

Why State Constitutions Differ in their Treatment of Same-Sex Marriage

Arthur Lupia University of Michigan
Yanna Krupnikov Indiana University
Adam Seth Levine University of Michigan
Spencer Piston University of Michigan
Alexander Von Hagen-Jamar University of Michigan

Some states treat a same-sex marriage as legally equivalent to a marriage between a man and a woman. Other states constitutionally prohibit legal recognition of same-sex marriages. In all states that have constitutional restrictions against same-sex marriage, the restrictions were passed by a popular vote. A rationale for allowing citizens to vote on constitutional amendments is to produce constitutional outcomes that reflect variations in attitudes across states. We reexamine the amendment-attitude relationship and find it to be weaker than expected. We then develop an alternate explanation that focuses on procedural variations in how states amend their constitutions. Explicitly integrating key institutional variations into an empirical model with attitudinal data yields an improved explanation of why the constitutions of states with similar public attitudes treat same-sex marriages so differently. Our findings have important implications for people who wish to understand and/or change the future status of same-sex couples in state constitutions.

The legal status of a marriage between two men or two women is the subject of one of the most visible social debates in America today (Segura 2005). Some people seek to protect traditional marriage norms by withholding legal recognition from same-sex marriages. Others seek equal recognition for such marriages so that lesbian, gay, bisexual, and transgendered citizens may enjoy the same benefits of marriage as heterosexual couples (Herek 2006).

In the United States, the constitutional status of same-sex relationships varies across states. Some states, like Massachusetts, accord all of the legal advantages of marriage to same-sex couples. Twenty-nine other states write into their constitutions language that prohibits same-sex unions from receiving equal treatment.

The constitutional status of same-sex marriage is important because a constitutional amendment is the most powerful legal statement that a state can make about the issue. To see why, note that while state officials are obligated to enforce both statutes and constitutional amendments, the two forms of law differ in how they can be challenged in a state's legal

system. Statutes can be challenged and overturned when they are found to be inconsistent with a state's constitution. But amendments are constitutional *by definition*. Hence, their legality is more difficult, and often impossible, to challenge in state courts.

In this article, we examine the correspondence between variations in public opinion about same-sex marriage across states and ways in which state constitutions treat same-sex marriages. It is often argued that state-level differences in legislative outcomes reflect state-level differences in mass preferences. Erikson, Wright, and McIver, for example, claim that "state opinion is virtually the only cause of the net ideological tendency of policy in the states" (1993, 81). Such studies of comparative state policy outcomes, as well as analyses that focus on same-sex marriage (see, e.g., Gamble 1997; Riggle, Thomas, and Rostosky 2005; Silver 2009), imply that constitutional treatments of same-sex marriage differ across states because the citizens of constitutionally restrictive states have different attitudes about same-sex marriage than do citizens whose state constitutions contain no same-sex marriage bans. Lax and Phillips, in an article that

focuses on gay rights issues, go even further concluding opinion variations explain differences across states and that “state political institutions have no significant effect on policy responsiveness” (2009, 367).

We offer a different view. It is not that attitudes are irrelevant to constitutional outcomes. It is that the attitude-outcome relationship is quite different than the previous literature suggests.

Our view arises from the fact that states differ substantially in their requirements for constitutional change. While all states except Delaware empower their citizens to cast votes on constitutional amendments, states vary in the details of what has to happen for their constitutions to change. Some states require little more than the assent of a majority of voters to amend the constitution. Others have more complex requirements. In this paper, we clarify how specific institutional attributes condition the relationship between citizens’ same-sex marriage attitudes and constitutional outcomes.

Our analysis proceeds in three steps. First, we use state-level polls to document how citizen attitudes about same-sex marriage relate to constitutional outcomes. We use this data to establish a baseline against which we can compare other explanations. Our initial finding is that the relationship between attitudes and amendments is weaker than previous research suggests. Attitudes in many constitutionally restrictive states mirror attitudes in many states whose constitutions do not ban same-sex marriage.

Second, we conduct a parallel analysis using a different factor: institutional differences. These differences are based on one of two decisions that a state made *decades or centuries before* same-sex marriage debates emerged. Since these institutional decisions were made so long ago, they could not have been caused by current attitudes on same-sex marriage. Since these decisions are exogenous to the relationship between same-sex marriage attitudes and constitutional outcomes today, they can provide an alternate basis for explaining contemporary constitutional outcomes.

The first institutional decision is whether or not the state permits citizens to place potential constitutional amendments on the ballot without legislative participation. The second decision, for states that require legislative participation, is whether a single vote of a legislative majority along with the support of a simple voter majority is sufficient to amend the constitution. *We find that simply categorizing states by these two decisions better predicts the current constitutional status of same-sex couples than do attitudes alone.*

Institutions, however, do not act as an independent force on constitutional outcomes. Instead, they condition the relationship between attitudes and

amendments in specific ways. So, when states make different institutional choices, we should see different patterns of variance in attitude-amendment relationships across states.

Hence, our third analytic step entails the development of a state-specific *threshold model*. The model takes simultaneous account of voter attitudes and a state’s relevant institutional specifics. It also integrates these institutional specifics into the model’s logic. We then show that state-level differences in the constitutional status of same-sex marriages are better explained by this approach. Our finding implies that many state constitutions lack same-sex marriage bans not because their citizens are “socially progressive,” but because public attitudes and institutional specifics jointly conspire to keep such amendments from occurring.

We conclude by discussing additional implications of the model. For example, we use it to explain why few states will adopt new constitutional restrictions against same-sex marriage any time soon. We also use it to clarify which strategies are likely to be used by people who wish to leverage progay or antigay sentiment for other constitutional changes. For all such purposes, predictive success requires knowledge of how institutions condition the relationship between voter attitudes and constitutional outcomes.

Do Amendments Follow Attitudes?

