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## *Acknowledgments*

This book would not have been possible without the help of many people. I benefited immensely from the insights of Jeff Dudas, David Yalof, Kristen Kelly, Virginia Hettinger, and the late Howard Reiter during the earliest stages of developing this project. I am particularly thankful to Jeff for introducing me to the field of law and society and for helping me craft a bunch of jumbled ideas into a coherent narrative. Jeff has also been a great mentor and general sounding board for me over the years. I could not have done this without him. I would also like to thank the various discussants, conference participants, journal editors, and workshop coordinators who read portions of this project over the years and provided useful commentary—in particular Anna-Maria Marshall, for her feedback on the California case study at the Law and Society Association's Early Career Workshop, and Joshua Wilson, for his insights on the Maine case study. Also thanks of course to Chuck Myers and his editorial staff at the University Press of Kansas for believing in this project and for helping to steer it to completion.

I have had so many great colleagues and mentors who have provided me support while working on this project. I would like to thank my colleagues at DePaul for creating a wonderful and engaging environment to work in every day, and Wayne Steger in particular for being a great mentor to me during the first few years of my career. Also thanks to Renee Cramer for giving me my first real academic job at Drake University and for being such a great source of support and advice. I developed many of the ideas for this project while in graduate school at the University of Connecticut. I would like to thank all of the people who helped make that experience more enjoyable. Special thanks to the contingent of law and society scholars in my cohort, including Sarah Hampson, Jamie Huff, Allyson Yankle, Dan Tagliarina, and Corinne Tagliarina. I am sure that many of the insights they shared with me during class, or over beers, have made their way into this book in one way or another. Also, thanks to Jason Charrette for helping code the dataset used in Chapter 3 of this book. Finally, I have to thank Richard Ellis at Willamette University for encouraging me to go to graduate school in the first place. Richard saw potential in a young scholar who was, in his words, “a total slacker.” He also saved me from becoming a lawyer by pulling me into his office during my senior year at

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Willamette and encouraging me to get a PhD instead. Richard continues to be a great source of advice and encouragement. His career is an inspiration to me as well—if I can be half as prolific a scholar as he has been, I will feel like I am doing pretty well for myself.

Last, but certainly not least, I must thank my family for supporting me as I worked through this project. My wife, Brianna Mello, is probably the only person other than me who has read every word of this book. Bri is an extremely talented copy editor, and this book's arguments are presented much more clearly and succinctly thanks to her efforts. Perhaps most importantly, though, she provided me the emotional (and financial) support I needed to get through the difficult times during graduate school. I do not know how I would have been able to cope with the crippling amount of uncertainty and anxiety that all academics must face during the first few years of their career without her. I would also like to thank my parents, Frank and Jeannie Mello, for always encouraging me to pursue my education and for enthusiastically supporting my decision to go to graduate school, even after I told them how long it would take to get my PhD and how little money political scientists actually make. Finally, I would like to thank my children, Elizabeth and Everett, for providing a needed distraction from the occasional drudgery of academic work, and Brent and Karen White for occasionally relieving me from watching them so that I could finish writing this book.



# 1. The Mobilization of Bias

*The majority today . . . seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. . . . I have no choice but to dissent. . . . This dissent . . . is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people . . . or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.*

—CHIEF JUSTICE JOHN ROBERTS

(Dissenting opinion, *Obergefell v. Hodges* 2015)

*The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” . . . This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”*

—JUSTICE ANTHONY KENNEDY

(*Obergefell v. Hodges* 2015)

The US Supreme Court’s landmark decision in *Obergefell v. Hodges* (2015) effectively ended an intense nationwide debate over the proper definition of marriage by legalizing same-sex marriage in all fifty states. Although much of this nearly two-decades-long debate was spent weighing the substantive implications of continuing to define marriage as a union of one man and one woman, the case itself touched not just on the question of what the definition of marriage should be but also on who should be charged with determining that definition—the courts or “the people.” The question of who should decide issues of fundamental rights has been a recurring point of reflection for

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the Supreme Court justices of late. In 2014 they issued an emphatic defense of Michigan's right to determine affirmative action policy through the ballot measure process (*Schuette v. Coalition to Defend Affirmative Action* 2014).<sup>1</sup> The following term, the Court heard two cases involving the constitutionality of laws passed through popular referendum. In *Obergefell* it invalidated the laws of twenty-eight states that had passed ballot measures defining marriage as between one man and one woman (*Obergefell v. Hodges* 2015), but just a few days later it issued an opinion that upheld Arizona voters' right to alter their redistricting policy through popular referendum (*Arizona State Legislature v. Arizona Independent Redistricting Commission* 2015). Clearly the Court has not yet developed a consistent answer to the question of whether citizens should be able to vote directly on issues of fundamental rights.

