most directly challenge 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 when the subject turns to gays and lesbians, many people grow 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 trouble many people who are genuinely committed to legal equality for all persons.

Moving Past "Gay Rights"

This book argues that 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 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 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?

The Importance of the Right to Marry

This book addresses each of those 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. I have chosen this particular issue because of its great importance to law and society. Legally, same-sex marriage is a fast developing issue. As Richard Epstein none-too-happily concedes, "The question of the legality of same-sex marriages has bullied its way to the front of the Constitutional agenda."[1] 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,"[2] and "it now plays a central role in the public debate in America over the legal status of gays and lesbians."[3]

The voters in Hawaii were taken aback by that decision and voted to amend the state constitution to allow the legislature to keep marriage

[1] Epstein, Richard A., "Caste and the Civil Rights Laws: From Jim Crow to Same Sex Marriages." *Michigan Law Review* 92 (August 1994): 2456–2478, 2473.

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

[3] Koppelman, Andrew, "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.

exclusively heterosexual. In 2000, the Supreme Court of Vermont added 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 allow 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 their partner's children, qualify for family health insurance, and many other benefits.

Same-sex marriage has also become a global issue. On April 1, 2001, the Netherlands became the first country to legalize same-sex marriage, and the number of countries that allow quasimarital, same-sex unions is growing. The United States is becoming increasingly isolated among Western nations in its lack of any legal recognition for committed same-sex relationships. In recent years, Norway, Sweden, Iceland, and France "recogniz[ed] same-sex marriage by another name," in the form of registered partnerships.[4] Numerous other European countries have, or are seriously considering, some more limited forms of legal recognition for same-sex marriage.[5]

The United States has gone in the opposite direction. In 1996 Congress passed the Defense of Marriage Act, which prevents same-sex couples from receiving any of the federal rights or benefits of marriage even if a state eventually allows same-sex marriage. Barring repeal of the statute, the only institutions with the power to alter the status quo at the federal level are the federal courts. According to former Supreme Court nominee Robert Bork, "many court watchers believe that within five to ten years the U.S. Supreme Court will hold that there is a constitutional right to same-sex marriage."[6]

Regardless of what one thinks of the merits of same-sex marriage, this is too important an issue for the federal courts to ignore. No right is more important to basic human happiness than the right to marry

[4] Waaldijk at 80. France's civil solidarity pact is more limited than in the other countries mentioned.
[5] Ibid. See also Eskridge, "Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition," 641–670, 641.
[6] Bork, *The Wall Street Journal* editorial (9/21/01).

the person one loves. Ninety-three percent of Americans rate "having a happy marriage" either one of their two most important goals or as a very important goal – far above the percentage of people who similarly rated "being in good health."[7] In fact, the right to marry is intimately tied to a person's health and longevity. Mortality rates are 50 percent higher for unmarried women than for married women. For unmarried men, the mortality rates are an astounding 250 percent higher than for married men. Being unmarried chops about ten years off a man's life.[8] The elderly are particularly vulnerable if unmarried. Unmarried patients have longer and more expensive hospital stays than married patients, and are two and a half times more likely to be discharged into a nursing home even accounting for obvious alternative factors such as the severity of illness, age, race, and diagnosis.[9] Furthermore none of this can be explained as mere selection effects.[10] Nor is cohabitation a substitute for marriage. These health differences are between married and unmarried people, not between people who live alone and people who live together.

Gays and lesbians crave entry to this life-altering relationship that has meant so much to so many heterosexual couples. "The most ambitious poll on the topic, conducted by *The Advocate* in 1994, found that almost two-thirds of the gay men polled wanted to marry someone of the same sex, with 85 percent open to the idea and only 15 percent uninterested. *The Advocate*'s poll of lesbians, published in 1995, also revealed strong interest in getting married."[11] Not all gays and lesbians see marriage positively or wish to marry,[12] but that is hardly a reason to deny the right to marry to the great majority of gays and lesbians that do.