We begin by evaluating the simple hypothesis that amendments follow attitudes or, putting matters more precisely, that state-level constitutional outcomes follow state-level public opinion variations. Our dependent variable is whether or not a state constitution prohibits same-sex couples from receiving the same legal treatment as married heterosexual couples. To evaluate this hypothesis, we gathered state-level opinion data for the 47 states from which we could acquire comparable data on the topic of same-sex marriage.¹ The states for which we could not locate such data are Delaware

¹An online appendix for this article is available at <http://journals.cambridge.org/jop>. It contains information about our data that, along with the content of the article itself, is sufficient to permit replication of our results. A replication file is also available at <http://www.umich.edu/~lupia>. Most of our polls come from high-circulation newspapers and major market television stations. In addition to the criteria mentioned in the text, we sought polls that were held in close temporal proximity to elections with a restrictive amendment on the ballot. Where there was a poll that explicitly mentioned a state constitutional amendment and a poll that was held closer to the election and mentioned same-sex marriage, and did not mention the amendment explicitly, we chose the poll mentioning the amendment as a means of limiting variation in question content.

(which does not allow citizens to vote on constitutional amendments), Mississippi, and West Virginia.² In our “attitudes only” analyses we omit these three states. The online Appendix B contains detailed information on the 47 state polls.

To permit comparability amongst polls, we searched for consistently worded questions. Our goal in each state was to find a question that asks whether respondents support or oppose a state constitutional amendment on same-sex marriage. If we could find no credible state polls that asked such a question, we used questions that ask whether respondents support or oppose legalizing same-sex marriage, but do not specify whether such a law would be statutory or constitutional. Polls that mention amendments generate slightly more opposition to same-sex marriage than those that do not (which is not surprising given that such polls are typically run in states with active political campaigns against such marriages) but these differences are not significant at the .05 level. Hence, we pool the question types in our analyses. For consistency, we term both the proportion of people opposing same-sex marriage and the proportion of people supporting a restrictive amendment as the proportion of people who oppose same-sex marriage.

Before continuing, we need to convey a presentational point. Some poll respondents neither support nor oppose same-sex marriage. There are many reasons for nonresponse. Goldman (2008), for example, has identified a segment of the population that is both reticent to admit to an interviewer that they oppose gay marriage but quite likely to support a restrictive amendment in the privacy of a voting booth.

To demonstrate that our substantive claims are not the product of a particular assumption about non-response, we describe our results under two extreme assumptions. Our “minimal” assumption is that only those who voice opposition to same-sex marriage support a constitutional restriction (i.e., we count all non-respondents as being against a constitutional restriction). Our “maximal” assumption is that only those who voice support for same-sex marriage oppose a constitutional restriction (i.e., we count all nonrespondents as supporting a constitutional restriction). For transparency, we report results using both extreme assumptions, but it turns out that none of our substantive claims depend on which assumption we use. For simplicity, we use the

²In these states, we contacted state party organizations, related political organizations, and public universities, but were unable to locate representative statewide polls covering the topic.

“minimal” assumption as the basis for all graphical depictions of public opinion.^{3,4}

Figure 1 depicts the relationship between state-level attitudes and constitutional outcomes for the 47 states. States are ordered by their same-sex marriage attitudes. On the figure’s left side are states whose attitudes towards same-sex couples are more permissive. On its right side are states whose attitudes are more restrictive. We draw a horizontal line at the 50% level. Bars that stretch above this line are states in which a majority of citizens express restrictive attitudes.

The color of each bar reflects the current constitutional status of same-sex marriages. Black bars represent states that have passed restrictive amendments. White bars represent states with no such amendments. If amendments follow attitudes, there should be white bars on the left and black bars on the right of Figure 1. *There should be no mixing of black and white in the middle.*

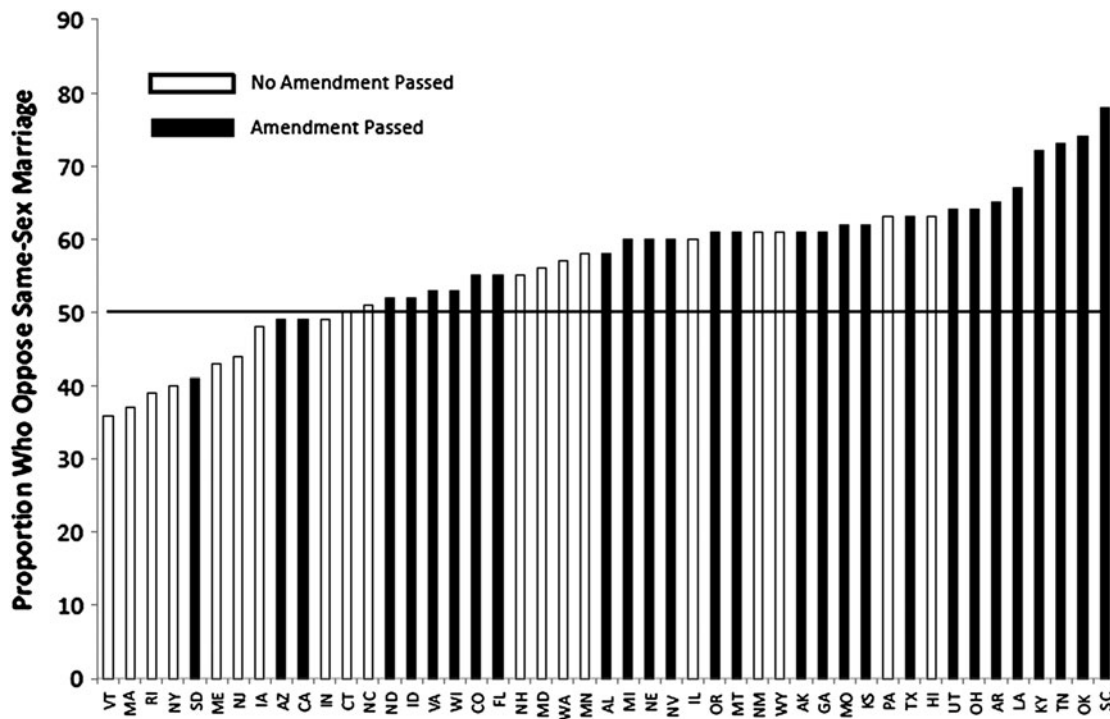
Figure 1 shows that the relationship between amendments and attitudes is not as strong as previous research suggests. At the extreme edges of the figure, the notion that amendments simply follow state-level attitude variations performs well. For example, only three of the 10 states with the lowest levels of opposition have passed restrictive amendments, while nine out of 10 states with the highest levels of opposition have done so. But there is substantial mixing of colors in the middle.