Increasingly, some of the most salient rights-based issues of our time, including same-sex marriage,<sup>2</sup> affirmative action,<sup>3</sup> abortion,<sup>4</sup> immigration,<sup>5</sup> and drug policy<sup>6</sup> are being decided through the ballot measure process. Yet, discussions of the merits of deciding these issues in this environment have tended to focus on the same well-worn theoretical debates. Proponents of the ballot measure process argue that it is the most democratic way to decide difficult moral questions (Schmidt 1989, 25–40). This echoes the sentiments of the progressive reformers who originally pushed for the expansion of the initiative and referendum process in the early twentieth century. They saw this process as a way for citizens to regulate the power of special interests and check the influence of corrupt elites (Cronin 1989, 43–59; Schmidt 1989, 6–10). In contrast, courts have often been regarded as antidemocratic institutions because they are, by design, insulated from the influences of popular will (Bickel 1962). Critics of the ballot measure process have responded by pointing out that it has often been used as a tool of retrenchment to roll back minority rights (Bell 1978; Cronin 1989, 90–124; Gamble 1997; Miller 2001). These critics question the value of endorsing a strictly majoritarian definition of democracy and contend that protecting vulnerable or unpopular minorities requires that we place some rights outside of the purview of potentially hostile and discriminatory majorities (Cronin 1989, 7–37).

These scholars raise valid concerns, but such arguments oversimplify this issue somewhat by focusing too much on the question of who should decide and not enough on how these different institutional environments affect the structure and tenor of these debates. This is important because institutions do more than just aggregate the individual preferences of the actors working

within them; they consist of norms and constraints that structure individual behavior and help determine outcomes (Riker 1980; March and Olsen 1984; Smith 1988; Gillman and Clayton 1999). As a result, moving this debate from one institutional environment to another does not just change the audience, it alters the entire nature of the debate itself in some fundamental, and often surprising, ways.

In this book, I seek to better understand how institutional norms and constraints shape debates over fundamental rights. Using conservative<sup>7</sup> opposition<sup>8</sup> to same-sex marriage as an extended case study, I analyze arguments made by opponents of marriage equality both inside and outside of the courtroom. I find that conservative opponents of same-sex marriage were able to use rights language to effectively argue against marriage equality in ballot measure campaigns but that they typically avoided using the language of rights to frame their arguments after the debate moved inside the courtroom. This finding is counterintuitive given that the language of rights would seem well suited for a legal environment. This raises two important questions that motivate the inquiry conducted in this book: Why did conservative opponents of same-sex marriage enjoy such an advantage when debating this issue in the popular arena of a ballot measure campaign? And why were they less successful at mobilizing the language of rights when arguing against it in more elite-centered environments?

Although most early scholarship on rights-based social movements was focused on efforts to bring about social change, rights discourse is also frequently used by conservatives as a means of protecting status-quo power structures (Goldberg-Hiller and Milner 2003; Haltom and McCann 2004; Dudas 2008). During same-sex marriage ballot measure campaigns, conservatives often used the discourse of parental rights and religious liberty to counter the rights-based appeals of marriage equality activists. An activist working to pass California's Proposition 8 in 2008 summed up the opinions of many opponents of marriage equality when he argued:

The marriage controversy has been contaminated by the language of rights. We must remember there are other groups and other people who also have their own rights besides gays. We have to think about children, their right to be raised by a mother and a father. We have to think about religious groups that believe that marriage is an institution established by God who are right now are [*sic*] having their rights violated by the supposed rights of the gay portion of our society.

(Miranda 2008, 53)

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Jim Garlow, a pastor at Skyline Church in San Diego, expressed a similar sentiment in a speech he gave to opponents of same-sex marriage at a rally in support of Proposition 8:

Rights have been crushed under every time same-sex marriage is legal. Some pastors have been threatened with jail. Many have been muzzled and silenced. Churches have been threatened and intimidated and parents . . . and business persons [*sic*] as well. . . . This is ultimately really not about marriage and homosexuality at its core. At its core is they have found a loophole hiding under the guise of civil rights by which they can put underfoot and crush underfoot the rights of every person who has a Biblical worldview. That is what is at stake. (2008a, 45–46)

This language is incredibly powerful. Using rights discourse in this way allowed conservative opponents of same-sex marriage to construct an identity of themselves as victims of oppression and to construct gays and lesbians as oppressors. Such logic mobilized conservative activists and helped them appeal to a wider audience as well. Although one must be careful not to assign too much instrumental importance to the use of rights language, it is notable that conservatives won thirty-four of the thirty-nine same-sex marriage ballot measure campaigns that took place from 1998 to 2012.

