

1 Introduction

IN INCREASING NUMBERS of nations, courts are significantly involved in the making of public policy. Particularly given the rise in the status of rights in modern liberal discourse, courts have been able to apply legal reasoning and decision making to areas of public policy that have traditionally been the province of more “political” branches of government. Judicial review, while largely originating in the United States, has spread to other liberal democracies in recent decades. In fact, while the U.S. federal courts have withdrawn from a period of rights-based activism and have been applauded by scholars of both the political left and right, high courts in other countries have picked up where the American courts have left off, often surpassing the Americans in their level of aggressive judicial policy making.

This phenomenon can be clearly seen with the issue of the legal status of sexual minorities. Many of the most groundbreaking and aggressive decisions concerning gays and lesbians have come from courts outside the United States. In the case of *M. v. H.* the Canadian Supreme Court held that a statute defining a spouse as only a member of the opposite sex was impermissible under Section 15(1) of the Canadian Charter of Rights and Freedoms.¹ This resulted in direct policy changes. The federal and provincial governments have amended scores of statutes to include same-sex couples where benefits are given for common law marriages, which include many of the same rights given for solemnized marriages, and two provinces, Quebec and Nova Scotia, have adopted Vermont-style civil union laws.² Building on *M. v. H.*, courts in several provinces and one territory have recognized same-sex marriages, and the federal government is poised to extend this policy to the entire nation.³

It is difficult to envision the U.S. Supreme Court handing down such a ruling. As recently as 1986, the Court ruled in *Bowers v. Hardwick* that there is no right to privacy for same-sex sex acts in the Constitution.⁴ Although some activists and commentators see the decision in *Lawrence v. Texas*, which overturned *Bowers*, as a step in the direction of court recognition of same-sex marriage, this appears unlikely in the short term. U.S. federal courts have been generally unresponsive to aggressive gay rights adjudication. In fact, state courts, rather than federal courts, have handed down the bulk of decisions favorable to lesbians and gay men. In the past decade, the high courts of several states have struck down sodomy laws, and three state supreme courts and several lower state courts have ruled that prohibition of the recognition of same-sex relationships is unconstitutional. Both developments will be examined in later chapters.

Ultimately, this book attempts to address the following questions: What accounts for the differences in the approaches of national courts systems in the

United States and Canada concerning gay rights? What do these differences tell us about the future of judicial policy making in this arena? This book argues that the greatest opportunity for aggressive judicial policy making in the realm of gay rights exists when a judiciary with activist potential meets a political culture that accepts a form of liberalism that conceives of rights broadly—not simply as a negative set of rights to be held against the state, but as a set of rights that recognizes the inherent dignity and worth of every individual. Indeed, the future success of the gay rights movement appears to be centered largely in the courts in these two nations. Courts, often relying on legal norms and arguments that emphasize the dignity of every individual and a more positive view of rights, can push states beyond where they might otherwise go on the subject of gay rights.

COURTS AS POLICYMAKERS

Courts possess a unique capacity to make policy decisions, particularly when policy questions are framed in terms of individual rights. Abram Chayes has argued that the unique position of judges, insulated from political pressure, provides them with a certain distance from the normal political process. Judges, unlike legislators, do not need to take multiple interests and values into account. They make their decisions on the basis of the adversarial legal process—a process that limits the parties to two and often narrows the questions involved. Norms that dictate judicial behavior also play a crucial role in judicial policy making. Chayes argues that judges are “governed by a professional ideal of reflective and dispassionate analysis” of the questions before them.⁵ Judges are generally concerned with what is the “right” decision, not simply the one that is politically expedient. A respect for precedent and tradition is important, but also as important is the novel argument. Lawyers are trained to win an argument by being innovative and creative. Particularly in the United States and even more so in Canada, law is not simply about narrow procedural questions but often concerns itself with large questions of substantive justice.⁶ Legal education contributes to this substantive concern by not simply teaching what the law is or has been, but also, according to Patrick Atiyah and Robert Sommers, “how to construct, analyse, compare, evaluate, and criticize arguments and decisions . . . and to ‘project’ lines of judicial decisions and legislation. . . . Law is not seen as a body of authoritative doctrine, so much as an ‘instrument of political, economic and social policy.’”⁷ Tocqueville’s declaration that, in America, all political questions become legal questions continues to hold immense validity and is increasingly becoming true in other national contexts. The nature of the legal process and legal reasoning, combined with the American, and increasingly global, emphasis on individual rights, has led courts in many states, as well as supranational courts, to become an immensely powerful force in public policy making.⁸ Indeed, Charles Epp has described this as a “rights revolution.” And Ran Hirschl has noted the rise of “jurisocracy.”⁹

Courts, of course, are not the only source of new rights. As R. Shep Melnick has argued, the U.S. Congress has created new statutory rights in a wide variety of

policy areas. This development, however, was the legacy of mid-twentieth-century federal court activism. Melnick argues that the success of the civil rights movement emboldened federal judges to increase their role in policy making and encouraged interest groups to pursue rights-based strategies in the courts. Congress also got into the game with rights-based legislation. Melnick describes this as an explosion of rights consciousness, stemming from the fact that “[t]he call for equality and justice is not easily confined.”¹⁰

Melnick notes that the use of the language of rights is a winning political strategy for legislators in a polity, like the United States, where rights rhetoric is prominent.¹¹ The difficulty for gay rights claims in the United States is, however, that not all rights claims fit with a polity’s dominant political tradition. Melnick notes this as well when he argues that the use of rights in welfare programs varies, given the nature of the program. In particular, “the political appeal of rights is substantially weaker in means-tested programs, where questions of fault, responsibility, and incentives remain at center stage.”¹² In other words, not all rights are created equally in a polity. The negative take on rights in the United States poses a similar challenge to gay rights claimants as does the claim of the poor for guaranteed welfare benefits. The poor ran up against the “work ethic” limit to rights, while sexual minorities have a difficult time convincing the American polity to view their relationships with equal dignity and respect.

Nor does liberalism in the hands of the judiciary always result in more progressive change than that driven by political liberalism. As Elizabeth Bussiere argues, New Deal political liberalism was a much more potent force for the poor than the conservative legal liberalism of the federal judiciary.¹³ This book suggests the opposite when it comes to gay rights, but the real distinction may not be the branch of government involved but the version of liberalism behind reform efforts.

