

Bill Eskridge & HKG Edit v2 071222

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This is Inside Yale Law School, the podcast series designed to give you a peek inside to the scholars, the thinkers, the teachers, and the game-changers of Yale Law School. I'm Heather Gerken, the dean, here to open a little window into the world of this remarkable place.

Ruth Bader Ginsburg, I taught with her husband, Marty. I'm friends with her daughter, Jane. And every six months, Ruth Bader Ginsburg invites me and Don Petrone, my artist friend, to a musicale at the US Supreme Court where I hobnob with justices who, just 30 years ago, their court had declared people like me enemies of the state, presumptive criminals who can be put away for as much as 20 years with the law that they upheld. So it's been a remarkable journey.

Welcome, everyone. Today, I have with me the wondrous Bill Eskridge, John A Garver Professor of Jurisprudence at Yale Law School. Bill, thank you so much for being here.

Heather, thank you for having me.

Bill, I actually want to start with something that's a little bit more personal and then move on to your scholarly work. But you are maybe not what someone would imagine as the paradigmatic Yale Law professor, so can you talk a little bit about where you grew up and how you managed to end up here? Well, Heather, I think you're right. I do have an unusual background for a Yale Law professor, because I grew up largely in small town Appalachia, southern West Virginia for most of my life, though I did come from a very educated family. Both mother and father had bachelor's degrees, and my grandfathers both had law degrees from the University of Virginia, of all places.

So I grew up in Princeton, West Virginia, the county seat of Mercer County, in the house that my great grandfather built, and I went on to Davidson College, Harvard University for a history degree, and then, Yale Law School for my law degree. The other thing kind of unusual about my background is that I grew up in an era where I realized at age nine that I was gay, but that was an era where to be openly gay would have been suicidal, and possibly, even dangerous. So for most of my adult life and all of my youth, I sort of lived in what was called the closet, coming out only when I went to Georgetown University, a Roman Catholic institution, interestingly enough.

So, Bill, here's a list of things I did not know about you. You were the GM of UVA softball team. You write movie reviews. You have a stamp collection. And you actually watched Steph Curry break the Davidson scoring record with the Curry family. Tell me about the other side of Bill Eskridge that no one else sees? Well, the Steph Curry thing is probably the most memorable. I went to Davidson College, Presbyterian school. Was a real struggle for me because I was still in the closet. But then, under President Carol Quillen, the current president of Davidson College, I've been warmly re-embraced by the college, and indeed, received an honorary degree, and have become much closer to the college than I had been before.

Ironically, my cousin, Sally Gross Close Corden and her husband and children also live in Davidson and they became very good friends with the Curry family. Dell Curry was a big basketball star in the NBA, and he and his wife have a couple of basketball playing sons. Steph Curry is probably the best known of them and was the basketball star in the history of Davidson College.

Well, cousin Sally was very good friends with the Curry family and I would attend basketball games with her. And I saw in a game, I think, against Georgia State, Steph Curry break the scoring record at Davidson as a junior. And he did it in a game where he passed the ball to his teammates every opportunity he got, and the teammates failed to make baskets every opportunity they had. So to win the game, he actually had to start taking some shots and making baskets, and we won the game.

He is a prince. The family is awesome. So I have met and known a number of absolutely fascinating people in my life, and it's been quite remarkable. Dean Heather Gerken, the first permanent female dean of the Yale Law School. Sonia Sotomayor was my note author when I was the note and topics editor at the Yale Law Journal and it's been a constant revelation in my life.

Ruth Bader Ginsburg, I taught with her husband Marty. I'm friends with her daughter, Jane. And every six months, Ruth Bader Ginsburg invites me and Don Petrone, my artist friend to a musicale at the US Supreme Court where I hobnob with justices who, just 30 years ago, their court had declared people like me enemies of the state, presumptive criminals who could be put away for as much as 20 years, the law that they upheld. So it's been a remarkable journey.

Amen for that. I want to talk more about your relationship to your work, and in particular, your work on marriage equality. But maybe I should just start with what some might think is a drier topic, but you've been a pioneer in the field of statutory interpretation. Could you talk a little bit about that work?

Well, first of all, I'd like to push back a little bit and announce that statutory interpretation is second to none as a fascinating and critically important topic. If you're interested in the future of the planet, climate and environmental, if you're interested in civil rights, if you're interested in employment, labor relations, if you're interested in the family, all central topics of law and central features of American constitutionalism in life, the starting point, and in most cases, the ending point, is statutory interpretation.

