Chapter 3
The Future of LGBT Politics

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ABSTRACT

This chapter summarizes the role of the U.S. Supreme Court in national policymaking. In the United States there exists a nationally shared set of beliefs, values, and customs, or cultural universals. However, these shared attributes vary according to place and political affiliation. Extending the right to marry to same-sex couples through judicial means precipitated a backlash in which religious groups and individuals turned to legislative solutions to contest the court's decision and their obligation to recognize marriage equality. As the final arbiter of law in the United States, the nine unelected justices of the U.S. Supreme Court play a significant role in policymaking, and their attitudes and decisions regarding policy are tied to the political selection of justices. In the future, decision making from the court to further extend the rights of LGBT citizens may be directly tied to the increasingly partisan selection process for justices.

INTRODUCTION

Alexis de Tocqueville said about American society in the early 19th century that Americans tend to transform almost every important political question into a legal one. The major issues of American political life, perhaps even more so today than in Tocqueville's time, frequently find their way into court. Contemporary issues such as same-sex marriage, abortion, gun rights, religious freedom, and a host of others have found their way into courtrooms. There can be little doubt that courts have played and continue to play a major role in shaping and influencing political and social life in the United States.

Judicial policymaking raises questions in the minds of many people as to whether it is fair for judges, rather than elected representatives, to make certain types of decisions and, even more important, whether judges are competent to decide on complex issues of public policy. Other critics maintain the major problem with contemporary courts is not that judges are engaged in policymaking but that the policy made is unjust (Tushnet, 1979).

There has been an increasingly strident chorus that asserts the United States has been secularized and religion has lost its force in the culture. Stephen Carter's (1994) widely read book, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, fed into this narrative. The

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book portrays religion as a diminishing influence in society. Ironically, the secularization thesis has permitted organized religion to don the garb of the underdog, when in fact its political power has been quite potent, even behind the scenes. Religion's double role of downtrodden and politically powerful was transparent when Utah Senator Orin Hatch justified the Religious Freedom Restoration Act of 1993, which put religious individuals and institutions in the position of being able to challenge every neutral and generally applicable law in the country, by saying, "Government too often views religion with deep skepticism, and our popular culture too often treats religious belief with contempt" (Statement of Senator Hatch, 1993). Indeed, the *Culture of Disbelief* and viewpoint it fostered aided religious entities in their lobbying efforts, because few would suspect that such "weak" political actors could be as busy and successful the religious "lobby" has been in the both legislative and judicial contexts (Carter, 1994).

The truth is, the clear majority of Americans are religious believers and attend religious services—and religious viewpoints fill the public square. In recent decades, religious entities have worked hard to immunize their actions from the law, either by obtaining legislative exemptions or by forcing the courts to invalidate any law substantially burdening religious conduct that was unnecessary. These religious actors have always waved the banner of "religious liberty," and few Americans have stopped to question them. What could be more important in a free society than religious liberty? When left in the abstract, it is hard to fathom anything more important.

But when one scrutinizes the facts, there are all types of interests that trump religious conduct in a just and free society. Every citizen has as much right to be free from harm as a religious entity has to be free from government regulation.

An underlying assumption throughout this book is that courts—as active and frequent makers of public policy—make a great deal of difference in American life. Theories of law wax and wane and have shifting emphases subject to developments at the time and place of their formulation. This includes broad influences such as a period of social turmoil or rapid social change as well as more immediate influences within the intellectual settings in which legal theories are developed—academic specialization, institutional support, and current scholarly norms or fads.

One of the more striking features of same-sex litigation in the United States was the prominent role of social science in addressing factual issues germane to legal arguments on both sides. It is impossible to say with certainty whether social science played a decisive role—whether it inñuenced legal outcomes in litigation. It is also difðcult to gauge indirect inñuences such as impacts on legal decisions that served as precedent in later court cases. Each side's use of social science evidence in the legal contests over same-sex marriage were a series of credibility contests. On issue after issue judges were required to assess the weight and credibility of each side's evidence.

Whether or not it did, should social science have played a decisive role in marriage equality litigation? Certainly, the cases could have been decided based on legal principles alone, without reference to social science evidence. Indeed, signiðcant prior Supreme Court jurisprudence on marriage (including dismantling interracial marriage bans and protecting the legal status of nonmarital offspring) disregarded social science evidence in favor of broad legal principles of equal treatment and nondiscrimination (Ball, 2014, pp.126–27).

By incorporating social science into its justiðcation for marriage equality, the courts may have set a dangerous precedent by making a group's "access to constitutional rights contingent on tests not imposed on other groups, such as the ability to produce child outcomes equivalent to the gold standard of intact biological parent families" (Ball, 2014; Meadow, 2013).