This expansion of the concept of rights has coincided with the “rights revolution,” most notably in the United States. Since the New Deal, an increasing number of public policy questions have been framed in terms of rights. Many scholars, like Mary Ann Glendon, bemoan this obsession with “rights talk,” or, like Stuart Scheingold, point to the “myth of rights.”¹⁴ However, the legal realism and positivism that began as a reaction to the legal absolutism of the Supreme Court at the turn of the century and sustained legal theory through the New Deal and well after began to fall out of favor by the 1970s with some academic lawyers and prominent political theorists who called for more of a rights-based politics. Legal realism and positivism had no use for rights. They simply got in the way of sound public policy. Legal realists subscribed to Bentham’s view of rights as “nonsense on stilts.” To the extent that rights were at all useful, they were legislatively, not judicially, defined. Realist scholars turned their attention away from a discussion of rights to the role that judges played as policymakers, and the main assumption of the school of thought was that judges and their reasoning are fairly inconsequential as an independent force.¹⁵ In this political jurisprudence model, judicially defined rights divorced from the political process were of little concern—the judiciary was merely responding to domestic political pressure and seconding the sentiments of the political arena, not carving out a separate policy realm.

However, as David A. J. Richards explains, this view of rights gave way to their current more prominent and richer manifestation. According to Richards, “Rawls’s book [*A Theory of Justice*] initiated a paradigm shift in political theory, replacing the long dominant utilitarian theory (with its skepticism, at least in its Benthamite foundation, about rights) with a rights-based or rights-sensitive political theory.”¹⁶ Courts are the natural beneficiaries of this rights revolution. As mentioned previously, the nature of the process of adjudication facilitates a focus on rights. The parties in a case are narrowly defined. Additionally, the process does not necessarily concern itself with questions of widely distributed costs and benefits, so a strong sense of individual entitlement is not unreasonable.

COURTS, POLICY MAKING, AND SOCIAL CHANGE

This book challenges the assertions of scholars regarding the ineffectiveness of courts in achieving significant political or social change. As noted above, Scheingold cautions lawyers and scholars of legal and political change not to put too much faith in the transformative power of rights alone. He argued in his influential work, *The Politics of Rights*, that rights were limited and potentially backlash-inducing resources for progressive activists, especially when litigation strategies were the primary thrust of a movement. This stems from the fact that judges are highly constrained by majoritarian politics; therefore, judicial innovation will be “small and erratic.”¹⁷ Even though rights have tremendous rhetorical cache in U.S. politics, according to Scheingold, they, in reality, do little to shift the political status quo: “Rights are declared as absolutes [by courts], but they ripple out into the real world in exceedingly conditional fashion.”¹⁸

Scheingold does not assert that rights have no utility. They can be a source of mobilization by planting seeds for political, not legal, action. The problem, as Scheingold sees it, is that lawyers are bad at mobilizing, since they never, as a result of their training, place much faith in routine politics. Ultimately, he argues, “Power cannot be purged from politics by a legalization of the political process.”¹⁹

Gerald Rosenberg, in his book *The Hollow Hope*, builds on Scheingold’s work and that of the political jurisprudence approach in arguing that courts merely react to politics; they do not transform it. Consequently, according to Rosenberg, activists who fail to understand this waste time on litigation strategies. Instead, their efforts should be focused on the political arena.²⁰ Rosenberg illustrates his case by comparing two views of the role of courts in the United States: the “dynamic” and “constrained” (which he favors) court models. The dynamic model sees courts as important catalysts, stemming from their neutral position (Chayes) and the political potency of their reasoning and language. This, Rosenberg argues, does not empirically reflect reality, since U.S. courts operate under enormous constraints. He argues, under the constrained court model, that courts do not have the proper tools to implement significant change and that courts are naturally conservative. This conservatism is grounded in the fact that, despite the Founders’ best intentions to create an independent judiciary, U.S. courts are strongly hemmed in by public opinion. Only when opinion shifts can courts ever have a voice. As Rosenberg

bluntly, and sweepingly, states: “U.S. courts can *almost never* be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government.”²¹ Rosenberg acknowledges that courts can achieve limited, localized change, but like Dahl and others, he asserts that courts cannot challenge dominant political majorities. He applies his framework to the famous cases of *Brown v. Board of Education* and *Roe v. Wade*, arguing, in both instances, that public opinion was already shifting in the direction of the court decisions and that the Court was only confirming this trend.²²

Furthermore, Rosenberg asserts that counter-mobilization is the most likely mobilization triggered by litigation. Opponents of group-initiating litigation feel threatened and mobilize in response.²³ In the case of gay rights litigation, Jonathan Goldberg-Hiller reaffirmed this perspective in arguing that opponents of same-sex marriage in Hawaii were galvanized by litigation to sanction such marriages.²⁴ Although counter-mobilization is certainly a reality, especially with same-sex marriage litigation, I argue that important benefits stem from litigation strategies that can ultimately trump the counter-mobilization. Finally, Rosenberg argues that, given the lack of potential for litigation, civil rights groups waste time and resources on litigation strategies and may weaken their efforts in the long run.²⁵

The perspective of Donald Horowitz is also in the tradition of critiques of court power. Contrary to Chayes, Horowitz argues that courts as institutions are ill-suited to making policy decisions.²⁶ Judges are generalists with little policy expertise, according to Horowitz. Litigation is often narrowly focused and disregards wider policy considerations. Judicial decision making is gradual and ad hoc, with courts as passive players relying on litigation brought to them. Thus, according to Horowitz, “Judicial decision becomes a chance occurrence, with no guarantee that the litigants are representative of the universe of problems their case purports to represent.”²⁷ In addition, these litigants are not representative in the legislative sense, and courts are not equipped to ascertain policy or *legislative* facts, only *legal* facts, nor is there a mechanism for policy review in adjudication. In short, judges and litigants do not stack up well against legislators, bureaucrats, and interest groups. According to Horowitz, their ability to make sound policy is severely constrained. This critique is reflected in broader critiques of judicial activism, from a wide array of scholars and commentators, who assert that courts should not be involved in certain kinds of issues, nor should they overstep the “proper” boundaries of their authority.²⁸ I argue, however, that Rosenberg’s sweeping assertions and Horowitz’s normative disapproval of judicial decision making ignore important developments on the gay rights front, thereby causing them to disregard the “constitutive” side of the equation in this policy area and others.