Another way to evaluate the “amendments follow attitudes” view is as follows: treat “majority rule” as a baseline, as it is the modal voting rule for passing constitutional amendments via direct democracy in U.S. states. If amendments follow attitudes and if majorities rule, then only states in which a majority of the public expresses restrictive attitudes should have a restrictive amendment. In other words, only bars that represent 50% opposition or above should be black. Here, the “amendments follow attitudes” view explains 33 of 47 states (70%) using the “minimal” assumption

³In several footnotes, we report on the results of ancillary analyses that demonstrate the robustness of our claims to other substantive assumptions. In all such cases, we state those analyses in terms of the “minimal” assumption. In every case, using the maximal assumption produces similar or identical results.

⁴We also looked into differences between polls that screen for likely voters and those that do not. Of our 47 polls, 34 represent likely voters and the other 13 are statewide adult samples. There are no significant differences between the two sample types. Using the “minimal” estimate, the average statewide support for restrictions is 57% in likely voter polls and 55% in adult samples. Using the maximal estimate, support is 64% in both types of states.

FIGURE 1 Public opinion and marriage amendments (minimal opinion depicted)



and explains 31 of 47 states (66%) using the “maximal” assumption. In more than a few states, and using either assumption, amendments do not follow attitudes.⁵

Do Institutions Matter?

U.S. states employ many different procedures for amending their constitutions. In this section, we

examine how two basic institutional variables relate to the current constitutional status of same-sex marriages. One variable pertains to whether or not a constitutional amendment can originate outside of the state legislature. The other variable reflects the amount of legislative effort and voter support that are needed to amend a constitution. After defining these variables, we use them to reexamine variations on state constitutional treatments of same-sex marriage.

DCI or Non-DCI?

The first procedural variable affects whether or not constitutional amendments must originate in a state’s legislature. In 15 states, citizens can place a potential constitutional amendment on the ballot without legislative participation or approval. Following Krislov and Katz (2008), we call this group “Direct Constitutional Initiative (DCI) states.” In all other states except Delaware, constitutional amendments must be placed on the ballot by the legislature. We refer to these 34 states as “non-DCI.”

Potential amendments qualify for the ballot in DCI and non-DCI states in different ways. We will describe DCI state procedures first. In a DCI state, a proposal can qualify for the ballot if its supporters

⁵An alternative hypothesis is that our classification of constitutional outcomes into the category of having or not having a restrictive amendment masks important differences in the content of constitutional restrictions. To evaluate this alternative, we used Lambda Legal (LL)’s categorization (November 6, 2009) of constitutional outcomes. LL places every U.S. state into one of five classes. Its “lowest class” contains states that have “inequality written into the constitution.” Its “fourth class” includes states that have nonconstitutional restrictions. The average percentage of opinion against same-sex marriages is 55% in the eight LL fourth class states for which we have data and is 61% in the 26 LL lowest class states for which we have data. This difference is not significant at the .05 level. Within the “lowest class” states, LL makes a further distinction between constitutional restrictions that “have not provided protections to reduce the harm” and constitutional restrictions that “might be read to cause more harm.” In the six “no protection” states for which we have data, the average percentage of opinion against same-sex marriage is 61%. In the eighteen “might be read” states, the average is 61%. This difference is also not statistically significant.

collect a required number of signatures from registered voters.⁶ The modal requirement is 10% of the total votes cast for governor in the state's previous gubernatorial election. Today, nearly all signature collection efforts are accomplished by paying a professional firm to gather the needed signatures (Kousser and McCubbins 2005). So, to qualify for the ballot in a DCI state, the number of people supporting a proposed initiative need not be big, but it helps if at least one or more of its supporters are rich enough to hire a competent signature collection firm.⁷

In a non-DCI state, placing a potential constitutional amendment on the ballot requires a different kind of effort. Non-DCI states require state legislatures to formally qualify potential amendments for the ballot. To succeed, such efforts require a broader supportive coalition than in DCI states. In a DCI state, a single person can—in principle—draft an initiative and pay a firm to collect signatures from a relatively small percentage of a state's residents. By contrast, legislators who seek constitutional change in non-DCI states formally require the support of at least a majority of legislators.

Simple Non-DCI or Complex Non-DCI?

The second procedural variable specifies whether or not non-DCI states erect special barriers to constitutional change. To simplify this variable's explanation, we sort non-DCI states into two categories: simple and *complex*. In the nineteen *simple* states, a single legislative vote is sufficient to place a potential amendment on the ballot and the support of a simple majority of voters is sufficient for the amendment to pass. The 16 *complex* states have additional requirements that are atypical of the normal legislative process and/or of the typical state election. If a non-DCI state

requires votes in two separate legislative sessions to place a potential amendment on the ballot or if a simple majority of votes on Election Day is insufficient for passage, we code the state as complex.⁸ Table 1 lists states by their institutional requirements for passing constitutional amendments.

Analysis

To what extent are present-day constitutional outcomes on same-sex marriage related to these two basic variables? From the procedural information just given, we can articulate a simple "amendments follow procedures" hypothesis. It has two parts:

1. Since non-DCI states have the extra burden of achieving a legislative coalition before placing an amendment on the ballot, DCI states are more likely than non-DCI states to have restrictive amendments.⁹
2. Since changing the constitution in complex states requires broader legislative and/or voter support than in simple states, simple states are more likely than complex states to have restrictive amendments.