And what is it-- and as you move the field forward, what are you most proud of in terms of the theoretical work that you've done there?

Well, I got my start in statutory interpretation. After Yale, when I was clerking for Judge Edward Weinfeld of the Southern District, and my first case that I was assigned was a statutory case, and I was hooked. Then, I practiced law for three years at the Tony DC law firm of Shea and Gardner from 1979 to 1982, and everything that I did was statutory, an area that Yale Law School gave me absolutely no preparation, background, intellectual, or doctrinal training.

We were waiting for you to come to teach it.

Maybe. But my best friend at Shea and Gardner, Phil Frickey, asked me one day, so, did Yale teach you anything about statutes that we're working with? I said, no. What about Michigan, where Phil went. No. Phil said, well, we both want to go into teaching. We should do a casebook. And so that was borne Statutes and The Creation of Public Policy that Phil Frickey and I wrote in the early and mid 1980s that came to be the foundational casebook for a whole area of law.

But the book would not have been possible were it not for the intellectual mentorship at Yale of Owen Fiss, of Jerry Mashaw, of Richard Posner outside of Yale, of Elizabeth Gibson, one of my mentors at Shea and Gardner, and my student, Beth Garrett, who was my best student and most brilliant student at the University of Virginia. It was a big hit, the casebook, and it's now in something like its sixth edition. You also wrote a book quite recently on statutory interpretation, which I believe features a picture of you on a bicycle. Could you say a little bit more?

Well, I did a book called *Interpreting Law* in 2016. It's been cited by the Supreme Court. And it's a counter statement of principles of statutory interpretation, confronting some of the claims made in Justice Scalia's last book called *Reading Law*.

Yes, there are many pictures in the book, including a picture of my 1995 beat up Toyota Camry. And the foundational example in the book is a statute in Lafayette Park prohibiting vehicles in the park. And for about 300 pages, I run through many permutations and arguments relating to how that should be interpreted.

It's fantastic. So I want to talk a little bit about your work on marriage equality, and maybe just begin by noting that we just had a faculty workshop on your most recent book, which we're going to talk about. And we were all addressing it as scholars, and then, at one moment, one of our young faculty members turned to you and said, I want to ask a question, Bill, but first, I want to just say, thank you for all the work that you did to make my life possible.

And everyone in the room was choking up because we were sitting there just being scholars, and then, suddenly, the reality and the magnitude of your life's work was put right there on the table for us, and it was enormously moving. And every time I think about you, I think about the fact that you were one of the very rare scholars who actually changed things. So I wonder if you might talk a little bit about what it was like to be a very lonely voice in the early days of the marriage equality debate and how your work has shaped that conversation.

Well, Heather, thank you for that really brilliantly phrased question. I would say it was lonely when I was at the University of Virginia because I was in the closet. Though, when I was denied tenure there, one of the faculty members called me a faggot, so that it was not entirely clear how successful the closeting strategy was.

I immediately ended up, however, at Georgetown University, I think the leading Roman Catholic University and law school in the country. And ironically, it was at Catholic Georgetown that I felt comfortable enough to come out. It's because the environment of Georgetown was the best features of Catholicism. It's. A Jesuit University Pope Francis is a Jesuit. Not a coincidence.

The dean was Judy Areen, family law scholar. The associate dean was Wendy Williams, who brought me to Georgetown, and my best friend there was Anita Allen. All very supportive. So it was at Georgetown that I felt comfortable enough to both come out as an individual, but also, come out as an openly gay scholar. And the agenda from the very beginning, from 1990 that I formulated in connection with gay law, the organization of gay and lesbian attorneys in Washington, was the normative movement for LGBT people from outlaws, where we were literally criminals in most states, to in-laws, where lesbian and gay people could literally get married and have the marriages recognized by the state.

It was a moment in time when no one thought what you were describing was going to be possible. So I remember when I was clerking at the Supreme Court in the year of *Romer versus Evans*, and I think that anyone who had bet on that case in the fall would have guessed that the result would be somewhat similar to the results we'd seen in so many cases before because *Bowers* was on the books. So that was the first victory, and it felt like an astonishing victory, and yet, it was a tiny one by comparison to what ultimately came about. I wonder if you just might talk about the arc of that movement, both inside the court, but also, inside the work that you were doing.