CONSTRAINTS ON COURTS

Scholars such as Horowitz, Scheingold, and Rosenberg highlight a crucial element in judicial politics. Courts often operate under real constraints. I do not argue that courts and judges can always do what they want and radically change policy quickly and with lasting effect. Indeed, politics often matters for judges. Their

path to the bench is influenced by politics, whether they are appointed or elected. Appointed judges can bring with them their own social and political biases and the political agendas of those who appoint them, while elected judges may obviously factor electoral concerns into their decisions. For instance, in Chapter 2, I describe the U.S. federal courts' relative lack of responsiveness to gay rights claims. This stems from wide societal homophobia through the middle to latter part of the twentieth century from which judges were not immune, as well as the dominance of conservative presidents in U.S. politics since 1968 and their ability to appoint generally conservative judges to the federal bench.

Beyond the selection process, judges also face direct and indirect limits to their power. Directly, they often possess limited tools of enforcement and often need to rely on other political actors to carry out their commands. Indirectly, they are subject to budget and jurisdiction changes from legislatures and executives, as well as the constitutional amendment process, which is the ultimate check on their power.²⁹ Judges may also constrain themselves out of concern for values more important than the policy choices in front of them, particularly a concern for allowing the fullest range of majoritarian decision making.³⁰ Public opinion also affects the decisions of judges. Given their lack of enforcement power and exposure to politics through the appointment or election process, judges often pay attention to public opinion, especially the U.S. Supreme Court.³¹

Trial and appellate court judges are often constrained by concerns for career advancement. Since they do not want to be seen as outside the judicial mainstream as a result of a high turnover rate on appeal, they tend to engage in "norm enforcement" adjudication, in which they apply previously established or settled doctrine, instead of innovative policy making.³² However, as we shall see, this is not always the case. Many pro-gay rights decisions have come from lower court judges.

Indeed, many of these constraints are limited themselves by a sense of judicial independence in a polity. In states with well-developed judicial systems, polity norms protect the judiciary from excessive political influence—for example, the resistance to FDR's court-packing plan, appointment rather than election of judges, significant emphasis on nonpartisan elections, and a "higher law" understanding of constitutions. Judicial decision making is complex, and, I argue, many outcomes cannot simply be reduced to politics. In many cases, legal norms matter.

THE CONSTITUTIVE PERSPECTIVE

As Michael McCann has noted, the perspective of Dahl, Horowitz, and Rosenberg is an heir to legal realism and its central notion that "judicially construed law is mostly epiphenomenal and derivative of, rather than an independent force shaping, social and economic life."³³ This study, along with the growing literature on courts and constitutive change, is an attempt to challenge the neorealist paradigm and enrich our view of the role that courts play in society. For instance, McCann argues that the law is not simply a set of neutral and distant rules for citizens to follow; it is an arena for change, "understood to consist of a complex repertoire of discursive strategies and symbolic frameworks that structure ongoing social

intercourse and meaning-making activity among citizens.”³⁴ Litigation and legal discourse can set new political and social agendas and change the terms of political debate by introducing new arguments and new methods of argumentation. Rather than being used instrumentally, legal norms and language become a forum for change. Legal norms can reinforce the status quo, but they can also undermine and transform it, especially as access to the law is democratized. As McCann again describes it: “judicial demarcation of ‘what is possible’ refers not to just those discrete options for actions that engaged political actors consciously access, but to the very frameworks of understanding, expectation, and aspiration through which both citizens and officials *interpret reality* or, to quote [Clifford] Geertz, ‘imagine the real’ around them.”³⁵ Law and legal language has the power to transform politics by articulating new goals for a polity. And I argue that this dynamic is most powerful when this imagining is not completely foreign to a polity’s political traditions but draws from and expands them.

Thus, the Rosenberg perspective is too “linear,” as McCann puts it, in that it posits a direct, simple line between judicial decisions and social change, and thereby fails to capture the full picture of the role of courts.³⁶ Whereas Rosenberg asserts that courts have done little to effect positive change in the direction of same-sex marriage,³⁷ I argue that this is overly simplistic and fails to capture the complexity of the situation. Significant change has, in fact, occurred.

Litigation also provides more tangible tools beyond shaping discourse. Lynn Mather has noted the problems with Rosenberg’s exclusive focus on the U.S. Supreme Court and argues that lower courts can be enormously powerful agenda setters, and the legal language used in litigation in these courts can shape and alter political discourse and lead to significant policy change.³⁸ McCann also notes that litigation can be used as leverage to increase the power of individuals and groups who may be powerless in the political arena. Also, this leverage may dissuade political and legal actors opposed to the agenda of a powerless group from further resistance to that agenda.³⁹ For example, some of the wind was taken out of the sails of opponents of gay rights in the United States after the *Lawrence* decision, which legally rejected the argument that same-sex intimacy is immoral and refused to continue to empower majorities with this argument in the legislative arena. After a string of same-sex marriage judicial victories in Canada, opponents have been marginalized.

Rosenberg also takes a narrow view of what constitutes social change. In addition to overlooking important developments, Rosenberg sets the bar for demonstrating social change too high by incompletely analyzing public opinion. Rosenberg’s broad top-down approach fails to capture more subtle, yet critical, changes in a polity. A constitutive, “bottom-up” approach is more complex. As Troy Ridell puts it: “In this view, courts participate in a complex policy milieu that includes interest groups, executives and legislatures, state and local governments, bureaucrats, media, and the public.”⁴⁰ Change, then, should not be measured by broad evidence, but by more detailed evidence of movement and change. For instance, Rosenberg argues that since national polling in the United States has not demonstrated a massive shift in the direction of same-sex marriage support, litigation has been ineffective

at achieving change.⁴¹ On the surface, this assertion appears correct; however, it ignores important conversations that have been taking place between courts and political actors. These conversations, I argue, have led to significant change. And, even by Rosenberg's broad measure, significant change has occurred in Canada.

Court skeptics also fail to appreciate the potential of courts to recapture lost political traditions or even create new ones grounded in marginalized traditions. Michael Kammen, who has a keen eye for American constitutional development, has predicted that "constitutional morality—that is the inclusion of social justice and fairness as legitimate criteria—will one day, not far distant, be broadly accepted as an appropriate underpinning for American jurisprudence."⁴² Scholars like Rosenberg sees these values as more political than judicial. As I will demonstrate using the issue of gay rights, Kammen's prediction is being realized—more rapidly in Canada than the United States, but courts in the United States are moving in this direction. However, they are being challenged and constrained by a political culture that is dominated by a more restrictive liberalism.