The Indispensability of "Rights Talk" to a Legally Equal Society

The Fourteenth Amendment grandly promises all persons in America the "equal protection of the laws." To enforce this promise, the Supreme Court asks two questions when someone alleges that a law

[7] Waite and Gallagher at 2.
[8] Ibid. at 47–48.
[9] Ibid.
[10] Ibid. at 51 et seq.
[11] Eskridge at 78–79.
[12] See, e.g., Polikoff at 1535.

is discriminatory. The first question is "who has been discriminated against?" If, for example, a state prison refuses to hire African Americans, women, and gay and lesbian prison guards, the Court will apply different levels of judicial scrutiny to each of these exclusions. In my book, *The Constitutional Underclass: Gays, Lesbians and the Failure of Class-Based Equal Protection,*[13] I criticize this approach for two reasons. One is that the Court has failed to give any rational justification for treating the rights of different groups differently, and the explanations it has put forward are incoherent. For these justifications to make sense, we would have to believe, for example, that gays and lesbians as a group are more politically powerful than women as a group, since gays and lesbians, but not women, have been told by the federal courts that they are too politically powerful to receive strong judicial protection from discrimination.[14]

The other reason I criticize the group-based approach to legal equality is that it is divisive. It requires groups that believe that their rights are being violated to argue that they need special protection from the Court because they are politically powerless victims of historical discrimination and modern prejudices. They must define themselves as a victim group. Many political theorists such as Jean Bethke Elshtain and Sheldon Wolin have warned of the dangers posed to democracy and civil society of "the politics of difference": defining oneself primarily as a member of a victimized group, rather than as a citizen who shares rights and responsibilities with other citizens.[15]

The Court also uses the equal protection clause to protect certain "fundamental rights," which are not explicitly mentioned in the Constitution but are deemed vital to a legally equal society. This approach is unitive rather than divisive. It requires us to ask what rights we all share, regardless of whether we are powerful or powerless, popular or despised. If we want Americans to think of themselves as citizens rather than members of aggrieved groups, then we need to take this question very seriously.

Gays and lesbians are often accused of seeking "special rights" or of trying to portray themselves as a persecuted minority analogous to

[13] See Gerstmann.
[14] This is explained in much greater detail in Chapter 4 of Gerstmann.
[15] See Elshtain, *Democracy on Trial.*

racial minorities.[16] But if we want gay and lesbian Americans to think of themselves as Americans first and as gays and lesbians second then we have an obligation to give serious, thoughtful consideration to the issue of what rights all American share regardless of sexual orientation. This book argues that we have not met this obligation. The reasons that courts have given for refusing to extend the right to marry – a Constitutional right that heterosexuals take for granted and do not lose even if they commit felonies or fail to support their children from previous marriages – are remarkably ill-considered. This will be discussed in Part I of this book.

Outside of liberal academic circles, the reaction of many to the issue of same-sex marriage is often one of weary dismissiveness. There is a sense that gays and lesbians are asking for yet more, or that the whole issue is rather silly because everyone knows that marriage is exclusively between two people of different genders. In fact, reasoned, genuinely attentive discussion on this issue is only just beginning as more courts are giving serious consideration to the scope of the right to marry and thereby requiring others to do so as well.

The question of who may marry whom is worthy of society's sustained attention, because marriage is absolutely fundamental to human freedom and happiness. Hannah Arendt believed that the right to marry whomever one wishes is even more fundamental than is the right to vote. As will be discussed in Chapter 4, the Supreme Court has long held that marriage is one of the fundamental rights of all people.

Consistent protection of the rights of all Americans is the only alternative to the politics of group rights and special grievance and is essential to a legally equal society. Unfortunately, the idea of legal rights is under attack from a multitude of sources. In her book *Rights Talk*, Mary Ann Glendon argues that the discourse of rights overemphasizes individual autonomy over the duties and responsibilities that make society worth living in.[17] But the right to marry is an excellent example of how rights protect not only individual autonomy but also the capacity for us to make meaningful commitments to others. Marriage is a unique and powerful institution for willingly taking on responsibility

[16] See Chapter 5 of Gerstmann.
[17] See, e.g., Glendon, *Rights Talk*.

for another human being. It is an indispensable means for making a meaningful long-term commitment to another person. People who merely live together are less sexually faithful to their partners than are married couples, are less committed to the idea of sexual fidelity, and are less willing to support or be financially responsible for their partners.[18]

Nonetheless, many influential scholars and lawyers are skeptical of rights-based equality. Court protection of individual rights is attacked by some as being antidemocratic. Others argue that judges decide cases based upon attitudes and strategic concerns rather than abstract legal rights. Still others argue that what courts say and do has little impact upon the outside world.

Unfortunately, there is a dearth of literature that addresses these various arguments in an organized fashion. "Originalists," who believe that the Court should not read modern values into the Constitution, rarely engage "attitudinalists," who believe that judges mostly read their own beliefs into the Constitution. Advocates of gay and lesbian rights rarely discuss the famed "Hollow Hope" thesis that Courts are usually ineffective at creating social change. Scholars of legal history and doctrine, mostly law professors, rarely engage scholars of judicial behavior, who are mostly social and political scientists.