How well does this hypothesis correspond to current outcomes? The hypothesis' first part is supported by the fact that *all* 15 DCI states have voted to constitutionally restrict same-sex marriages. The same is not true in non-DCI states. The pattern in non-DCI states, moreover, is consistent with the hypothesis' second part. Ten of the 19 simple non-DCI states (53%) have restrictive amendments. Only four out of 16 (25%) complex non-DCI states have such restrictions. Hence, a crude version of the hypothesis that reads, "simple and DCI states will have restrictions, complex states will not" explains current constitutional outcomes in 37 of 50 states (74%). In other words, this crude hypothesis outperforms the "amendments follow attitudes" hypothesis of the previous section.

⁶We classify Illinois as a non-DCI state. In Illinois, DCIs are possible, but only for changes to Article IV of its constitution, which pertains to legislative procedures. So, any amendment to the Illinois constitution that pertains specifically to the legal status of same-sex couples must originate in the legislature. Also note that in all DCI states, it is possible for the legislature to place proposed amendments on the ballot. The important difference between DCI and non-DCI states is that in the former constitutional change does not require legislative involvement.

⁷In fact, many amendment-oriented groups organize for the purpose of a single election and disband soon after the election is held (Boehmke 2005). Also noteworthy is the fact that many of the people who participate in writing the draft, paying the firm, or collecting the signatures need not be residents of the state (Bowler, Donovan, and Fernandez 1996).

⁸The modal supermajority Election Day requirement in complex states is a majority of *all votes cast*. To see how this requirement works, suppose that 1,000,000 people vote in an election in a state that has the modal requirement. Suppose further that only 800,000 cast votes on the matter. In this case, the amendment must get 500,001 votes (a majority of all votes cast) to pass.

⁹Implicit in this presentation is the assumption that if a restrictive amendment is placed on the ballot, it can gain a majority of votes on Election Day even if preelection polls show a majority opposed to the election. Such an outcome has now occurred in every state that has put an amendment on the ballot.

TABLE 1 Institutional Requirements for Passing Constitutional Amendments

DCI	Complex		
	Simple	Mult. Sessions	Voter Supermajority
AZ	AL	DE	HI
AR	AK	IA	IL
CA	CT	IN	MN
CO	GA	MA	NH
FL	ID	NY	TN*
MI	KS	PA	WY
MO	KY	SC	
MT	LA	TN*	
NE	ME	VA	
NV	MD	VT	
ND	MS	WI	
OH	NJ		
OK	NM		
OR	NC		
SD	RI		
	TX		
	UT		
	WA		
	WV		
	Percent Passed		
100%	53%	36%	17%

Bold indicates states that have passed amendments restricting marriage

*TN requires both voter supermajorities and multiple sessions

Is this basic relationship between constitutional outcomes and procedural variations illusory? Perhaps citizens of DCI states are more opposed to same-sex marriage than citizens of non-DCI states. It could also be the case that citizens of simple non-DCI states are more opposed to same-sex marriage than citizens of complex non-DCI states. Figure 2 allows us to evaluate these possibilities. In this figure, the bars show the percentage of each institutional category (DCI/complex/simple) that has restrictive amendments. The line connects three dots, where each dot represents the state-level average percentage of citizens who oppose same-sex marriage in each institutional category.

Figure 2 reveals that the average of statewide opinions is nearly identical in the three categories of states. Hence, the figure reinforces the idea that differences in constitutional outcomes across states are not simply an artifact of amendments following attitudes. The present-day state constitutional status of same-sex marriage corresponds at least as well to

basic institutional decisions made long ago as it does to current state-level public opinion variations.¹⁰

Integrating Institutions and Attitudes: A Threshold Model of Constitutional Change

The previous section suggests that knowing about basic institutional categories can help explain the current state constitutional status of same-sex marriage. These institutional categories have explanatory power because they establish the voter and legislative support thresholds that constitutional change requires. In this section, we examine those thresholds explicitly, integrate them with our polling data, and use the combination to offer an improved explanation of variations in state constitutional treatments of same-sex marriage.

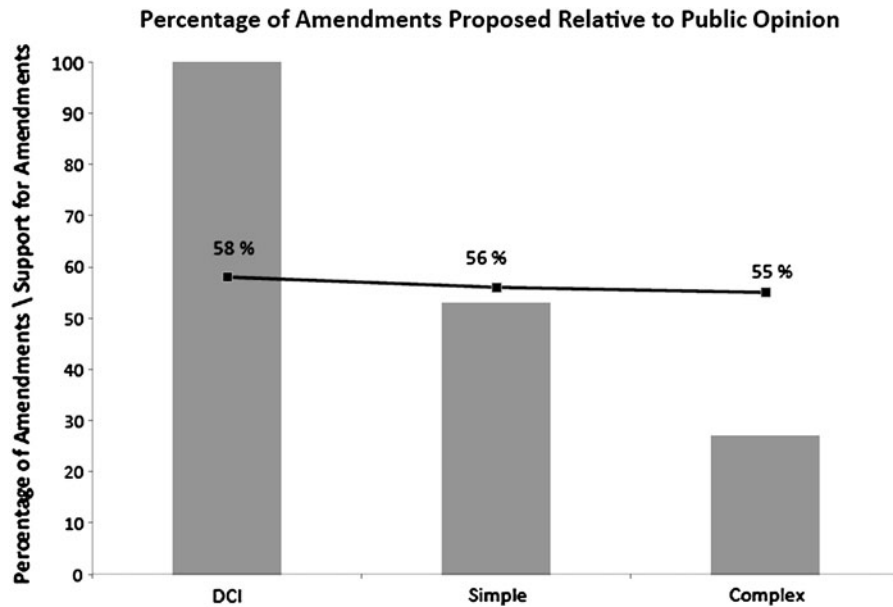
Figure 3 depicts our threshold model of constitutional change. The top of this figure represents the constitutional status of same-sex marriages as of 1997. At that time, no states had restrictive amendments. Since states have historically recognized marriages performed in other states, Massachusetts' decision to legalize same-sex marriage fueled demands for marriage-related constitutional amendments in other states. All but three states that now constitutionally restrict same-sex marriage have done so since that decision. The bottom of the figure represents our expectation of the constitutional status of same-sex marriage today.