Melnick points to another flaw in Rosenberg's framework. In analyzing rights expansion and significant policy change in welfare policy, Melnick asserts that "legal reformers are more politically astute than Rosenberg and most other court watchers have realized. Far from the naifs who relied exclusively on litigation," the reformers Melnick analyzed were politically astute and combined litigation with other, more "traditional," forms of political activity.⁴³ Similarly, many gay rights activists initially shunned litigation on the marriage issue, fearing a political backlash, and have chosen their legal battles carefully. Thus, Rosenberg's (and Schenigold's) "cause lawyer" caricature does not fit the case of gay rights.

This more sophisticated perspective on judicial policy making echoes recent assertions and findings by Malcolm Feeley and Edward Rubin. In the context of examining the judiciary's role in American prison reform, they assert that judges do indeed make policy, and this is not the dire situation that many commentators describe. They argue that viewing concepts like "the rule of law," separation of powers, and federalism as constraints on the actions of judges is outdated. Like Chayes, they are interested in the institutional capacity of courts to make public policy. They do not claim that judges are completely unrestrained; judges are also tied to legal doctrine and often justify their decisions with respect to this doctrine. But they also free themselves from doctrine when they wish to make policy. Feeley and Rubin distinguish this from mere interpretation:

When a judge is interpreting a legal text, the opinion will be replete with textual references, and will attempt to link those preferences to the result by linguistic analyses, historical accounts of meaning, . . . the drafter's intent, and citations of prior decisions. . . . When the judge is making public policy, such references will be absent, and in their place will be discussions of moral norms, social principles, nonlegal sources, nonauthoritative legal texts and citations of prior decisions that feature such discussions.⁴⁴

This dynamic can clearly be seen in gay rights litigation. Court decisions that validate gay rights claims often turn on theoretical values that trump an interpretive

approach and preserve the status quo. Whether it is a Millian concern for individual autonomy, which drives courts to strike down sodomy laws, or a concern for equality as a substantive value, which allows courts to require something like same-sex marriage, these decisions involve more than narrow, deferential interpretation.

However, this policy making is met with different reactions, both within and among nations. Sodomy law adjudication in the United States elicits little negative outcry, while same-sex marriage litigation stirs up a political hornet's nest. In Canada, court-driven same-sex marriage-like arguments are met with much more legitimacy than in the United States; political actors do not view court activity as illegitimately as do U.S. political actors. Indeed, there appears to be much more space for court policy making concerning gay rights in Canada. To understand the differences, however, we must first understand the new reality of judicial policy making.

THE NEW INSTITUTIONALISM

This book echoes the statement made by Rogers Smith that “public law scholarship will not flourish if all scholars focus simply on spinning out their own normative legal theories.”⁴⁵ A more promising approach to understanding courts is offered by the “new institutionalism,” which attempts to go beyond the normative debates and views courts as institutions that impart an independent force on the legal and political process. According to Smith, “institutions are expected to shape the interests, resources, and ultimately the conduct of political actors, such as judges. . . . The actions of such persons are in turn expected to reshape those institutions more or less extensively.”⁴⁶ There are certainly several strains of the new institutionalism, including rational choice and historical and social institutionalist approaches. However, the best approach is the least deterministic. It is influenced by neither structural-functionalist nor rational-choice reductionism, but takes history seriously and pays close attention to the development of legal and constitutional norms. It also recognizes that other institutions and political culture affect courts. According to Howard Gillman, the goal of this approach is to “reconstruct intentional states of mind and cultural or political contexts in the hope that we can induce with some confidence the reasons that led a particular person to adopt a particular course of conduct.”⁴⁷ In this context, the “mission” of the institution becomes important, as institutional actors try to maintain the legitimacy of the institution. Judges thus see themselves as upholding the legitimacy of courts as institutions; they do not simply always impose their personal policy preferences. In doing so, the language of rights is often employed, since rights are increasingly the raw material of litigation. Courts, as institutions, are immersed in the language of rights, and this language can constrain and compel decision making. Although Glendon and Scheingold bemoan the use of rights, a new institutionalist approach sees rights discourse as a central component to understanding the nature of courts and their impact on social and political change. The way that legal arguments are developed and presented through the process of litigation is a central concern of this book. As the twenty-first century begins, rights discourse is firmly enshrined

in the political and legal language of many nations and cannot be easily dismissed in the name of legal realism and its progeny or the preservation of “democratic” decision making.⁴⁸

Another approach of new institutionalism utilizes the concept of “path dependency” in explaining political change. Under this approach, according to Miriam Smith, “Political institutions and policy legacies open up certain opportunities for social movement politics while foreclosing others and these opportunities influence the policy agenda of each movement.”⁴⁹ Ellen Andersen has explained the successes and failures of gay rights litigation in the United States in terms of “legal opportunity structure” which facilitates and constrains legal actors through the variation in access to institutional structures, power configurations among decision makers, the existence of allies and opponents, and historically and culturally rooted legal “frames” that allow or prevent change.⁵⁰

These opportunity structure approaches tend to discount political culture as a variable and focus more on institutional arrangements. Indeed, Smith argues that the differences between Canada and the United States on gay rights are not sufficiently explained by differences in the political cultures of the two nations.⁵¹ The approach of this book, however, sees these cultural differences as crucial. Ultimately, it may be necessary to view these developments through the dual prisms of ideas and institutions.

LIBERALISM VERSUS MAJORITARIANISM

Because this book assumes a strong role for courts, it is perhaps necessary to comment on the legitimacy of their role, given critiques of judicial policy making. An argument against judicial activism (if this is a useful category) is that it allows judges to simply be moral philosophers, inserting their judgment for that of elected representatives. Legal discourse, then, becomes little more than abstract moral philosophy, unmoored from politics. One cure for the problem is original intent jurisprudence. This is not a real alternative, since it is far too minimal and gives short shrift to evolving constitutional principles. Instead, according to Harry Hirsch, “our philosophy of fundamental rights is not without content; it contains some propositions—historical propositions—that do bind us in certain ways. Thus ‘history’ and ‘intent’ are not the same thing. If we eschew a jurisprudence based on clause bound intent, we need not run headlong into a jurisprudence based on contemporary moral philosophy (as do Dworkin, and many others). . . . We must ask whether there is any space between these poles.”⁵²

One way to find that space is to ground interpretation in polity traditions. I argue that when judges utilize arguments and reasoning that are drawn from, and grounded in, a legitimate political tradition, they are not simply acting as Platonic guardians. Instead, they are trying to reconcile living under a principled constitutional order with democratic rule. Thus, finding Hirsch’s space involves an exploration of competing and alternative political traditions to those held by current political majorities. This is particularly relevant for sexual minorities, since they come nowhere near to forming a numerical majority. And in the American

and Canadian political traditions, groups need not be a majority to have their rights affirmed and be fully absorbed into the polity.