Yet despite their considerable emotional appeal, such arguments were almost never used by conservatives when arguing this issue in a courtroom environment. I argue that this is because our modern conception of law as an “arena of reason” (Fitzpatrick 1992; Darian-Smith 2010) has shaped courtroom procedures, ensuring that the claims of conservatives will be subjected to a level of scrutiny inside the courtroom that they do not receive in more popular arenas. Though this conservative rights language is not overtly discriminatory, these arguments rely on an implicit assumption that gays and lesbians are “dangerous” and “deviant” others whose selfish and excessive rights claims threaten the legitimate rights of the majority of Americans (Schacter 1994; Goldberg-Hiller and Milner 2003; Dudas 2008). This logic builds on a long-standing conception of citizenship in which individuals must prove they deserve equal rights by disciplining what are thought to be deviant sexual urges (Foucault 1990; Comaroff and Comaroff 1991, 365–404; Merry 2000, 221–257). Although these arguments would be rejected by many if made explicitly, when masked by the secular discourse of rights, these implicit moral assumptions



are free to operate at a subconscious level, feeding on latent stereotypes and helping to foment popular opposition to same-sex marriage. In this way, rights discourse is used as a means of transforming arguments based on moral assumptions into something acceptable to a more secular audience (Schacter 1994, 289–290; Herman 1997, 115, 144; Hardisty 1999, 114).

Litigation has proven an effective tactic for advocates of gay and lesbian rights in part because the courtroom environment allows them to move beyond simple sound bites and more successfully challenge the arguments of their opponents (Gerstmann 1999, 99–127; Andersen 2005, 143–174). Requirements such as the need to support claims with evidence; to subject them to more dispassionate scrutiny from experts; and to show how the law in question furthers a legitimate, secular, government interest all work to unmask the discriminatory stereotypes that underlie many of the rights-based arguments made by conservative opponents of same-sex marriage. As a result, I find that the same arguments that work so effectively for conservatives in a popular environment frequently become a liability for them when the debate over marriage equality moves inside the courtroom.

#### LAW AS AN ARENA OF REASON

The insights provided in this book have been influenced by “new institutional” approaches to social science inquiry.<sup>9</sup> This scholarship argues that institutions consist of norms and constraints that shape how individuals react to different types of political issues, structure conflicts, and determine outcomes (Riker 1980; March and Olsen 1984; Smith 1988; Gillman and Clayton 1999). As E. E. Schattschneider famously asserted, “All forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because *organization is the mobilization of bias*. Some issues are organized into politics while others are organized out” (1960, 69).<sup>10</sup> This “mobilization of bias” represents what some have called “the second face of power” (Bachrach and Baratz 1962; Gaventa 1980, 8–11). According to this conception, institutional norms are a source of power because they determine how disputes must be structured—placing those who adhere to this structure at an advantage and disadvantaging those either unable or unwilling to do so.

Contemporary US legal disputes are shaped by our modern conception of law as an objective, unbiased, and rational process. This conception of law

emerged in the West during the Enlightenment era, when new scientific discoveries and an emphasis on reason began to challenge entrenched religious authority. These changes caused law to be seen as an exercise of science and logic, a break from previous conceptions of law as a product of divine inspiration and a reflection of religious beliefs (Fitzpatrick 1992; Darian-Smith 2010). This led to the creation of a “positivist” conception of law as a form of decision making that exists outside the realm of politics or morality. Legal positivism argues that judicial decisions should be the product of careful, unbiased, legal reasoning untainted by individual moral or political beliefs (Austin 1879). Although the idea that it is possible to remove politics and morality from law has been thoroughly disputed (see, for example, Holmes 1897), the belief that law is an objective and reasoned process persists (Fitzpatrick 1992).

