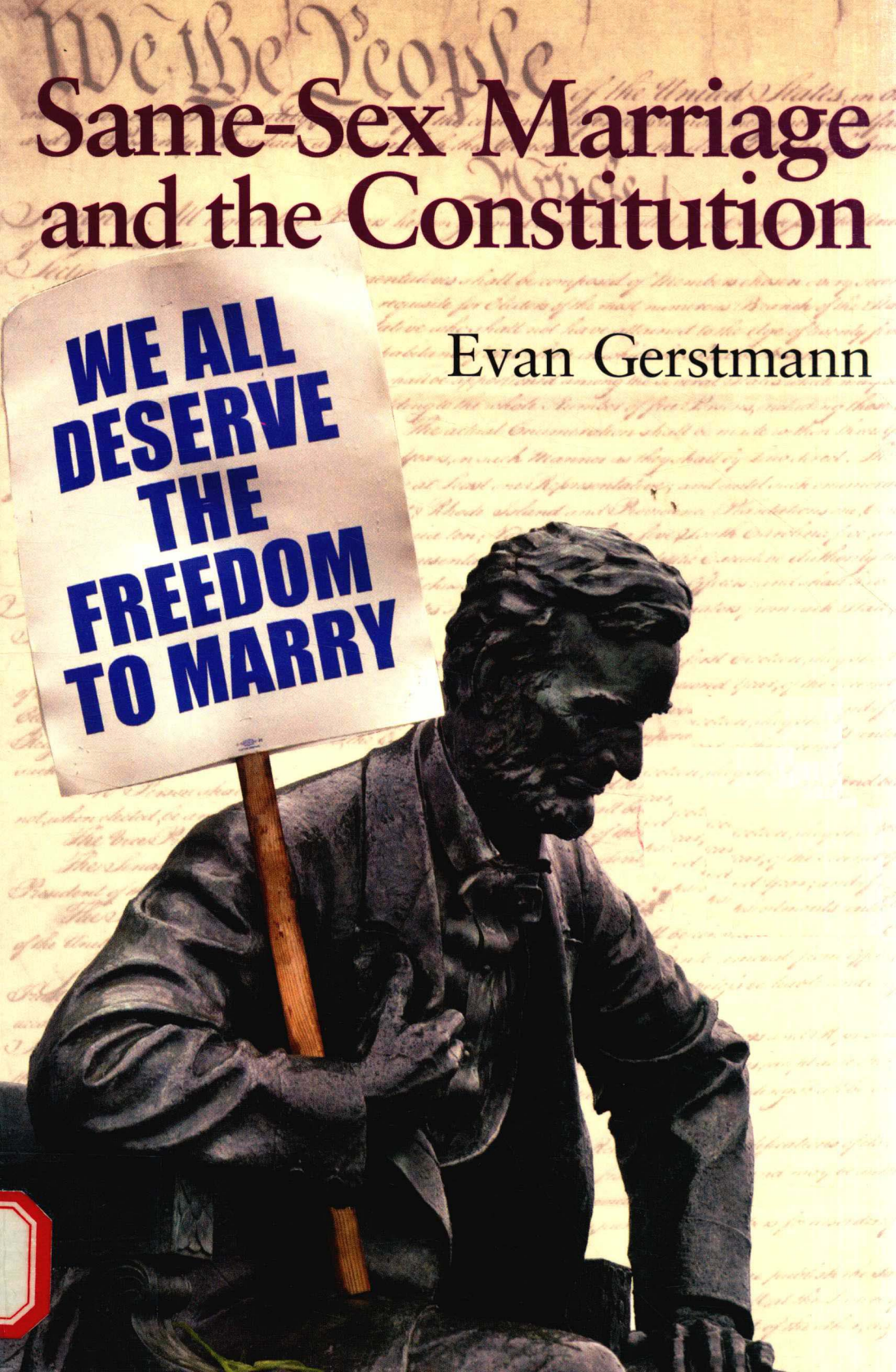
Same-Sex Marriage and the Constitution



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

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,
2004

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PART I

THE CHALLENGE OF SAME-SEX MARRIAGE

1

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).