

**Sexual Orientation,
Gender Identity,
and the Constitution**

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Sexual Orientation, Gender Identity, and the Constitution

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To Mike

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Preface

When I first started teaching a course in sexual orientation, gender identity, and the law over a decade ago, I would have never imagined that the legal landscape for sexual minorities would change as quickly and dramatically as it has. Back then, *Bowers v. Hardwick*—the U.S. Supreme Court’s 1986 decision upholding the constitutionality of sodomy laws—was still the law of the land, and it was regularly invoked by lower courts as a basis for upholding the constitutionality of laws discriminating against sexual minorities in virtually every aspect of life, including laws denying them custody of their children and laws allowing them to be discriminated against in public employment. Back then, not a single state permitted same-sex couples to marry, sexual minorities were not permitted to serve openly in the military, and public support from elected officials was rare.

Today, by contrast, *Bowers* is no longer the law—having been overturned in 2003 by *Lawrence v. Texas*—and *Lawrence* is with increasing frequency invoked by lower courts as a basis for striking down laws discriminating against sexual minorities. Six states plus the District of Columbia currently allow same-sex couples to marry, while another dozen states permit same-sex couples to enter into domestic partnerships, civil unions, and other substitute relationship recognition schemes. Voters in three states—Maine, Maryland, and Washington—will decide whether to extend the right to marry to same-sex couples in the November 2012 election, with polls showing all of them standing a reasonable chance of being approved. In 2011, Don’t Ask, Don’t Tell—the military’s policy banning open service by gay, lesbian, and bisexual servicemembers—was repealed. Elected officials from both major political parties have recently voted in support of extending marriage and other rights to sexual minorities, and the President of the United States in 2012 became the first U.S. President to publicly back marriage rights for same-sex couples.

Despite this progress, sexual minorities continue to face significant legal obstacles. Thirty states have amended their constitutions to prohibit same-sex marriage, and in some cases, domestic partnerships and civil unions as well. The Federal Defense of Marriage Act prevents same-sex couples lawfully married under state law from receiving federal rights, such as joint income tax filing and survivor social security benefits. Sexual minorities are still largely unprotected against employment discrimination. Moreover, some Members of Congress seek to reinstate Don’t Ask, Don’t Tell, and military service by transgendered persons is still prohibited. And new state laws are constantly being proposed or adopted to limit the rights of sexual minorities. Accordingly, constitutional litigation regarding the rights of sexual minorities is certain to continue into the foreseeable future.

I decided to write this textbook to fill an important gap in the existing collection of textbooks in the fields of constitutional law and sexual orientation, gender identity, and the law. Textbooks in the field of constitutional law cover so many topics that they can provide only limited coverage of constitutional litigation regarding the rights of sexual minorities. On the flip side, existing textbooks in the field of sexual orientation, gender

identity, and the law provide only limited coverage of constitutional law, as they seek to cover all areas of common and statutory law impacting the rights of sexual minorities, such as family, employment, and tax law. Moreover, because constitutional law books are not typically written from the perspective of sexual minorities, they often omit cases—and edit out language in foundational cases—that are of critical importance in litigating the constitutional rights of sexual minorities. And because books on sexual orientation, gender identity, and the law are not typically written from the perspective of a constitutional litigator, they likewise omit critical cases and excerpts from cases. Given their respective broad scopes, both types of textbooks provide only limited coverage of lower state and federal court constitutional law decisions. Finally, neither type of book takes into account the many procedural obstacles that are typically covered in textbooks on federal courts and that have played an increasingly prominent role in constitutional litigation involving the rights of sexual minorities.

As someone who has written and taught in the fields of constitutional law, federal courts, and sexual orientation, gender identity, and the law, I have written this textbook so as to incorporate all three perspectives. The result is a book narrower in focus but greater in depth that is designed to teach students all of the procedural and substantive aspects of constitutional litigation regarding the rights of sexual minorities.

The book is divided into six chapters. Chapter 1 addresses threshold questions regarding the definitions of sexual orientation, sex, and gender, raising the question whether they are about status, conduct, desire, biology, self-identification, or some combination of all of these, and thus setting the stage for the question of “immutability” and the status-conduct and speech-conduct lines that arise in the equal protection, substantive due process, and First Amendment materials that follow. Chapter 2 addresses the various procedural obstacles that arise in constitutional litigation, such as standing, mootness, abstention, and the precedential weight of prior summary affirmances by the U.S. Supreme Court. The next four chapters address each of the three key constitutional doctrines that arise in litigation regarding the rights of sexual minorities. Chapter 3 introduces students to substantive due process, while Chapter 4 introduces them to equal protection principles. Chapter 5 then provides in-depth coverage of both substantive due process and equal protection principles working in tandem in cases involving marriage, parenting, and public employment. Finally, Chapter 6 examines the application of First Amendment principles in cases involving the rights of sexual minorities.

The six chapters are not completely independent, but are instead carefully integrated with one another. Thus, excerpts from the same case might appear in all six chapters, as students consider the threshold definitional questions and procedural obstacles, followed by substantive constitutional challenges on equal protection, substantive due process, and First Amendment grounds. The book thus replicates the stages of analysis that arise when litigating any such case from start to finish.

Throughout the book, I try to use a balanced mix of cases, problems, textual narrative, and explanatory notes. Thus, each section of the textbook typically begins with introductory narrative designed to introduce students to the concept or constitutional principle covered in that section. That narrative is often followed by a problem designed for use in class as a vehicle for raising and addressing the conceptual ambiguities that arise in applying that concept or constitutional principle. Resources for answering the problem are provided by the materials following the problems, usually a set of cases followed by a series of explanatory notes.

The extensive use of problems throughout the textbook—twenty in-depth problems in all—is a key feature of this book designed to help students to master the *application*

of constitutional law. By the time law students take constitutional law, most of them have learned how to read cases and to recite the holdings of those cases. Yet many students find it difficult to apply those principles when presented with alternative factual scenarios. These problems thus provide students with ample opportunity to hone their skills in applying constitutional law and to receive feedback on the same.

Because the book covers basic constitutional law doctrine as well as more focused case law regarding the constitutional rights of sexual minorities, it can be used effectively in three different types of courses. First, it can be used in a stand-alone course on sexual orientation, gender identity, and the law. Second, it can be used in a traditional, rights-based constitutional law course by a faculty member who wishes to teach the course with greater focus on the constitutional rights of sexual minorities. Finally, the book is sufficiently comprehensive that it can be used in non-law school courses as well.

In putting this textbook together, I am indebted to my student research assistants, Walter Smith, Chris Olah, Daniel Richards, and Mark Tyson. Walter has worked with me on the book since its inception, comparing all of the edited cases and cited materials with the original sources to ensure accuracy, as well as providing me with valuable research assistance and substantive feedback throughout the drafting process. Chris—in addition to providing me with valuable research assistance—meticulously proofread the entire book from cover-to-cover. Daniel and Mark proofread the final draft of the book from cover-to-cover. I also wish to thank Visiting Professor Ronald K.L. Collins (University of Washington School of Law) and Professor David Skover (Seattle University School of Law)—both experts on the First Amendment—for their invaluable feedback and suggestions regarding Chapter 6. Finally, I wish to thank the students in my Winter 2011 and Spring 2012 courses in GLBT Rights & the Constitution, who gave these materials a trial run and provided me with extremely valuable feedback and suggestions as I prepared these materials for press.

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