In an attempt to ensure that legal decision making is a product of reason, a number of norms and procedures have been established that govern the actions of courtroom officials. Arguments made in court are required to be supported with evidence, they must be based on legal reasoning, and they must be subjected to scrutiny from opponents as part of an “adversarial process.” These requirements have been formalized through a system of legal education that imparts these values to budding legal professionals. Law school trains students to use the “case study method” and reinforces expectations that lawyers and judges will “think logically,” carefully scrutinize arguments, and make dispassionate decisions based on evidence. Though these procedures have fallen well short of accomplishing the goals of legal positivism, this does not mean they are irrelevant. As we shall see, these constraints have had an important impact on the debate over same-sex marriage. They limit the value of specious arguments, which cannot be supported with credible evidence, and they lessen the impact of arguments based solely on individual moral values or discriminatory stereotypes.

The norm of impartiality in law sets the courtroom apart from other institutional environments. In the legislative arena, for example, no such assumptions exist. Instead, these institutions celebrate partisan bias and encourage individual actors to pursue their own self-interest. Here, individuals make decisions typically based not on notions of fundamental rights but on narrow self-interested goals, such as winning reelection (Downs 1957; Mayhew 1974) or advancing up the ranks of the party hierarchy (Cox and McCubbins 1993). These unique institutional norms can diminish the impact rights discourse

has on legislative officials. This has, we will see, a dramatic impact on the way debates over same-sex marriage play out in the legislative arena.

In contrast to the elite-centered environments of the courtroom and the legislature, ballot measure campaigns are a more wide-open affair. Every state has some mechanism that allows citizens to vote on issues directly.<sup>11</sup> Although states carefully regulate the process of qualifying measures for the ballot, they generally allow discourse used during ballot measure campaigns to operate without restrictions. Arguments for and against ballot measures are typically presented to the public through short television advertisements and thirty-second sound bites. As we shall see, these arguments often contain conceptions of individual rights that rest on discriminatory stereotypes. Because these arguments are targeted at a “rationally ignorant” popular audience that is typically unable, or unwilling, to subject them to extensive scrutiny, the moral assumptions that underlie this rights discourse go largely unchallenged during these campaigns.

In this book, I examine how these different institutional norms and constraints have shaped the debate over marriage equality by conducting comparative analyses of arguments used by opponents of same-sex marriage in different institutional environments. This approach offers an opportunity to empirically test what have often been necessarily theoretical ideas about how different institutional environments might affect the efficacy of social movements.<sup>12</sup> Social scientists do not have the luxury of creating controlled experiments. They cannot replay historical events to see what might have happened had movement activists pursued their cause in a different institutional venue. The same-sex marriage debate was, however, carried out in a variety of different institutional contexts. Focusing on this issue provides a unique opportunity to examine how institutional frameworks have affected the way opponents of same-sex marriage think and talk about their cause while holding other factors such as region, culture, and time frame constant.

## SOCIAL MOVEMENTS, RIGHTS TALK, AND LAW

This book is also grounded in scholarship that uses a sociolegal approach to study the relationship between law and social movements. Legal scholars working within the interdisciplinary field of law and society have long studied how members of social movements mobilize the law in order to bring

about or resist social change (Scheingold 1974; Zemans 1983; Burstein 1991; McCann 1994; Engel and Munger 2003; Epp 2009). This scholarship has often challenged what Stuart Scheingold (1974) called the “myth of rights,” which holds that social change can be brought about directly through litigation. This popular belief can result in frustration for social movement activists because legal victories typically fail to deliver tangible change immediately (Rosenberg 1991). Scheingold argued instead that rights should be understood as resources that can be used by activists to bring about change indirectly. In what he called the “politics of rights” activists use legal symbols and discourse to lend legitimacy to their positions, mobilize supporters, and agitate for social change both inside and outside of formal legal environments.

This approach challenges us to expand our view of the law beyond the walls of the courtroom. This is important because most studies of law and social movements have focused on the actions of formal legal actors—primarily the US Supreme Court. This can have the effect of artificially separating the “political” and the “legal,” missing the way in which politics are frequently imbued with legal symbols and discourse and reinforcing the conventional legal formalist view of law as distinct from politics.<sup>13</sup> Law and society scholars have long recognized, however, that the United States has a “plural legal order” and that legal meaning is frequently constructed outside of formal legal institutions (Merry 1988). In light of this fact, they have called for a more expansive view of legal phenomena that moves beyond the courtroom and examines the “common place of the law” (Ewick and Silbey 1998). This book builds on that tradition by examining how legal discourse is employed not just inside the courtroom but also in ballot measure campaigns and legislative arenas—institutions that, with a few notable exceptions (Gerstmann 1999, 99–127; Andersen 2005, 143–174; Stone 2012) have not received much attention from sociolegal scholars.