Indeed, this project is not obsessed with Bickel's "countermajoritarian difficulty."⁵³ Legal realism certainly had a point in rejecting a natural law-based jurisprudence, but a purely positivistic view of the law, a view to which advocates of a restrained judiciary subscribe, is incomplete. Majorities do not always have their way in American politics, nor even, increasingly, in Canadian politics. At any rate, the legislative arena is seldom a perfect reflection of majoritarian sentiment. As Epp puts it, "many legislative policies could not survive a popular referendum either."⁵⁴ In addition, legislatures and executives often care little about the rights of minorities. They respond to majoritarian or interest group power, not calls for justice.

The American constitutional structure is designed to protect minorities, or at least to soften the power of majorities. And with the adoption of the Charter of Rights and Freedoms in Canada, the protection of minorities is increasing as a political value in a political culture that has been largely noted for its belief in legislative supremacy. As Jennifer Hochschild has noted in her study of court-mandated school desegregation, "Liberal democracy has always relied on elites to save it from itself. If authoritative leaders see what is necessary to turn the semblance of democracy into real democracy, and the promise of liberal rights into their guarantee, the elitism (of a certain sort) is perfectly compatible with liberal democracy."⁵⁵ As she argues, school desegregation met with such popular resistance because it threatened the status quo of white privilege. The same is true with opposition to same-sex marriage: Heterosexuals are afraid of losing status by granting new rights to others. I argue that legal elites need to challenge the status quo by enforcing liberal rights for all. Epp also has noted that the "rights revolution" is not necessarily counter-majoritarian. The tendency for groups to assert rights in court resulted from a democratization of access to the judiciary. No longer are business groups the sole utilizers of the courts.⁵⁶

As Feeley and Rubin argue, judicial policy making is a modern political reality, and fear of undermining "democracy" is misplaced. As they note in the U.S. context, "we are a massive modern state, not a Greek polis or a New England village."⁵⁷ Bickelian and Republican revival fretting is perhaps an important cautionary note; however, given the modern presence of judicial activism in the United States and Canada (and the fact that "activism" is usually in the eye of the beholder), excessive concern for the conflict between judicial review and democratic practice is normatively and methodologically misguided.

RESCUING RIGHTS

This book also represents an attempt to revive the legitimacy of rights claims and rights-based litigation by emphasizing liberalism's capacity to accommodate rights claims by sexual minorities. Such claims have come under attack from the left and the right. Rights are either hollow, status quo reinforcing tools, destructive of majoritarian decision making, or tools of liberal judicial activism.⁵⁸

In a sense, the issue of gay rights is a test for liberalism and its emphasis on rights. To what extent can a liberal political and legal order accommodate the acceptance of gay and lesbian relationships on a par with heterosexual relationships? In other words, can liberalism go beyond mere tolerance of private sexual acts and achieve recognition of lesbian and gay relationships for the purposes of extending public policy benefits like the extensive legal protections and benefits that come with civil marriage? Or, is liberalism essentially concerned with freedom at the expense of notions of equality and inclusion?

One of the most aggressive critiques of rights comes from the left. Legal realism not only spawned political jurisprudence; it also can count critical legal studies as its offspring. The claim that rights are hollow and, in reality, vehicles for the oppression of minority groups has gained prominence in the past several decades. The argument that liberalism is too limited to embrace fully the equality of sexual minorities represents a common critique of liberalism. It is far too focused on a narrow, procedural view of rights and fails to incorporate a true concern for equality. This critique is echoed by Joel Bakan who argues that despite the apparent potential for progressive social policy to result from the adoption of the Canadian Charter, the reality is that courts are fundamentally conservative institutions that use a “liberal form of rights” to limit social policy.⁵⁹ Conversely, I argue that liberalism is not simply a force of conservatism. In fact, through court enforcement of evolving legal norms, it can sustain a richer version of rights than commentators such as Bakan claim.

An example from the U.S. case is illustrative. As previously indicated, American state courts have been receptive to striking down state prohibitions of sodomy. But they have been more reluctant to move aggressively on the issue of same-sex marriage, although courts in Hawaii, Alaska, Vermont, Massachusetts, Oregon, New York and Washington have handed down decisions favorable to same-sex marriage. Not only have courts been more reluctant on the marriage issue, but the reaction from the political branches and the public has been quite different. In reaction to the striking down of sodomy laws, there has hardly been a stir from politicians and citizens. The vast majority of these decisions create no reaction; in fact, they often receive an implicit or explicit affirmation. Conversely, the public reaction to gay marriage decisions has been swift and vociferous at both the state and federal levels. A large majority of states have passed laws explicitly banning marriages between members of the same gender, with many constitutionalizing this policy, and the Defense of Marriage Act has made this national policy.

What accounts for this vast difference? A significant part of this gap can be explained by the distinction that J. David Greenstone makes between variants of liberalism. He distinguishes between “humanist” and “reform” liberalism, the former emphasizing negative freedom and the latter emphasizing a more positive form of freedom. Reform liberalism sees the individual in a richer context than does humanist liberalism; the individual is not to be simply left to his or her own devices. Rather, reform liberalism requires that an individual be allowed and encouraged to develop “abilities of body and mind, that come with the mastery of excellence in important human practices.”⁶⁰ Most significantly, reform liberalism opens the door for a stronger notion of equality. Individuals are not simply autonomous

individuals, unconnected with others, but are in fact a part of a greater whole. Society has a positive obligation to ensure that these individuals develop to their utmost capacity. Implicit in this view of liberalism is a strong emphasis on equality, not only freedom. As Greenstone noted, Abraham Lincoln's brand of this richer notion of liberalism led him to emphasize the issue of equality, while Stephen A. Douglas was only concerned with preserving the freedom of whites to decide for themselves the issue of slavery. This concern, which includes strong notions of equality in liberalism, is also reflected in the neo-Kantian arguments of political theorists and legal scholars like John Rawls and Ronald Dworkin, who advocate a richer, thicker notion of freedom and rights. This idea is not simply that individuals have a right to be left alone, but that they have a right to "equal concern and respect."⁶¹ This strain of American liberalism has been dwarfed by the more prominent negative strain, but it nonetheless exists.