To pass an amendment, a *procedural requirement* and an *Election Day requirement* must both be satisfied. By procedural requirement, we mean the percentage of votes in each chamber of a state's legislature that is required to place a potential amendment on the ballot. By Election Day requirement, we mean the percentage of voters whose formal assent is required to pass a potential amendment.

Since citizens in a DCI state can place a constitutional amendment on a ballot directly, legislators in

¹⁰We have also looked into the correspondence between majority preferences and constitutional outcomes at the state level. Using the "maximal" opinion numbers, majorities oppose same-sex marriage in 15 of 15 DCI states, 16 of 17 simple non-DCI states, and in 13 of 15 complex non-DCI states. These are not significant differences. Using the "minimal" opinion numbers, majorities oppose same-sex marriage in 12 of 15 DCI states, 14 of 17 simple non-DCI states, and in 10 of 15 complex non-DCI states. Applying the logic of the crude institutional hypothesis to these figures explains constitutional outcomes in 31 of 47 states (66%).

FIGURE 2 Comparisons of Attitudes and Outcomes by State Type



DCI states do not cast a formal vote. Hence, the procedural requirement in DCI states is “zero.” Moreover, the typical DCI state Election Day requirement is a simple majority.¹¹ With respect to both requirements, there is more variation across non-DCI states. Table 2 lists detailed requirements for these states.

Using the threshold model and the Table 2 information, we generate an estimate of what the constitutional status of same-sex marriages should be in every state. To generate state-specific predictions of constitutional outcomes, we need to make an assumption about the preferences of state legislators in non-DCI states. This is a difficult task. There are a wide range of political traditions across the 50 states. Moreover, each state legislature tackles distinct topical agendas under a variety of different rules. Hence, there is no central database from which we can draw comparable, direct, and reliable conclusions about state legislators’ preferences. Yet, there are two assumptions about these preferences that we can make using data from other sources.

First, we assume that where the constitutional status of same-sex marriage is contested on partisan

grounds, Republican legislators will support placing restrictive constitutional amendments on the ballot. Preservation of traditional definitions of marriage is, for many social conservatives, a vitally important issue. As social conservatives are a core component of Republican Party supporters across the country, we expect Republican state legislators to support ballot access for restrictive amendments.

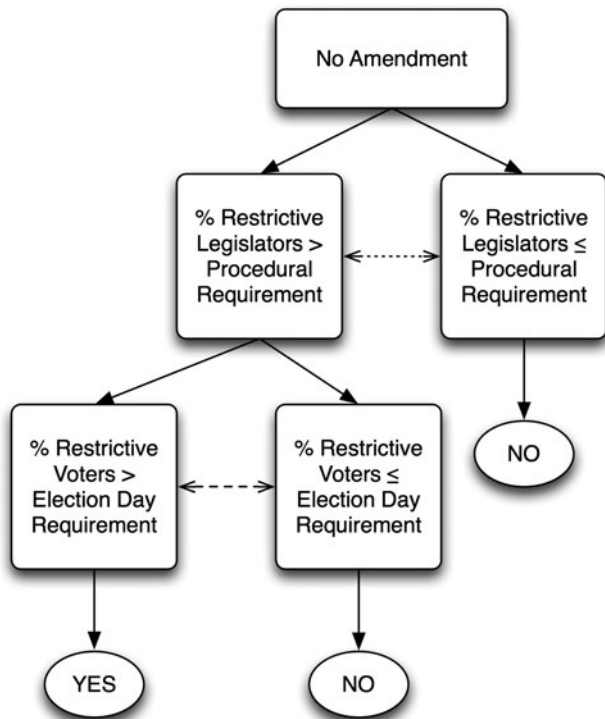
Our second assumption, about Democratic state legislators, is more nuanced. While members of neither party are in complete agreement about all issues, the most prominent within-party split of the last 100 years is between southern and non-southern Democrats. We expect non-southern Democrats to oppose placing restrictive amendments on the ballot and we expect southern Democrats to support such placements.

Two votes in the U.S. Congress, taken 10 years apart, are the main evidence we present in support of these two assumptions. The first vote occurred in 1996, when Congress voted on the Defense of Marriage Act (DOMA). This act allows states to disregard same-sex marriages granted by other states and prevents the federal government from recognizing such marriages. The bill passed by margins of 85–14 in the Senate and 342–67 in the House.

All 53 Senate Republicans (100%) supported DOMA as did 224 of 225 (99.6%) of House Republicans who cast a vote. Southern Democrats acted similarly. Seven of eight (88%) of southern

¹¹The exceptions are Florida (which requires 60% of votes cast for or against the proposal), Nebraska (which requires 50% of votes cast for or against the proposal and 35% of the total votes cast in the election), and Nevada (which requires voter majorities in two consecutive general elections).

FIGURE 3 Constitutional Change Flow Chart
 The dashed line indicates places where attitude shifts can affect constitutional outcomes directly by affecting votes cast on proposed amendments that make it on to Election Day ballots. The dotted line shows where shifting public attitudes on any of a number of issues can lead voters to elect persons who have particular points of view on the constitutional status of same-sex marriage



Democratic senators voted for DOMA, as did 42 of 48 southern Democratic House members (88%). Nonsouthern Democrats were more split. Two thirds of nonsouthern Democratic senators (25/38) supported the bill as did just over half of the nonsouthern House Democrats who cast a vote (77/136).

