Same-Sex Marriage and the Constitution

Does the Constitution protect the right to same-sex marriage? Much of the writing on this subject has been highly one-sided. This book takes a careful second look at the issue. Not only does it carefully look at the legal debate, but it also asks whether, in a democratic society, the courts should settle this question rather than the voters and it takes on the issue of whether such a court-created law could be effective in the face of public opposition. The book argues that this issue is one of the most significant constitutional issues facing society because it challenges society's commitment to the promise of true legal equality.

Evan Gerstmann is an Associate Professor at Loyola Marymount University. He received his Ph.D. from the University of Wisconsin–Madison after receiving his undergraduate degree from Oberlin College and his law degree from the University of Michigan Law School. His publications include *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection.*

"Evan Gerstmann has here presented a carefully crafted, highly nuanced, and important argument about same-sex marriage. His conclusion will be controversial, but in the best sense: People will be forced to reckon with his powerful argument."

– H. N. Hirsch, *Macalester College*

"This book does the best job I have seen in relating the constitutional law and theory of equal protection and the implied fundamental right of privacy to the politics of whether the Supreme Court should decide the important question of the right to same-sex marriage. This well-written, sensitive, and original book will be of invaluable use in undergraduate and law school classrooms. Evan Gerstmann demonstrates the tautological nature of arguments against gay marriage, while still being respectful to alternative arguments such as Sunstein's call for Supreme Court minimalism on this matter."

– Ronald Kahn, *Oberlin College*

"In *Same-Sex Marriage and the Constitution*, Evan Gerstmann once again applies his considerable analytical scalpel to an issue of constitutional and moral importance. Showing due regard for competing normative and legal arguments, Gerstmann exposes the weaknesses in existing positions on both sides of the debate. He then presents an illuminating and convincing case on behalf of same-sex marriage rights based on a conception of equal protection that is applicable to all citizens, regardless of their sexual orientation. The book will enlighten not only those concerned with the issue of same-sex marriage, but also those interested in jurisprudence, constitutional law, and the relationship between constitutional law and citizenship. Gerstmann's innovative approach points us toward a more productive understanding of equal protection."

– Donald A. Downs, *University of Wisconsin-Madison*

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

Contents

Revised Preface

Just as this book was being published, the Supreme Court handed down its decision in *Lawrence v. Texas*, striking down the Texas anti-sodomy law. Shortly afterwards, a tidal wave of change swept over the landscape, in Massachusetts, California, New York, Canada, and elsewhere, altering the debate over same-sex marriage with dramatic speed. This revised preface takes into account these new developments.

Lawrence is an enormously important decision that supports the central arguments of this book. Most constitutional experts had thought the Court would strike down the law on the relatively narrow ground that it targeted only gays and lesbians. Instead, the Court unexpectedly issued a much more radical decision, overturning *Bowers v. Hardwick* (1986), the constitutional *bête noire* of gays and lesbians. *Bowers* not only had upheld Georgia's broadly defined sodomy law, but also contained language that was widely viewed as vilifying gays and lesbians. The rejection of *Bowers* was further noteworthy because the Court rarely overturns its own decisions, and because a Court with a conservative majority overruled a decision that many conservative commentators viewed favorably.

When I was writing this book, a great many experts who were sympathetic to the idea of same-sex marriage believed it was too aggressive to call for federal courts to recognize a right to these unions under the Constitution. Many averred that the idea of same-sex marriage was too unpopular and the arguments for it were too radical. It was better that advocates for same-sex marriage set their sights on more limited goals,

including civil unions or domestic partnerships, they argued. This book rejects such a cautious approach, and *Lawrence* suggests the Court well might recognize the right to same-sex marriage.

First, *Lawrence* disposes of the argument that same-sex marriage is not a real marriage because it cannot legally be sexually consummated, an argument that has been central to the case against same-sex marriage. Second, *Lawrence* appears to indicate that the Justices have a new appreciation of the complexities of history and of the daunting challenges of interpreting its lessons. A simplistic, one-sided account of how Western society has always condemned homosexuality dominated *Bowers*; historians have widely condemned this view for its lack of balance and rigor. Such simplistic history has also been at the core of opposition to same-sex marriage. Even people who rightly regard themselves as tolerant and sympathetic to equal rights for gays and lesbians are hesitant to endorse same-sex marriage because of their overwhelming intuition that marriage has *always* been between a man and a woman, and that same-sex marriage is contrary to the weight and lessons of history. These arguments are problematic, and a more sophisticated Court is more likely to understand those problems. *Lawrence* presents a far more nuanced view of history and of the complexities that, in the Court's words, "counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance."