Rights, then, can serve as important tools, especially for marginalized groups. Martha Minow has argued forcefully for reclaiming rights as vehicles for political and legal change. Although noting that rights are not perfect tools, they nonetheless possess the power to transform the political status quo. As she states: "Rights pronounced by courts become possessions of the dispossessed."⁶² Minow also noted that rights can be remade and reinterpreted; they don't always serve the powerful. This book demonstrates this in the context of rights claiming by sexual minorities.

A MODEL OF JUDICIAL DECISION MAKING

This book explores the process of decision making for a wide range of courts. What, then, goes into judicial decision making? A dominant explanation in political science is the attitudinal model. This model asserts that a judge's own views and attitudes drive and shape judicial decision making, so much so that one can predict judicial outcomes. "Simply put," according to the leading proponents of this perspective, Segal and Spaeth, "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal."⁶³ Another view holds that legal doctrine determines outcome. Judges apply legal norms without regard to their own personal preferences or biases. Judicial doctrine and methods of interpretation play a central role in judicial decision making, according to this perspective.

This book relies upon an alternative framework that embraces some of both perspectives. It is clear that judges' ideology and background matter. Daniel Pinello has demonstrated that these factors play a significant role in the outcome of gay rights cases. Race, religion, gender, and party affiliation were some of the factors Pinello found salient.⁶⁴ Diversity is good for gay rights claims, with women, minorities, and Jews being the most favorable to gay rights claims, according to Pinello.⁶⁵ As he states, "when these judges from social groups with an extensive history of invidious discrimination . . . signed opinions in gay rights appeals, they spoke resoundingly in favor of the civil rights of another downtrodden minority."⁶⁶ However, Pinello also found that factors like *stare decisis* (doctrine), level of court (appellate versus court of last resort), and length of term (more than method of

selection) played a role in outcomes.⁶⁷ Geography was also a powerful variable, with Southern judges least responsive to gay rights claims and judges in the Northeast and West most responsive.⁶⁸

Pinello thus demonstrates that judicial decision making is complex and not always suited to the reductionism of the attitudinal model. Nor is legal doctrine always the driving force. But I share the criticism of Ronald Kahn that the traditions of realism, behavioralism, and attitudinalism miss a great deal in judicial decision making by neglecting the role of ideas as an independent force and by only seeing them as instruments used to further a judicial predisposition.⁶⁹ Kahn, following Greenstone, places constitutional interpretation, and thus a large amount of judicial decision making, in the context of American political thought and ideas. Constitutional interpretation is a conversation between alternative perspectives in the American political tradition. It is also a conversation between the courts and the scholars, journalists, public officials, informed citizens, and those involved with or affected by litigation, or what Kahn calls the “interpretative community.”⁷⁰ This conversation is informed by Greenstone’s variants of liberalism, noted above, as well as what Greenstone identifies as the republican strain in American political thought that places great emphasis on process and proper democratic procedures. Kahn refers to the republican concerns as “polity principles” and the more substantive liberal values as “rights principles.”⁷¹ For Kahn, constitutional adjudication involves the sorting out of these values and principles in each era. As he puts it:

Justices seek coherence in polity and rights principles to increase their influence over the development of constitutional principles within the Court and wider society and thus make a place for themselves in history. They ask themselves what fundamental rights may be viewed as “in” the Constitution and how these principles are to be applied in a particular case, in view of their polity and rights principles, precedent, and the facts in the case. Justices create personal visions in which their views of polity and rights principles, their underlying moral values, and their attitudes toward the history of the Court and nation are central. . . . To achieve coherence, a justice cannot think only of the case outcomes, or the individual case, but must consider the implications of each choice for later applications of polity and rights principles.⁷²

This dovetails with new institutionalist approaches by considering institutional mission and valuing ideas as separate influences on judicial outcomes.

The model of judicial decision making offered in this book takes attitudinal and institutional factors into account but also pays particular attention to legal norms and doctrine. And given that this study involves analysis of a mix of courts (state and federal, trial and appellate, U.S. and Canadian), I take a flexible approach to analysis, but ultimately argue that in many significant instances doctrine and ideas matter.

JUDGES AS POLITY THEORISTS: BRINGING THE COURTS BACK IN

The framework outlined by Greenstone and Kahn invites a role for courts in national political and legal conversations. Courts are the institutions best able to recapture lost or subsidiary political traditions, since the more political branches tend to

reinforce the ideological status quo. Through legal norms and arguments, courts can bring these traditions back into play and give them legitimacy.

Also, since judges are more removed from the political process, they are better able to reason abstractly based upon perceived notions of justice, not simply on the basis of who has the most political power. Michael Perry notes this capacity and has argued for the idea that courts should enforce human rights norms. Judges should play a key role in finding “right answers to political-moral problems. As a matter of comparative institutional competence,” according to Perry, “the politically insulated federal judiciary is more likely . . . to move us in the direction of a right answer (assuming there is such a thing) than is the political process left to its own devices.”⁷³ As we shall see, the U.S. federal judiciary is not the best example of a guardian of rights on the gay rights front. Other courts are playing this role. The larger point is that, institutionally, courts can bring this mode of decision making to the table.

In the legislative arena, it is hoped that outcomes will be rational, especially if true “deliberation” takes place. Courts, however, do more than hope; they often enforce the notion of rationality and apply it to political decisions. This is certainly true in the context of fundamental rights and equal protection jurisprudence in the United States. Even the minimal “rational basis” test is a rejection of the notion that majoritarian power is absolute in a constitutional democracy. This will be explained later in the book, as many judges begin to rule that prohibitions of same-sex intimate relationships and marriage do not make logical sense, but are only reflective of majoritarian morality and insufficient to pass constitutional muster.⁷⁴

I do not argue that courts ought to be the final arbiter in all political controversies, only that they are important institutions in modern liberal democracies. They can especially be helpful in considering the full range of viewpoints and strains of discourse in a polity. At the same time, they are limited to those strains and the parameters of a polity’s discourse. Judges should not be seen as philosopher kings, a caricature often used by opponents of judicial power, but as actors exploring and applying a nation’s (sometimes forgotten) values, especially when political majorities, at a given moment in time, are not doing so.