Another key insight provided by law and society scholars is an understanding of how movement activists and average citizens use “rights talk” to create frames of collective meaning favorable to their cause. Scholars who study this phenomenon have worked to unpack the instrumental and constitutive implications of rights discourse (Ewick and Silbey 1998; Gilliom 2001; Passavant 2002; Engel and Munger 2003; Goldberg 2007; Dudas 2008; Lovell 2012; Wilson 2013). Rights carry with them substantial symbolic power in the United States. As a result, framing one’s cause as a rights-based issue can lend considerable legitimacy to it (Glendon 1993). Activists may capitalize on this fact by using rights discourse to “expand the sphere” of a conflict and broaden their

appeal beyond their base of supporters (Schattschneider 1960).<sup>14</sup> Scholars have shown, for example, that members of the religious right will often couch moral arguments in the language of rights in an attempt to appeal to more secular individuals (Schacter 1994, 289–290; Herman 1997, 115, 144; Hardisty 1999, 114).<sup>15</sup>

Framing one's cause using the language of rights also has constitutive impact on the identity of the speaker. Rights are often popularly conceived of as assets available to everyone equally without conditions, but this has not proven true historically.<sup>16</sup> Instead, rights should be understood as contingent resources given only to those who demonstrate that they deserve them by exhibiting behavior deemed acceptable by the majority (Goldberg 2007). Making a valid rights claim does more than just allow an individual to “do something”; it also entitles her to “be someone”—to be considered a legitimate, virtuous US citizen (Passavant 2002; Engel and Munger 2003; Dudas 2008). Examining the debate over same-sex marriage through this prism makes it clear that activists engaged in this issue are offering competing conceptions of identity. Proponents of same-sex marriage have used rights language to argue that gays and lesbians are full and equal citizens entitled to the same treatment as everyone else (Hull 2006; Richman 2014). In contrast, opponents of same-sex marriage argue that gays and lesbians are deviant others whose values pose a threat to the legitimate rights of the majority (Schacter 1994; Goldberg-Hiller and Milner 2003).

I find that this perspective has important constitutive implications for conservative opponents of same-sex marriage. These activists typically view the push for marriage equality as a “zero-sum game” in which granting rights to gays and lesbians necessarily means infringing on the existing rights of the majority. Using rights discourse in this way creates an inversion process whereby gays and lesbians become the oppressors seeking to infringe on individual rights, and conservatives become victims of oppression (Goldberg-Hiller and Milner 2003). Adopting such a perspective personalizes opposition to same-sex marriage, transforming it from a fight to protect the somewhat abstract institution of marriage to a personal defense of one's individual rights. Using the discourse of rights in this way causes opponents of same-sex marriage to see themselves as “cultural warriors” fighting to preserve fundamental rights and values threatened by the “excessive” and “unnecessary” rights claims of gays and lesbians.

These conceptions of rights still motivate conservative opponents of same-sex marriage today, despite the fact that these positions have been repeatedly

invalidated by the courts. This shows that the constitutive power of this conservative rights discourse is incredibly resilient. Unfavorable legal decisions are often thought to repudiate existing interpretations of the law and kill alternative legal meanings that develop outside of the courtroom (Cover 1983). However, the “deployment of legal claims is not always a one-way process in which government officials impose their vision of law on a passive population” (Lovell 2006, 285). Conservatives have always treated formal legal actors with a great deal of skepticism, particularly with regard to what they consider moral or cultural issues. This approach seems to inoculate them against unfavorable judicial decisions, easily dismissed as “judicial activism.” As a result, the conceptions of individual rights advanced by conservative opponents of same-sex marriage continue to thrive despite the fact that these conceptions have been ignored or even outright rejected by formal legal actors. This suggests that the *Obergefell* decision might have altered the dynamics of the marriage equality debate in some fundamental ways, but it is unlikely to have ended it altogether.