Well, *Romer*, as you know, was handed down, I believe, on May 20, 1996, right in the middle of Congress's deliberations on the Defense of Marriage Act, which was a pushback against the possibility of

marriage equality in the state of Hawaii. The defense of Marriage Act, notwithstanding Romer versus Evans, was passed by overwhelming bipartisan majorities, was fulsomely supported by President Bill Clinton, and indeed, Bill Clinton relied on DOMA in an advertisement for his re-election in September or October of 1996. So things did not look good for the future of marriage equality.

I might also add, that was also exactly at the time that I published my first book, which was a book on supporting marriage equality in 1996. The book was quoted derogatorily on the floor of the Senate and had no valence in the political process. So it was called *The Case for Same Sex Marriage, From Sexual Liberty to Civilized Commitment*, and it made all of the arguments that were ultimately accepted by your judge, Judge Reinhardt, and later, by Supreme Court justices in the next millennium.

Our colleague, Jack Balkin, also talks about the difference between something being on the wall and off the wall. And when you published that book, it was clearly something that was not just off the wall, but something I think very few people thought would be, as Jack says, on the wall, a serious theory moving forward, a movement in any time that was short, and yet, it wasn't that many years later that things had changed in a fundamental way, at least, as a matter of law. And I wonder what it was like to live history and push forward history at the same time, and now, just going to your new book, you're writing about the history that you lived. How do you manage that, both as a person and a scholar?

Well, actually, it was remarkably easy. I actually represented a gay couple in a marriage litigation in the District of Columbia from 1991 to 1995, and I was inspired by my work with gay law, the group of gay and lesbian attorneys in Washington, where I knew a number of particularly lesbian couples who were raising children. My own sister and her partner were a couple in California, and they later adopted children in the next millennium.

So I started with the foundational propositions that, number one, lesbian and gay people were not psychopaths. There was nothing wrong with lesbian and gay people, contrary to what many Americans believed. Number two, that lesbian, gay, bisexual, and transgender people were productive citizens who should be accorded every one of the same rights, duties, and responsibilities, including military service, as other Americans. And number three, that lesbian, gay, bisexual, and transgender people did form relationships that were serious, and did raise children very capably within committed relationships. And I knew all three of those propositions were social facts. They were not opinions. They were facts. And once you get a hold of the truth, you should never let go of it, and you should never stop talking about it until other people are persuaded. And that was a happy event.

It was a very sad event when I was denied tenure at Virginia, but when I was at Georgetown, I was in dialogue with Roman Catholic theologians, professors. I was in dialogue with traditionalists, obviously, with a lot of LGBT people, and came to a number of people like Beth Robinson in Vermont, and Mary Bonauto in Massachusetts who had the same reaction that I did to what was going on in the 1990s, the same reaction I did to DOMA, the same reaction I did to couples and families. And indeed, Mary Bonauto and I became very good friends. She now has two children, two biological children. Has been married in Massachusetts for more than a decade, and is the star, kind of, of the book.

I think it's fair to say that this book is going to be the definitive history of the marriage equality movement, though I know you would never call it such. But I want to ask you, I mean, I think, sometimes, when I talk to students about the Civil Rights Movement, it's such a triumphant story in their mind that I always remind them to go read Taylor Branch's books which make clear how fraught it was, how unclear the path forward was, how everything seemed to be on the knife's edge and it wasn't easy to see the path forward.

And I wonder how you think about your place in that story given what you just said about holding on to the truth. Because you were holding onto the truth, and yet, it wasn't easy in any way, and it wasn't a given, and I wonder how you negotiated that.

Well, I think as an intellectual it was much easier than if I'd been just a true believer. As an intellectual, you take disagreements less personally, or at least, that's the aspiration. And one of the greatest things about being involved in this debate, I formed very close friendships, of course, with supporters, some of the people like Mary Bonauto in Massachusetts, Beth Robinson in Vermont, and Stan Bach here in Connecticut, Evan Wolfson at Lambda Legal, Matt Coles at ACLU, Shannon Minter at the National Center for Lesbian Rights, and so on.