My perspective echoes that of an earlier generation of scholars who were discontent with the lack of justice that is often present in legislative and bureaucratic decision making. Critical of mid-twentieth-century pluralism and its emphasis on procedure in legislative and bureaucratic policy making, rather than substantive considerations, these “critical pluralists,”⁷⁵ most notably Grant McConnell and Theodore Lowi, favor a larger role for courts in order to address a broader range of issues and arguments. McConnell argued that the U.S. polity was dominated by decentralized and local decision making that privileges private, economically powerful, interest groups. According to McConnell, “The tendency inherent in small [political] units to stratification of power relationships and to protection of established informal patterns of domination and subordination is most alien to equality.”⁷⁶ The solution, then, is to emphasize nationalizing and universalizing institutions, like the federal courts, in order to develop “policies serving the

values of liberty and equality,” rather than the desires of powerful groups.⁷⁷ McConnell was trying to reassert a Madisonian vision of democratic politics, one that focused not on narrow considerations of power but on the notion of “justice and the general good.”⁷⁸

Theodore Lowi rejected the extreme positivism of pluralism and its elevation of nonlegal forms of decision making. He objected to the sterile, interest-group-driven politics of the United States in the latter part of the twentieth century. As he described it, this politics left no room for substantive consideration of justice or morality: “In a pluralistic government there is, therefore, no substance. Neither is there procedure. There is only process.”⁷⁹ Lowi’s solution was a turn toward “juridical democracy” that would lift politics above simple interest-group bargaining and empower more voices in politics, as well as allow for a “justice-oriented politics.”⁸⁰ Lowi backed off his initial large role for courts in this process, later emphasizing that juridical democracy is not necessarily judicial democracy,⁸¹ but Kahn effectively summarizes the pro-court thrust of McConnell’s and Lowi’s arguments. As he states, “they favor federal court intervention because they see that it may result in the expansion of the range of issues under discussion to include questions of rights, due process, and equal protection.”⁸² When applied to a fuller range of courts in both the United States and Canada, this accurately describes the role courts are playing in the area of gay rights.

LEGAL MOBILIZATION

This book also addresses the way in which lawyers and litigation groups structure their efforts and the effect of those efforts on the legal and political systems. Marc Galanter noted in the 1970s that groups that consistently engaged in the practice of litigation (which he termed “repeat players”) would find significantly more success than those that only occasionally accessed the legal system (“one-shotters”). This is due to greater expertise with, and knowledge of, the system, in addition to greater financial resources. These groups, therefore, can engage in long-term litigation strategies and develop bargaining power through this longevity, along with an understanding of informal modes of decision making that come from prolonged access to the system. “One-shotters,” conversely, lack these resources and are more prone to settle early and do not have sufficient expertise and leverage to compete with the repeat players. This results in an imbalance in the system, with the established and wealthy having the upper hand in litigation; however, Galanter thought that certain reforms (increased funding for legal aid programs, class action lawsuits, active governmental support for one-shot litigants, outsider interest group litigation strategies, etc.) would level the playing field.⁸³

An implication of Galanter’s thesis is also that groups will have a natural advantage in litigation over individuals. Individuals and outsiders, to be successful, need to structure their litigation to take on the attributes of repeat players. And they have. As Epp puts it, “in recent decades, there has been a significant growth in the number and diversity of nonproducer advocacy groups claiming to represent

the interests of one-shotters. As a result . . . *some* kinds of ‘have nots’ have gained *some* of the structural prerequisites for repeat playing.”⁸⁴ Many have nots have become haves.⁸⁵ This includes a sophisticated network of gay rights litigators. Groups like this are able to bring a wide variety of resources and capabilities to assist “outsider groups,” including expertise, money, publicity, legal and non-legal research, and communication networks.⁸⁶ In addition to those qualities noted above, litigation groups can create a narrow focus on an issue or group of issues, thereby facilitating legal and political dialogue, use law review articles to put new legal arguments into play, and solicit amicus briefs from influential sources, including the government.⁸⁷ Also, litigation can have indirect, but important, “radiating” effects on policy. Litigation can, as McCann asserts, “help to redefine the terms of both immediate and long-term struggles among social groups.”⁸⁸ Gay rights litigation, while not always fully successful in its aims, has profoundly changed the terms of the debate over gay rights.

Gay rights litigation has been a combination of gay interest groups, repeat player, and one-shotter litigation. And contrary to Galanter’s thesis, it was one-shotter litigation, not one-shotters transformed into repeat players, that successfully launched the drive for same-sex marriage in the United States in the 1990s. By only focusing on financial and status resources, Galanter neglected to account for the potentially transformative power of litigation. Rather than disempowering individuals, litigation is a potent form of political participation that can transform law and politics,⁸⁹ especially when legal decision makers give greater support and standing to individuals and outsiders.⁹⁰ Litigation on behalf of outsiders, including sexual minorities, has been enormously successful in Canada and has had more limited, though arguably substantial, success in the United States.

THE STUDY OF COURTS IN COMPARATIVE PERSPECTIVE

Scheingold has noted that inquiry into the politics of rights can benefit from national comparisons.⁹¹ Although the main focus of this book is on the United States, a comparison to the Canadian case is useful for several reasons. First, in order to critique effectively the current approach of courts in the United States on the issue of gay rights, one must look outside the U.S. border. If, as I assert, arguments that go beyond libertarian conceptions of freedom have a difficult time finding a place in American political discourse, it is important to test whether or not this situation is unique. Through a comparative analysis, one can discover alternative approaches that demonstrate the plausibility of change. In this case, the type of liberalism that has developed in a country goes a long way toward explaining the capacity of that country’s courts to adjudicate expansively on the subject of gay rights. If the dominant strain of liberalism conceives of rights narrowly, it may not be easy for courts to expand the notion of liberalism.

This is not a comparative study in the strictest sense of political science methodology. It is not a side-by-side, variable-by-variable, large-*N* comparison but is, instead, a softer comparison. As noted above, I argue that a primary reason for the difference in policy outcomes between the United States and Canada is the

difference in political cultures, particularly differing visions of liberalism. But other variables most certainly played a role in the different outcomes: the lesser influence of religious conservatives in Canadian politics, differences in party systems and legislative processes (which allowed for a more uniform policy response in Canada, since the Liberal Party was firmly in control of national politics), the greater role played by the Canadian federal government in marriage policy (in the United States, marriage is almost exclusively a state issue), and differences in legal norms and practices, despite a shared common law heritage. These are all examined later in this book. The latter variable, however, merges with the variance in liberalism, and, I argue, these two variables disproportionately drive the change. After the adoption of the Charter in 1982, Canadian courts have adopted American-style approaches to judicial review. The previous doctrine of parliamentary supremacy has given way to a judiciary empowered by a new constitution based on modern liberal values. This combination has been a potent force for change in the realm of gay rights.