#### RIGHTS ON THE RIGHT

Finally, this book is focused on understanding how conservative activists mobilize legal symbols and discourse in order to oppose social change. In doing so I build on the insights of scholars who have studied the growing conservative legal movement in the United States (Brown 2002; Heinz et al. 2003; Hacker 2005; Hatcher 2005; den Dulk 2006, 2008; Dudas 2008; Southworth 2008; Teles 2008; Wilson 2013). Much of this scholarship has been influenced by the work of Charles Epp (1998), who showed how the development of progressive legal organizations helped to spark the “rights revolution.” These scholars pick up where Epp left off, documenting how New Right<sup>17</sup> conservative activists sought to counter this rights revolution by building stronger legal organizations during the 1980s and 1990s (Stefancic and Delgado 1996; Brown 2002; Hacker 2005; Southworth 2008; Teles 2008). Organizations formed during this time, such as the Federalist Society, the Alliance Defense Fund, and the American Center for Law and Justice, helped to provide training and resources to lawyers interested in pursuing conservative causes and worked to appoint judges sympathetic to the conservative point of view. Many scholars have credited these legal organizations with recent gains made by conservatives on economic issues, such as free enterprise, economic deregulation, and property rights (Southworth

2008; Teles 2008), as well as social issues, such as religious liberty and abortion (Brown 2002; Hacker 2005; den Dulk 2006; Southworth 2008).

This focus on conservative law use is a necessary perspective because rights have traditionally been understood as a tool the politically powerless can, in theory, use to challenge status-quo power structures (Scheingold 1974; Zemans 1983; Burstein 1991; McCann 1994; Engel and Munger 2003). The marriage equality debate in particular has received considerable attention from legal scholars of late. However, with a few notable exceptions (Goldberg-Hiller 2002; Klarman 2012), most of this work has focused primarily on the efforts of marriage equality activists and given little attention to their opponents (see, for example, Andersen 2005; Hull 2006; Pinello 2006; Gerstmann 2008; Smith 2008; Hirshman 2012; Richman 2014).

Scholarly inattention to this conservative rights use can result in a skewed perspective of US history and an overly optimistic view of the country's future. An exclusive focus on progressive rights use tells a tale of a nation driven by a common creed of equal treatment for all citizens to consistently expand the rights of once-marginalized populations (Myrdal 1944). Such a view lends an air of inevitability to the cause of social movements that advocate on behalf of oppressed groups. However, as scholars such as Rogers Smith have noted, the "dynamics of American development cannot simply be seen as a rising tide of liberalizing forces progressively submerging contrary beliefs and practices" (Smith 1993, 558–559). The findings of this book underscore the fact that there is nothing inherently liberating about rights. They are, instead, indeterminate or "contingent" resources (Scheingold 1974, 7). Rights are given meaning by the parties who seek to use them and by the institutional contexts in which they are advanced. As such, rights can be used just as effectively to preserve entrenched hierarchies as they can to challenge them. There is nothing inevitable about calls to extend rights to marginalized populations. Instead, appeals to particular notions of individual rights will continue to be used as a means of preserving existing power dynamics or as instruments of retrenchment used to roll back newly won concessions.

## ON METHODS

This book is focused on understanding the use and effectiveness of legal symbols and discourse. As such, it is theoretically and methodologically informed



by interpretive social science. Scholarship oriented by interpretive epistemology begins with the assumption that reality is socially constructed and that the meaning we give to the world around us is necessarily mediated by cultural and linguistic understandings and normative assumptions (McCann 1996, 463; Hawkesworth 2006, 31; Yanow 2006, 75). According to this conception, language does not merely describe reality but actually constitutes it. As a result, meaning construction is seen as a complex, indeterminate, mutually constitutive, and hotly contested process. The complex nature of this process frustrates attempts to isolate the impact of individual variables, requiring that scholars instead explore how social, legal, institutional, and cultural norms work together to shape our understanding of the world (Rabinow and Sullivan 1988, 14; McCann 1996, 463).

In order to overcome these inherent difficulties, I examine conservative rights discourse using a variety of different methodological techniques. This mixed-methods approach is common in interpretive work. Because interpretation is such a complex and interrelated process, and because all interpretations are necessarily partial and incomplete (McCann 1994, 14–16), interpretive scholars frequently use a variety of methods to ensure their findings conform to rigorous scholarly standards (McCann 1994, 1996, 477; Yanow 2006, 77). I follow this model by studying conservative opposition to same-sex marriage using a “quantitative” content analysis of discourse used by opponents of marriage equality in different institutional environments (Chapter 3), and two “qualitative,” bounded, comparative case studies (Chapters 4 and 5).