Lawrence is also notable for the Court's attention to the legal views of other Western nations. Generally, the Court has been extremely parochial, ignoring the legal world beyond the United States. But in *Lawrence*, the Justices paid careful attention to the views of the European Court of Human Rights, which has held repeatedly that the right of sexual privacy extends to gays and lesbians. In fact, in the Court's most recent term, it referred to the laws and legal decisions of other Western nations in several cases. This increasing global awareness bodes well for advocates of same-sex marriage. While I was writing this book, only the Netherlands recognized same-sex marriages. Now, just a year later, Belgium recognizes them and, apparently Canada, is about to do so. A great many Western nations recognize the kinds of legal rights of same-sex partners that, until very recently, only the tiny State of Vermont recognized in this country. The growing recognition of same-sex marriage around the world should help make the Court more receptive to the idea of such unions.

Internationally, the situation in Canada is likely to have an especially great impact here in the United States. In 2003, courts in Ontario, British Columbia, and Quebec all ruled that Canada's common law definition of marriage – one man, one woman – violates Canada's Charter of Rights and Freedoms. In Ontario, same-sex couples, including American couples that travel to Ontario, are free to marry. At the time of this writing, it appears that the Canadian government is likely to ratify same-sex marriage for the entire country. A bill allowing same-sex marriage was sent to the Supreme Court of Canada to be vetted prior to being returned to the legislature.

While it is far from guaranteed, the Supreme Court might follow Canada's lead. *Lawrence* represents a new judicial recognition of, and respect for, the human dignity of gays and lesbians. The Court bluntly stated that its decision in *Bowers* "demeans the lives of homosexual persons," an admission that is critical to the debate over same-sex marriage. Also, *Lawrence* recognizes the crucial link between substantive rights and legal equality. "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests," the Court said. In attempting to protect legal equality, federal courts have focused much of their energy on dividing people into "classes" that receive different levels of constitutional protection against governmental discrimination. "Suspect classes" are protected by "strict scrutiny," "quasi-suspect classes" are protected by "intermediate scrutiny," and others, such as gays and lesbians, are protected by the lowest level of scrutiny, which is called "rational basis scrutiny". A discriminatory law will pass rational basis scrutiny if the State can show that it is rationally related to a legitimate governmental interest. I argue in other writings that this approach is a misguided dead end that should be abandoned. *Lawrence* could represent an important step toward recognizing that the key to legal equality is to protect substantive rights at the same level for everybody.

Finally, *Lawrence*, like other recent decisions, indicates that the Court might not be the rigidly ideological institution it is often portrayed to be. Among social scientists, the overwhelming view of the Court is that it is mostly interested in translating its members' politics (mostly conservative) into constitutional doctrine; the much-criticized decision in *Bush v. Gore*, in which the Court split along ideological lines

in favor of George W. Bush, reinforced this view. If this interpretation is correct, same-sex marriage would have virtually no chance of passing muster with the Court. But the justices ended their term in June 2003 with a flurry of liberal decisions in major cases involving affirmative action, the rights of criminal defendants, and, of course, sexual privacy.

I must note that the Court's overturning of *Bowers* meant that a few parts of this book were dated just before publication, an inevitability when the world changes quickly. Fortunately, only a very small part of this book deals with *Bowers*, and the rejection of that decision merely buttresses my arguments in those sections. I address *Bowers* mostly to show that the ruling did not contradict my arguments. Obviously, those sections that refer directly to *Bowers* should be read with *Lawrence* in mind. Most significantly, Chapter 2 discusses whether the government has a rational basis for banning same-sex marriage. It argues that most reasons given for the ban are ill considered, but that pursuant to *Bowers*, moral condemnation of homosexuality qualifies as a rational basis. After *Lawrence*, however, a ban on same-sex marriage is on even shakier ground and might not even pass the lowest standard of judicial review.