Ten years later, a constitutional amendment to prohibit same-sex marriage was introduced in the House (HJ RES 88) and the Senate (SJ RES 1). In the Senate, a motion to consider the bill was killed by a party line vote. In the House, the resolution failed by a vote of 236–187. The bill was supported by 88% of voting House Republicans (202/229) and by 18% of voting House Democrats (34/193). Amongst Democrats, however, the regional split continued to persist. Almost half of the southern Democrats who voted (26/

55) supported the bill. Outside the South, only 6% of House members who voted (8/138) did the same.¹²

To be sure, ours is a crude assumption.¹³ We know of Republicans and southern Democrats who have opposed constitutional restrictions against same-sex marriage and we know of nonsouthern Democrats who support restrictions. However, we shall demonstrate that *even with this crude assumption*, a threshold model can yield an improved explanation of constitutional outcomes across states.

To generate a set of expectations about the constitutional status of same-sex marriage in non-DCI states, we integrate the procedural information from each state with the poll data from earlier in the paper, the legislative preferences assumption just stated, and data on the partisan makeup of non-DCI state legislators.¹⁴ We do this for every state and for every year from 2002 (the legislature that was in session at the time of Massachusetts’ decision to legalize same-sex-marriage) to 2008. For any state, if the voter and legislative thresholds are satisfied simultaneously *in any year* (or if these requirements are satisfied in consecutive years as some non-DCI states require) and if the conditions for overturning such an amendment are never subsequently satisfied, then our expectation is that the state will have a constitutional amendment. Table 3 documents these expectations.

¹²Other scholars also find this difference between southern and nonsouthern Democrats. In analyzing environmental policy, Shipan and Lowry find a systematic difference between the average score assigned to southern and nonsouthern Democrats in Congress by the League of Conservation Voters. This difference leads the authors to form the following hypothesis: “The higher the percentage of Democrats who are from the South, the closer ideologically the party will be to the Republicans and therefore the smaller the divergence in environmental voting scores” (2001, 252). Moreover, Shipan and Lowry find that “As expected, the South measure has a negative correlation with divergence. The lower the percentage of southerners in the Democratic party, the more different the party is from the Republicans and the wider the divergence” (259).

¹³We will note that it was not our initial intent to make this assumption. The importance of this regional split within the Democratic Party became apparent after we collected information on state legislatures.

¹⁴We integrate institutional provisions with opinion data as follows. First, we use Carl Klarner’s dataset on partisanship in state legislatures (accessed via the State Politics & Policy Quarterly Data Resource). As Klarner’s data contains information through 2007, we obtained 2008 data from the National Conference of State Legislatures. To consider whether there was a sufficient number of Republican legislators to pass a bill, we focused on the partisan breakdown of both houses of the legislature in every year from 2002 to 2008. As we could not precisely estimate how public opinion would translate to outcomes where state policy required that an amendment must obtain majority of all votes cast to pass, we simply considered whether or not a simple majority of citizens opposed same-sex marriage.

TABLE 2 Legislative and Voter Requirements in Non-DCI States

ST	Lower House Requirement	Upper House Requirement	Voters Needed
AK	2/3	2/3	majority
AL	3/5	3/5	majority
CT	3/4 of each chamber in one session or a majority of each chamber in multiple sessions		majority
DE	2/3 of each chamber in multiple sessions		N/A
GA	2/3	2/3	majority
HI	2/3 of each chamber in one session or a majority of each chamber in multiple sessions		majority of all voting in election
IA	majority of each chamber in multiple sessions		majority
ID	2/3	2/3	majority
IL	3/5	3/5	3/5 of those voting on question or majority of those voting in election
IN	majority of each chamber in multiple sessions		majority
KS	2/3	2/3	majority
KY	3/5	3/5	majority
LA	2/3	2/3	majority
MA	majority of members sitting in joint session in multiple sessions		majority
MD	3/5	3/5	majority
ME	2/3	2/3	majority
MN	majority	majority	majority of all voting in election
MS	2/3	2/3	majority
NC	3/5	3/5	majority
NH	3/5	3/5	2/3
NJ	3/5 of each chamber in one session or a majority of both chambers in multiple sessions		majority
NM	majority	majority	majority
NY	majority of each chamber in multiple sessions		majority
PA	majority of each chamber in multiple sessions		majority
RI	majority	majority	majority
SC	2/3 of each chamber in one session and then a majority of each chamber after popular ratification		majority
TN	A majority of both chambers in one session and then 2/3 of each chamber in a second session		majority of all voters
TX	2/3	2/3	majority
UT	2/3	2/3	majority
VA	majority of each chamber in multiple sessions		majority
VT	first passage: 2/3 of Senate and majority of House second passage: majority of each chamber		majority
WA	2/3	2/3	majority

TABLE 2 (Continued)

ST	Lower House Requirement	Upper House Requirement	Voters Needed
WI	majority of each chamber in multiple sessions		majority
WV	2/3	2/3	majority
WY	2/3	2/3	majority of all voters

Source: Text of individual state constitutions and Dinan (2009).

Our expectations are correct in 40 of 49 (82%) states under the “minimal” assumption and in 41 of 49 (84%) cases under the “maximal” assumption.^{15, 16} This result is 12 (minimal) to 18 (maximal) percentage points higher than the success rate of the “amendments follow attitudes” hypothesis.¹⁷

¹⁵The numbers in both the numerator (states predicted correctly) and the denominator (total states in study) reflect the availability of poll data. There are three states—Delaware, Mississippi and West Virginia—for which we have no polls. The fact that Delaware and West Virginia never meet the legislative requirements necessary to begin the amendment process is sufficient for us to generate an expectation: we expect no amendment in these states. Mississippi’s legislature, on the other hand, does meet the legislative requirement. Since Mississippi’s Election Day requirement is a simple majority in support of changing the constitution, If we had a poll showing majority support for a constitutional restriction (and it is worth noting that the 2004 constitutional ballot measure banning same-sex marriage in Mississippi passed with over 86% of the vote), our expectation would be that Mississippi would have one. But we have no such data for Mississippi. Hence, we exclude it from this part of the analysis.