Texts are used as the unit of analysis throughout this project. By “texts” I mean anything written down or recorded in some way. This would include, for example, speeches transcribed and made available to the public, amicus curiae briefs submitted in court cases, documents made available on organization websites, statements made before a legislative body, and television advertisements used in statewide ballot measure campaigns. I have chosen to use written texts as opposed to other forms of data, such as interviews, because this project is focused on understanding the implications of the rights discourse of conservative activists. Understanding these implications requires the researcher to focus on the text itself rather than determine the intentions of the author. This is because as soon as a speaker has finished speaking (or writing), she loses control of the meaning of her words. The audience members are free to interpret them however they see fit, regardless of intentions. Thus, when interpreting the meaning of a text, it is more important to look to



the text itself than it is to consider the motivations of the author who wrote it (Ricouer 1973, 113; Rabinow and Sullivan 1988, 13).

## CHAPTER OVERVIEW

In Chapter 2 I begin my analysis of conservative opposition to same-sex marriage by examining the history of the gay rights movement in the United States and the conservative countermobilization against it. I focus in particular on how conservatives have used rights discourse to construct gays and lesbians as deviant and how proponents of gay rights have sought to challenge this conception. Examining this history is crucial for understanding the current debate over same-sex marriage because this dispute is built on an existing framework of cultural traditions and mediated by frames of collective meaning established during these previous conflicts. The historical analysis conducted in this chapter provides the necessary context for understanding conservative opposition to same-sex marriage today.

I begin by exploring the movement-counter movement dynamics of the early gay rights movement. For much of US history, gays and lesbians have been targets of discrimination and violence. This discriminatory treatment has been fueled in large part by popular conceptions of gays and lesbians as “sick” and “depraved” individuals who are unable to control their own sexual impulses and who often seek to prey on children (Fejes 2008). In the 1970s, members of a nascent gay rights movement began challenging these conceptions and arguing that they deserved equal rights. Conservatives responded to this movement by using the ballot measure process as a tool of retrenchment. Antigay activists such as Anita Bryant argued that local gay rights ordinances normalized “homosexuality” and made it easier for gays to “recruit” children into their “sinful” lifestyle. These arguments worked well with a popular audience because they played on long-standing conceptions of gays and lesbians as sexual deviants. The success of Bryant’s strategy proved to be short-lived, however. She often aggressively denounced homosexuality by using overtly religious and homophobic language to characterize gays and lesbians as dangerous and sinful predators. Although this discourse resonated with many in the conservative base, it alienated more moderate voters.

I conclude the chapter by examining how, during the 1990s, antigay activists began eschewing the more overtly discriminatory and homophobic

language of these earlier campaigns in favor of a more rights-based approach. This strategy was used most successfully to pass Colorado's Amendment 2 in 1992 (Herman 1997, 137–169; Gerstmann 1999, 99–127; Andersen 2005, 143–174). During this campaign, conservatives convinced voters to pass a constitutional amendment prohibiting gays and lesbians from being recognized as a “protected class” by framing gay rights as excessive, “special rights.” Although this discourse refrains from using overtly homophobic language, it still communicates the message that gays and lesbians are deviant others pushing for excessive rights that infringe on the legitimate rights of responsible, disciplined citizens (Schacter 1994; Goldberg-Hiller and Milner 2003).

In Chapter 3, I provide a “big-picture” overview of opposition to same-sex marriage in the United States and begin my empirical analysis of the impact of institutional environments on the use and effectiveness of conservative rights discourse. I begin by examining the structures of the local and national organizations that led the fight against same-sex marriage. I then conduct a quantitative content analysis of discourse used by opponents of marriage equality in a variety of different institutional contexts. This analysis reveals that conservative rights discourse is much more prevalent outside of the courtroom than inside it and suggests that the use of this rights discourse was crucial to the success opponents of same-sex marriage had in statewide ballot measure campaigns.

Chapter 4 focuses on conservative opposition to same-sex marriage in California. I begin this chapter with a brief overview of the political development of California. This historical analysis traces the development of the state's political culture and institutions and examines how this dynamic affected the debate over marriage equality in that state. I then conduct an in-depth analysis of the 2008 Proposition 8 campaign. This analysis begins by describing the organizational structure and strategy of the campaign. Finally, I use interpretive textual analysis to explore the constitutive and instrumental implications of arguments used in support of the measure. I conclude the chapter with an analysis of the *Perry v. Schwarzenegger* trial (2010). Here I examine arguments made during the trial and show how institutional norms and constraints present inside the courtroom made it difficult for conservatives to effectively mobilize rights discourse in that environment.