But I also actually formed friendships, and even rather warm relationships with some of the leading opponents. And two good examples of that are Lynn Wardle, who is a member of the Church of Jesus Christ of Latter Day Saints and was the leading family law scholar on the other side, and Maggie Gallagher, who is a very devout Roman Catholic and the founder of the National Organization for Marriage and the most brilliant and articulate intellectual arguing for the Federal Marriage Amendment and other measures which I was opposed to. So I debated both of these eminent intellectuals on numerous occasions and became actual friends with them, which was enriching to me, and I hope enriching to them as well.

So I thoroughly enjoyed every bit of the debate and dialogue and the drama and the unexpectedness of almost everything that happened. I was surprised in 1996 at the ferocious opposition. And then, I was surprised that it only took 19 years after that to achieve nationwide marriage equality. Neither of those was entirely predictable to me.

Can you talk about the book a little bit, particularly from a scholarly perspective? What would our listeners find most surprising about what's in the book?

The book is a panoramic view of the marriage debate, what ultimately led to marriage equality in 2015. And by that, I mean, the point of the book is not going to be wonderful lesbian couples raising children persecuted by evil bigots. Though we do have many lovely lesbian couples raising children, we also have gay couples, we have transgender persons in relationships, we have interracial couples, and so on and so forth, and we have a number of delightful opponents who are on the other side of the debate.

So it's going to be a panoramic view of the many different perspectives, traditionalist perspectives supporting one man one woman marriage, the liberal perspective that I championed, marriage equality, but also, progressive perspectives, such as the brilliant Paula Ulbrich and the scholarly Nancy Polikoff, who have been insistent, and I think, in many ways, very persuasive critics of marriage equality, at least as the main goal of the movement and not as complete a goal as it might be. So that's one thing. A second feature of the book that will surprise many readers is that the central theme of the book is not the rise of LGBTQ people in America. That's critically important.

But in the 50 years we cover from 2017 back to 1967, the critical value was the status role and economic opportunities of women. It is women in America and the changing role of women in America, and by that, I mean straight women, married women, lesbian women, bisexual women, nonbinary women, women that have revolutionized the American family, of which, marriage equality is merely one feature of the revolution that has been wrought by women's changing patterns of reproductive choice, their economic opportunities, their ability to be dean of the Yale Law School, justices in the Supreme Court, president of the United States. And that has driven, it seems to me, the story.

We see, thirdly, the marriage equality debate is not primarily a Supreme Court debate. The Supreme Court cases play a critical role and we provide a lot of inside information, but it's primarily a social debate, an intellectual debate at the grassroots level, a debate that shows up very centrally and dramatically in legislatures even more interestingly than in courts. We have a whole chapter on the Obama administration and the fascinating way that the regulatory state wrestles with this.

We have a fascinating chapter on ballot initiatives and how marriage equality or the freedom to marry groups were finally able, after dozens of losses, to start winning ballot initiatives, which I think was an essential prelude to Obergefell, the 2015 Supreme Court decision where marriage equality was recognized. And then, finally, the role of religion. We don't back away from that.

I was raised as a Presbyterian. I believe in God. I believe that Christ has written the most moving and profound and important role guidances that humankind has ever encountered.

And I believe that religion has always been on every side of this issue. When I represented the gay couple in DC, we got about 24 letters from religious leaders in the DC Metropolitan area, not the primary people, like the archbishop, or whatnot, but pastors, rabbis, priests, religious thinkers saying that from their point of view, the Old Testament, the New Testament, other expressions of God's will were very open to the freedom to marry for gay and lesbian, later, bisexual, transgender people. And though many of the most fervent opponents and sincere opponents have been inspired by religious traditions, Baptist, Catholic, Latter Day Saints, many others have been from the same religious traditions, emphatic supporters and eloquent defenders of freedom to marry for sexual and gender minorities.

The debate after Obergefell, the Supreme Court decision, continues very intensely on the religious side, and I welcome that. But I want to emphasize moving forward the debate occurs within religious faith traditions as well as within society, as well as at the micro-level of, does a florist have to follow an anti-discrimination law and provide services to a gay wedding? Does Catholic Charities have to place children with lesbian and gay married couples? Does a church have to accommodate a lesbian organist? These are all questions moving forward.

And one of the points of the book is that these are not simple questions, and that dogmatic points of view that say religion ought to simply fold and accommodate everything or that religion ought to have an absolute blank check, these are not productive ways moving forward.