¹⁶Our results in this section are a product of the polling data described earlier in the paper. It is reasonable to ask about the extent to which our results are sensitive to other plausible measures of state-level attitudes on same-sex marriage. Lax and Phillips (2009) derive estimates using different polls than we do. With this data they use multilevel regression and poststratification to generate state-level preference estimates of same-sex marriage attitudes. This estimate is of attitudes towards same-sex marriage generally rather than state constitutional amendments. We replicated our analysis using Lax and Phillips’s (2009) measures of public opinion instead of our own. Because of how Lax and Phillips treat nonrespondents, the result of the replication should resemble that of our “maximal” assumption. Indeed, the only state on which the two measures yield different predictions is Florida, where Lax and Phillips estimate greater opposition to same-sex. Using their data, the success rate of our threshold model is 86% (43/50).

¹⁷In online Appendix B, we examine the states for which our estimations were incorrect. A summary of that appendix is as follows. In Kansas, a small number of Democrats voting contrary to the broad assumptions of this section were sufficient to render our expectation incorrect. In Indiana, Iowa, Pennsylvania, and Wyoming, a small number of Republican defections from amendment proposals were sufficient to block ballot access. In North Carolina, our expectation was undermined by a significant number of “southern” democrats voting like nonsouthern democrats. In Kentucky, our expectation was undermined by the opposite being true.

Of course, one can argue that because we have used an assumption about legislative preferences to derive this revised estimate, attitudes have found their way back into the explanation. To the extent that attitudes lead voters to choose some legislators rather than others, it is certainly true that such attitudes help to produce the explanatory improvement of our approach. But any such effect is indirect and necessarily limited by the fact that *voters choose state legislators for a wide range of reasons*—only one (at most) of

TABLE 3 Expectations for non-DCI states.

No Amendment Expected	Amendment Expected
Procedural requirement or election day requirement not satisfied since 2003	Procedural and election day requirement simultaneously satisfied since 2003
Connecticut ^{✓*}	Alabama ^{✓*}
Delaware ^{✓*}	Alaska ^{✓*}
Hawaii ^{✓*}	Georgia ^{✓*}
Iowa ^{✓*}	Idaho ^{✓*}
Illinois ^{✓*}	Louisiana ^{✓*}
Indiana ^{✓*}	North Carolina
Kansas	Pennsylvania
Kentucky	South Carolina ^{✓*}
Massachusetts ^{✓*}	Tennessee ^{✓*}
Maryland ^{✓*}	Texas ^{✓*}
Maine ^{✓*}	Utah ^{✓*}
Minnesota ^{✓*}	Virginia ^{✓*}
New Hampshire ^{✓*}	Wisconsin ^{✓*}
New Jersey ^{✓*}	Wyoming
New Mexico ^{✓*}	
New York ^{✓*}	
Rhode Island ^{✓*}	
Vermont ^{✓*}	
Washington ^{✓*}	
West Virginia ^{✓*}	

Placement of states in columns follows “minimal” opinion assumption. ✓ = correct under minimal * = correct under maximal.

which is the legislator's view on the state's constitutional status of same-sex marriage. Put in more general terms, our argument is not that attitudes are irrelevant to the pattern of constitutional amendments on same-sex marriage. Our argument is that explaining why state constitutions differ in their treatment of same-sex marriage requires more than simple assertions about voter attitudes. It also requires integrating detailed knowledge of the relevant legislative and voter support thresholds into the empirical model.

Our findings further imply that states like California, which currently has a constitutional restriction against same-sex marriage though public opinion on the matter is nearly evenly split, would have a different outcome if it was a non-DCI state with a supermajority legislative requirement. In other words, our estimates imply that there is not enough opposition to same-sex marriages in such states to make legislatures propose restrictive amendments. By contrast, we estimate that states such as Maryland and Minnesota, which do not have constitutional restrictions against same-sex marriage even though majorities oppose same-sex marriage, would have such restrictions if they were DCI states. That these state constitutions do not outlaw same sex marriage is not a sign that their citizens are more permissive on the issue of same-sex marriage than many of the other states listed in this table. It is, instead, a sign that their constitutions are harder to amend.¹⁸

Before moving to a discussion about the implications of our findings, we briefly compare our findings to recent work of Lax and Phillips. They find "little to no evidence that state political institutions affect policy responsiveness" (2009, 367) to public opinion on policies affecting the GLBT community. Our work reveals problems with their logic and contradicts their

¹⁸This claim is consistent with findings by scholars such as Bowler and Donovan (2004), Gerber (1996), Gerber and Hug (2003), Matsusaka (2004), and Schildkraut (2001), who show how institutional variations such as the magnitude of signature requirements affect the frequency of direct democracy usage. It also complements Haider-Markel, who argues that the diffusion of same-sex marriage bans across states "is best explained by the presence of an organized national campaign by conservative religious groups, the local resources of interest groups, and other internal state characteristics" (2001, 5). Our effort complements his by providing an answer to the question "Why would conservative religious groups organize in some states and not others?" One possibility is that the groups organize where their members are. Another, more strategic, possibility suggested by our work is that these groups believe that the likely policy return on their campaign investments depend on the institutional variables described in our paper. If they combine this information with the kinds of local knowledge that Haider-Markel describes, they could well conclude that their best response is to invest their resources in states where the procedural and Election Day requirements specified above are achievable.