This book attempts to bridge these several divides by taking a single important rights issue, same-sex marriage, through the gauntlet of objections and challenges posed by these various schools of rights skepticism. I have made an effort to address every substantial objection to judicial protection of same-sex marriage on its own terms. This book does not take for granted that the Court should protect rights that cannot be found in the text of the Constitution, or that the Court's past decisions protecting marriage were correctly decided, or that judges mechanically apply law to facts, or that Courts can change society with a bang of the gavel. Each of these important issues is specifically addressed in the following chapters. Thus, this book should be of interest to people who care about the issue of same-sex marriage, as well as to readers who are broadly interested in the role of courts and law in society.

[18] Waite and Gallagher at p. 39.

Advocacy and Objectivity

This is a work of advocacy, but it is not primarily advocacy for same-sex marriage, although I do support the right to marry a person of one's own gender. It is meant as advocacy for good faith engagement with an issue that people often react to in an angry or emotional manner. I make no claim to "objectivity," a term that is, to say the least, controversial. I do attempt fairness, by which I mean a willingness to take counter positions seriously and respond to them without ignoring or defining away their underlying merits. I believe that arguments speak for themselves and do not depend upon the identity of the person who makes them. It is worth noting, though, that when I began this project, I was planning on writing a book *against* courts requiring states to recognize same-sex marriage. I believed that the democratic process should resolve the issue rather than the courts. As I progressed in my research, I simply became won over by the strength of the arguments on the other side.

For a very long time, the Supreme Court has held that the Constitution protects our right to marry whomever we want and I was genuinely surprised at the lack of convincing reasons for denying this right to same-sex couples. Andrew Koppelman, who is actually a well-established advocate of same-sex marriage, has written, "This right [to marry] must, however, have implicit limits. It cannot mean that I have a right to marry my goldfish, or my sofa."[19] But marriage is a consensual relationship and animals and furniture are unable to consent to any contract, much less a marriage contract. Nor are children. The arguments for why two consenting adults cannot enter into a marriage are far murkier.[20]

The Book's Organization

The following two chapters explore and reject alternative theories as to why the Constitution might protect same-sex marriage. In Part I, Chapter 2 examines the argument that the heterosexual monopoly on

[19] Koppelman, Andrew, "Why Gay Legal History Matters." (book review). *Harvard Law Review* 113 (June 2000): 2035–2060, 2046.

[20] The analogies to incestuous and polygamous marriages require a lengthier treatment. See Chapter 4.

marriage is "irrational." Chapter 3 asks whether gays and lesbians as a group should receive heightened protection from the Court because they are a persecuted minority or because sexual orientation discrimination is really a disguised form of gender discrimination.

Part II of the book begins, in Chapter 4, the analysis of the fundamental right to marry. Chapter 4 lays out the history and development of that right. It demonstrates that the right to marry is one of the oldest recognized constitutional rights, far older than the better known, but more recent and amorphous "right to privacy." Chapter 5 examines whether there is any reason that the right to marry does not apply to same-sex couples.

Part III, in Chapters 6 and 7, engages in normative analysis of the Court's decisions on marriage. Just because the Court has held that there is a broad right to marry does not mean that the Court is right. Many scholars have argued that the Court should not be in the business of protecting rights that are neither mentioned in the Constitution nor in keeping with the intent of the people who framed or ratified the Constitution. These chapters address the question of why the Court enforces certain rights at all and what those reasons tell us about whether the Court should protect the right of same-sex couples to marry.

In Part IV, Chapters 8 and 9 discuss some of the broader issues. In a democratic society, should the Court take up this question at all? Does any of the doctrinal analysis even matter when many have argued that legal principles actually have little to do with how judges really act? Would judicial action make any difference as a practical matter? These chapters answer these questions in the affirmative. They use the Court's First Amendment jurisprudence as an example of an area in which judges have applied legal principles vigorously, even in the case of powerful public opposition and, in some cases, despite their own explicit distaste for the outcome. We will see that gays and lesbians have had their greatest and most consistent successes in First Amendment cases, because this is an area where the law is unusually well defined and therefore well situated to effectively protect unpopular litigants. This book argues that the best way for the courts to protect legal equality for all under the equal protection clause is to identify fundamental rights such as the right to marry and to define and protect those rights with the same rigor and consistency as in the area of freedom of speech.