Consequently, a comparison between these two nations, rather than only a U.S. state-by-state comparison, is necessary for understanding the future of same-sex marriage claims in the United States. Despite the perception that developments toward same-sex marriage in Hawaii and Vermont resulted from the uniquely progressive political climates of these states, change was actually driven by courts and the legal norms and values they articulated, and even imposed, on legislatures. Progressive political climates alone have not resulted in policy change. Climate can facilitate policy change after a court mandate, but the political process has not changed policy on its own. Therefore, the real story in the United States has been the influence of legal norms and values, not variance in state “political factors.” For example, public opinion on same-sex marriage in Hawaii and Vermont differed little from national public opinion before the courts stepped in.

Carl Stychin has made the link between a nation’s political culture as it relates to rights and issues of sexuality. He argues that rights are the link between national and sexual identity. The way a culture views rights can often heavily influence the way sexuality issues are addressed in public policy. Claims to rights are the link, since they are increasingly becoming universal. Given the rise of international human rights norms, the range of rights claimants is constantly expanding. Thus, according to Stychin, “rights claims are one means by which groups and individuals can play an active role in altering how the nation is imagined.”⁹² Stychin also argues, however, that a national culture’s stance toward rights can also limit this alteration of the national imagination if those rights are conceived narrowly, a central premise of this project.

The notion of political culture is a disputed concept in political science. Many believe that it is a useless concept, even tautological.⁹³ However, the explicit assumption of this book is that political culture exists, it is definable (at least broadly), and it is a relevant explanatory variable. Certainly no national political culture is completely homogenous; multiple ideological traditions exist side by side in the same culture.⁹⁴ But this book assumes that broadly distinct political cultures exist and can affect policy outcomes by setting the broad terms of political debate. In

particular, this inquiry is focused on the nature of liberalism in a particular nation and the manner in which a particular version of liberalism promotes a broad or narrow notion of rights.

Canada serves as an interesting comparison to the United States for several reasons. Prior to the adoption of the Canadian Charter of Rights and Freedoms in 1982, there was little history of judicial activism concerning individual rights in Canada. Parliamentary sovereignty, not judicial supremacy, was the hallmark of the Canadian political system. Seymour Martin Lipset has summed up the differences between the Canadian and American approaches to governing by highlighting the different political traditions that established the frameworks for each country: “The very organizing principles that framed these nations, the central cores around which institutions and events were to accommodate, were different. One was Whig and classically liberal or libertarian. . . . The other was Tory and conservative in the British and European sense—accepting of the need for a strong state, for respect for authority, for deference.”⁹⁵ However, this distinction began to break down in the twentieth century. A Bill of Rights was enacted by Parliament in the 1960s, but it was only a statute, and courts could not use it to restrict the actions of Parliament.⁹⁶ With the adoption of the Canadian Charter of Rights and Freedoms, Canadian politics made a turn toward a politics of rights and judicial involvement in the determination of those rights. As F. L. Morton states, “The Charter has stimulated Canadian interest groups to adopt American-style litigation tactics to promote their objectives.”⁹⁷ In particular, before the 1980s few cases existed that expanded the realm of gay and lesbian rights, but since the adoption of the Charter the situation has changed dramatically.⁹⁸ This rise in judicial activism has combined with a political tradition concerning rights that is not simply negative. As the Canadian Supreme Court stated in *M. v. H.*: “The exclusion of same-sex partners from the benefits of s. 29 [of the Family Law Act] promotes the view that . . . individuals in same-sex relationships . . . are less worthy of recognition and protection. . . . Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.”⁹⁹ This decision transcends mere privacy concerns and calls for the equal recognition of heterosexual and homosexual relationships.

This position contrasts starkly with the situation in the United States, a nation whose political culture is saturated with the notion of rights. These rights, however, have often been narrowly defined, negatively conceived, and have not been open to everyone.¹⁰⁰ Despite Greenstone’s identification of a positive strain of American liberalism, it has mostly been conceived of in negative terms. The example of gay rights has been no exception to this reality. Federal courts in the United States have been quite uncomfortable with gay rights issues, having, until recently, refused to declare a right to privacy for sexual minorities and refused to view sexuality on par with race or gender for constitutional protection against discrimination.¹⁰¹

Indeed, the Canadian and U.S. polities appear to be diverging on social issues in significant ways, not just at the margins.¹⁰² Canada is combining a richer liberalism with a more secular outlook on society, while in the United States negative liberalism dominates much of the political discourse, combined with a continued

religiosity that cuts against secularism. This has made the Canadian polity much riper for legal and political support for same-sex marriage. And when courts in the United States enforce a richer liberalism, same-sex marriage claims gain traction.

OUTLINE OF THIS BOOK

In the following chapters, I explore the issues outlined above. I begin in Chapter 2 with a brief history of U.S. federal gay rights jurisprudence to illustrate the lack of innovation in this jurisprudence and its tendency toward negative notions of freedom. I then turn to a discussion of liberalism's relationship to gay politics in Chapters 3 and 4, exploring the arguments of liberalism's critics and defining a liberalism that is accommodating of a full range of gay rights claims. In Chapters 5 and 6, I take up the question of U.S. jurisprudence concerning sodomy laws, arguing that decriminalizing sodomy is supported by the dominant liberal tradition in the United States, but that courts still need to achieve significant change in many parts of the country. Chapters 7, 8, and 9 examine same-sex marriage litigation in the United States and the political reactions to it. Chapter 10 examines same-sex marriage litigation and policy change in Canada as a source of comparison to the U.S. case. In Chapter 11, I argue that courts have contributed to significant social change and they should continue to invoke liberal arguments to do so. Chapter 12 then concludes this study.

Concerning the U.S. case, I have chosen to focus on sodomy and same-sex marriage litigation in order to highlight the potential of rights-based litigation and to show that variants of liberalism may shape the course and success of this litigation. Certainly, a larger array of litigation areas could be examined. For instance, litigation concerning same-sex parental rights would fit nicely into this discussion, but I chose to limit the inquiry to these two areas because I feel they offer a rich and useful contrast. In the Canadian case, sodomy laws were eliminated in the 1970s, thus eliminating a need for litigation but also demonstrating the difference between Canadian and U.S. political culture.

It is hoped that this book will not be seen as niche scholarship. Ultimately, the issue of gay and lesbian rights is not merely a side issue of significance to only a small segment of society. In many ways, the issue is a proxy for larger issues concerning tradition, morality, and rights and how these elements relate to one another in modern liberal democracies.