The results of this analysis show that conservatives have been able to employ rights discourse instrumentally to influence ballot measure campaigns. Framing their arguments using the discourse of rights, and minimizing the

use of moral or religious appeals, allows conservatives to connect with a more secular audience and helps them build popular support for their cause. In addition to its instrumental implications, this discourse also has constitutive impact on opponents of same-sex marriage. Thinking about their cause using the discourse of rights helps mobilize opposition to marriage equality. This language lends increased legitimacy to the arguments of conservatives. It allows them to see themselves not as a recalcitrant majority stubbornly opposing the rights of gays and lesbians but as victims of oppression standing up against the excessive and unnecessary rights claims of subversive elites.

After the debate over same-sex marriage moved inside the courtroom, however, these conservative rights claims became much less effective. Conservatives attempted to downplay the rights-based arguments they had used during the Proposition 8 campaign when arguing against same-sex marriage during the *Perry* trial. However, proponents of marriage equality made the Yes on 8 campaign's arguments a centerpiece of their case. They used expert testimony to expose the stereotypes underlying advertisements run by conservatives in support of Proposition 8 and showed that the law was motivated by a discriminatory intent, not a compelling government interest. This strategy proved successful because the court largely agreed with this analysis. Thus, the rights-based arguments used by conservatives during the Proposition 8 campaign were not merely ineffective in this environment, they actually became liabilities.

Chapter 5 focuses on conservative opposition to same-sex marriage in Maine. I begin my analysis by briefly discussing New England's political development and examining how the region's institutional environment shaped the same-sex marriage debate. Although the citizens' initiative process is a staple of politics in many parts of the nation, political systems in northeastern states tend to be much more elite-centered. I argue that this dynamic placed conservatives at a disadvantage when debating this issue in this region and explain why the marriage equality movement was able to gain an early foothold there. Maine is an exception to this rule, however. It is the one New England state with a robust citizens' initiative process, and as a result, opponents of same-sex marriage were able to resist marriage equality more aggressively there.

After discussing the development of New England's political institutions, I conduct an in-depth exploration of the passage of LD 1020, a bill legalizing same-sex marriage in Maine in 2009. I show that marriage equality activists were able to capitalize on the fact that Democrats had won significant

majorities in Maine's state legislature in 2008 by pushing for the passage of a marriage equality bill. Conservatives had a difficult time opposing these efforts because legislative officials are primarily concerned with winning reelection and currying favor with members of their own political party. This makes them less receptive to rights discourse than a popular audience. The success of LD 1020 proved short-lived for marriage equality advocates, however. Opponents of same-sex marriage placed a measure seeking to repeal the legislation before voters in 2009. During the campaign over what came to be known as Question 1, conservatives used the same tactics employed during the Proposition 8 campaign in California to mobilize their own counter-rights discourse and successfully repeal LD 1020.

The chapter concludes by examining Maine's 2012 Question 1 campaign. During this campaign, advocates of marriage equality successfully convinced voters to legalize same-sex marriage using the ballot measure process. Maine is one of only three states to have done so. I find that marriage equality activists succeeded in 2012 by avoiding the language of rights, choosing instead to frame support for same-sex marriage using the language of family. I speculate that this approach might have proven successful in part because it caused voters to stop thinking about this issue as a debate between competing rights claims, a dynamic that seems to favor conservatives. This suggests that rights language can actually be counterproductive to efforts to bring about social change when used in a popular arena. Though avoiding this rights discourse had instrumental value for proponents of marriage equality, this strategy has problematic constitutive implications. Most of the arguments made by the Yes on 1 campaign in 2012 were presented by heterosexual individuals who talked about what family meant to them. Gays and lesbians were largely kept in the background of the campaign. This suggests that many voters are willing to support same-sex marriage but only if gays and lesbians are made to appear less threatening to them by not making "aggressive" rights claims and by not being the face of the campaign.

Chapter 6 is the conclusion. In this chapter I highlight the key findings of this book. I then expand the scope of this project and consider the broader implications of these insights. I show that institutional environments have shaped a number of important cultural conflicts in ways similar to the debate over same-sex marriage. These debates frequently end up being decided in the popular arena through the ballot measure process. Rights discourse often plays a central role in these campaigns, but I argue that it does not necessarily

add value to these debates. On the contrary, the results of this study suggest that the institutional norms and constraints present in this environment make it more likely that rights claims will be used to obfuscate these issues than to enrich this discussion. This suggests that the results of ballot measure campaigns are not a reflection of popular will, as so many of their most ardent supporters suggest, but rather a distortion of it. This may lead us to question the wisdom of allowing so many important cultural questions to be decided in this environment.



University Press of Kansas