Indeed, one court has already come to that conclusion. *Bowers*' demise helped pave the way for the Supreme Judicial Court of Massachusetts' landmark ruling that the state's ban on same-sex marriage lacks a rational basis. In *Goodridge v. Department of Public Health* (November 2003), the Massachusetts court declared that "the marriage ban does not meet the rational basis test for either due process or equal protection." The *Goodridge* Court rejected all three of the State's reasons for the same-sex marriage ban: providing a "favorable setting for procreation"; ensuring an optimal setting for child rearing; and preserving state resources. Using reasoning nearly identical to the arguments in this book, the *Goodridge* Court concluded that the major impact of same-sex marriage on children would be to provide additional protections to children in same-sex-headed households, and would not adversely affect any other children.

In February 2004, the Supreme Judicial Court of Massachusetts issued a further ruling, clarifying that the *Goodridge* decision required same-sex marriage, not merely civil unions or any other marriage-like institution. The court reasoned that: "The history of our nation has demonstrated that separate is seldom, if ever, equal." The court ruled that same-sex couples must be allowed to marry by May 17, 2004. As

this book goes into its second printing, the Massachusetts legislature was still debating whether to amend the state constitution. Passage of such an amendment, despite numerous premature predications that such action was imminent, remains uncertain. Also, because the Massachusetts constitution cannot be amended until the legislature votes to do so in two consecutive years, no amendment could take effect until Fall of 2006 at the earliest. Therefore, it appears inevitable that, as a result of *Goodridge*, there will be legally recognized same-sex marriages in the United States.

Much remains unclear about what the results of this will be. Legal experts sharply disagree about whether same-sex marriages will have to be recognized by other states and what the status of those marriages will be in Massachusetts, should that state choose to eventually amend its constitution. Nonetheless, the United States is about to pass a major milestone in the debate over same-sex marriage.

Another major event since the first printing of this book is the decision of city officials in San Francisco to allow same-sex marriages. Over 4100 couples got married in San Francisco between February 12, 2004, when the Mayor first implemented the new policy, and March 11, 2004 when the California Supreme Court ordered at least a temporary halt to them, until the court could rule on whether the Mayor of San Francisco exceeded his authority. Notably, the Court did not void these marriages, leaving the future of same-sex marriage in California very much up in the air.

After San Francisco officials began performing same-sex marriages, a number of other city and county officials across the nation followed suit, with officials in New Jersey, New Mexico, New York State and Oregon performing same-sex marriages or issuing marriage licenses to same-sex couples. In each case the officials argued that the equal protection language in their state constitutions, as well as the United States Constitution protected the rights of same-sex couples to marry.

Opponents of same-sex marriage reacted strongly to many of these events. Prosecutors charged the Mayor of New Paltz, New York with 19 criminal counts of violating state law by solemnizing weddings without a proper license. The Attorney General of New Jersey also threatened to bring criminal charges against local officials who conducted same-sec marriages. Prosecutors in New York brought criminal

charges against two Unitarian Universalist ministers for performing same-sex marriage.

The response that gained the greatest national attention, however, was President Bush's call for an amendment to the Unites States Constitution that would ban same-sex marriage. This call for an amendment, although perhaps predictable in an election year, struck many legal and political experts as unnecessary and premature, even from the point of view that same-sex marriages are undesirable. For one thing, the President's call seemed to concede the central argument of this book, which is that, absent amendment, the Constitution does indeed protect same-sex marriage. The President's call was also surprising because it federalizes an issue that had always been left to the states. The President warned that courts might force all fifty states to recognize same-sex marriages performed in Massachusetts under the Constitution's "full faith and credit clause." But as many legal scholars have pointed out, the Court never used that clause to force Jim Crow states to recognize interracial marriages performed in other states.

Although the majority of the American public is opposed to same-sex marriage, both elite and popular attitudes toward a constitutional amendment are mixed. Of course, should such an amendment pass, which would require approval by two-thirds of both houses of Congress and ratification by the legislatures of three-quarters of the states, this would dramatically alter the landscape for same-sex marriage.

This is an exciting, sometimes confusing time to be studying same-sex marriage. From this author's point of view, the rapidity of the change in this area has been astonishing. This is an area in which law and politics are both moving swiftly, sometimes synergistically, sometimes in opposition. My hope is that this book will give the reader a solid grasp of the constitutional issues at the core of this debate and provide a foundation for understanding the quickly, sometime convulsively, changing terrain of the same-sex marriage debate.

Los Angeles,
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