So, Bill, I want to talk about that forward-looking debate for a moment. But before I do, I just want to mark how deeply consonant your description of the same-sex marriage movement was with your books on the forging of constitutional meaning. So your book with John Ferejohn tracks this exactly, even though it's talking about every issue involved in constitutional interpretation. So it's just amazing how consonant your work on statutory interpretation and constitutional law ends up being with what emerged in real life. It's like watching your research agenda unfold in the most important part you could imagine.

Well, John Ferejohn and I did a book in 2010 called *A Republic of Statutes*, and one of the chapters in the book was actually a chapter on the way in which women's insistence on rights and opportunities transformed the small c constitution of the family, the day-to-day operation, later, the statutory protections within the family, and then, ultimately, the Large C Constitutional decisions by state supreme courts and the US Supreme Court. So to that extent, the book that will come out from Yale Press on marriage equality, and what we colloquially refer to as the movement from outlaws to in-laws of LGBT people, that book, as you presciently suggest, is a continuation of the prior work, including political science work with John Ferejohn.

Looking forward on these issues, the Trump administration is moving in a quite different direction. And now that we've achieved marriage equality, but are still working forward to reach equality, how do you think about the issues that are coming down the pike and what the ultimate results will be?

I think the Trump administration poses a deep challenge to America, as well as to the conversation that our book is going to address. And the central problem, I think, is we are a pluralistic society, ethnically, racially, religiously, sexually, ideologically. A pluralistic society cannot survive where important groups are egged on by politicians to be at one another's throats.

There's always got to be a balance in a pluralistic society between healthy competition and some degree of conflict and more healthy cooperation and finding common ground. And so the marriage debate was, in large part, an effort by thousands of LGBTQ people, mostly grassroots folks, movement leaders, professors, sociologists, social scientists, legislators, Obama administration officials, judges, Republicans, Democrats, to find common ground for lesbian and gay couples, many of them raising children, and traditional straight, married, including older couples, some of whom had lesbian or gay children who wanted to get married and to have children. So I think the nation stands at a crossroads. And if the nation does continue along the lines of acrimonious divisiveness, I think that literally imperils the future of the United States as either a democracy, or as a world leader. And so our book is part of a broader middle group that seeks common ground and that adjures Americans, whether it's the political arena or the policy arena, to lower the stakes of acrimonious, primordial-feeling debates that have dominated the last three years.

You have a longer perspective on these issues. I wonder, are you optimistic or pessimistic?

I'm both. That's usually a law professor answer. I'm optimistic that the American people will tack back toward the middle. And America's greatness has really been always its ability to absorb and profit from the emergence of new groups, whether they're immigrant groups, or lesbian and gay groups, or empowered women, or empowered racial minorities, and then, to move forward in a more integrative way. So I'm optimistic on that score.

But I'm very pessimistic mainly on a score that doesn't relate as directly to the marriage debate, and that is the growing chasm of income inequality in the United States. And that's actually the big threat to marriage. Why do people not get married, straight, gay, et cetera? It's usually because the demographers tell us they can't afford to do so.

So the decline of marriage has almost nothing to do with lesbian or gay people. The decline of marriage is overwhelmingly people's inability to form economically viable households. So the exacerbating division between the wealthy haves and an increasingly struggling set of have-nots, that is cause for great concern and some degree of pessimism.

One of the things I've noticed about you, Bill, is that you have the keenest ability as a mimic of anyone that I know, and I've heard your dean impressions for all my predecessors. Am I going to see you in law review at some point playing me?

Bill, now Heather. I do believe it's a particularly interesting phenomenon that the great dean of the Yale Law School for many years, in my opinion, is Guido Calabresi, who is now a judge on the Second Circuit and is no longer the dean. Well, he was a great one. And I believe that Dean Gerken is going to possibly be right up there in the pantheon of Guido Calabresi. And there is no higher compliment that I can provide than to compare at the Heather Gerken with Dean Calabresi.

Thank you, Bill. So, Bill, I'm going to close this with a confession. There's no crying in baseball. There's no crying in deaning. I will just say that what you said during the interview about holding on to the truth and not stopping, talking about it reminded me yet again of how proud I am to be your colleague, and I got a little choked up. I think there's a pause on the tape as a result. But I just want to say, I'm so proud to be your colleague and feel so lucky to be at a place where you are. So thank you very much.

Well, it's a pleasure to be a foot soldier in the Dean Gerken command. And I really appreciate the opportunity.

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