conclusion. First, with respect to same-sex marriage, Lax and Phillips's dependent variable is whether or not states allow it. At the time they did their work, three states allowed it and 47 did not. Hence, their dependent variable has almost no variance. Second, we argue that Lax and Phillips fail to find an effect because they ignore the aspects of the institutional environment that shape attitude-amendment relationships within states. That is, they draw their claim from a multivariate regression that includes an interaction between state-level public opinion and a dichotomous variable that indicates whether or not a state allows the direct initiative process (for statutes or amendments). This specification is very restrictive. It allows Lax and Phillips to detect a modifying effect of institutions only to the extent that the true effect of institutions can be represented by the simple slope shift included in their model. However, we know that states differ dramatically in the thresholds that they pose as necessary for constitutional change. States differ in whether or not legislators are required to participate in the process that places a potential amendment on the ballot, in how many legislators must agree to place such a measure on the ballot (when required) and in how many voters must agree to the proposed change. Since these thresholds are essential components of state-level institutional environments, we build them into the logic of our model, which allows us to find the institutional effects that eluded the previous authors.¹⁹

¹⁹Like us, Matsusaka (2007a, 2007b) argues that institutions condition the relationship between public opinion and policy outcomes. His main explanatory variables reflect how states implement the initiative process and the primary means of empirical inference is statistical. Matsusaka's analysis derives important explanatory power from a variable measuring whether or not judges stand for election (also see Besley and Payne 2005). His argument for this effect is that because the threat of elections should limit exercises of judicial discretion that counter public opinion, policy outcomes are more likely to reflect public opinion when judges are elected. We examined this hypothesis with our data. Using our "minimal" opinion numbers, 25 of the 37 judge-election states for which we have polling data, the state constitutional status of same-sex marriage matches state-level attitudes. The same is true in eight of the 10 nonelection states for which we have data. While these figures contradict Matsusaka's conclusion, the outcome is reversed (26/37 and 5/10, respectively) when using maximal opinion numbers. Hence, in the case we are studying (state constitutional amendments), the election of judges offers no clear explanatory improvement. This difference in results is likely due to the fact that we focus exclusively on constitutional amendments, while Matsusaka focuses on statutes. As we described earlier, judges can overturn statutes that they find to be inconsistent with a state's constitution. But amendments are constitutional by definition. Since an amendment's legality is more difficult, and often impossible, to challenge in state courts, amendments offer less opportunity for the kind of judicial discretion that statutory interpretation can allow (see, e.g., Eskridge 1994). Hence, the effect of judicial elections found by Matsusaka should not, and does not, have the same relevance to our analysis.

The Future Constitutional Status of Same-Sex Marriage

To this point, we have focused on the question of whether a state will come to have a constitutional restriction after not having one. There has not yet been a case where a state reverses a restrictive amendment (by passing a new amendment that is less restrictive). However, many polls suggest that Americans are becoming gradually more tolerant of gay marriage (Franklin 2008).²⁰ Our efforts speak to the general matter of how much opinion change will be needed to change current constitutional outcomes.

If attitudes continue to shift in a permissive direction, and using the logic stated above, we expect DCI states where a simple majority of voters is sufficient for an Election Day victory to be quickest to change their constitutions. Given the relatively small number of people required to qualify a proposed amendment for ballot access in DCI states, a small group of advocates paired with enough money to satisfy the signature requirement would have a strong incentive to seize the first possible opportunity to reverse the restriction.²¹

Those seeking change in non-DCI states face higher barriers. For example, in a state where two-thirds of a legislature was required to place a restrictive amendment on the ballot, two-thirds of the same body will be required to place a permissive amendment on the ballot. Hence, a permissive constitutional shift will require a change in the views of at least one-third of the legislature. Barring an unprecedented acceleration of permissive attitude changes amongst Republicans or southern Democrats, or wholesale changes in many state-level partisan voting patterns, it is likely to be a very long time before many non-DCI states will be capable of making their constitutions more permissive (also see Andersen 2005).

²⁰Research about why beliefs are evolving as they are continues to clarify how and why people come to have beliefs relevant to same-sex marriages (see, e.g., Haider-Markel and Joslyn 2008).

²¹We expect that if attitudes shift in a more permissive direction, DCI states where a simple majority of voters is required to pass an amendment will be the first to pass permissive amendments. For strategic reasons, activists who seek greater permissiveness may not go directly to a call to full equality for same-sex marriages (see, e.g., Penn 2008 an explication of the logic of such a choice), but political entrepreneurs may see opportunities to win a majority of votes for proposals to lessen the severity of existing constitutional restrictions. They may, for example, seek amendments about matters such as hospital visitations or they may seek expanded rights for civil unions. In states where poll numbers suggest bare majorities currently in favor of restrictions, relatively small changes in opinion could provide an opportunity for less restrictive amendments to proceed.

At the same time, our logic implies that there are very few states where new restrictive marriage amendments are likely to occur in the next few years. The reason has little to do with an expectation of changing attitudes. Instead, our expectation is driven by the observation that all of the “low hanging fruit” has now been picked. As we have argued, constitutional changes are easiest to achieve in DCI states. In the elections of November 2008, the remaining three DCI states that did not have constitutional amendments restricting same-sex marriage (Arizona, California, and Florida) passed them. No more opportunities like this are available. If more states are to pass restrictive amendments, legislatures will have to be involved and, in most cases, large legislative supermajorities will have to openly support such measures.

A good bet for such change is Wyoming where Republicans are numerous in both legislative chambers. Other states could also move in this direction with Republican legislative gains or the emergence of Democrats who are willing to support restrictive amendments. If such moves occur in 2010 or 2012, restrictive amendments in non-DCI states like Indiana, Iowa, and Pennsylvania could be back on the table.

While we expect the constitutional status of same-sex marriage to wane as a focal issue in state politics, our data also suggest that political entrepreneurs may tap public apprehensions about same-sex couples in other ways. One way involves restrictions on adoption. In 2008, Arkansas passed by popular vote a statutory restriction on gay adoption. This is not an issue for which we have multistate public opinion data comparable to that of gay marriage. If, however, there is a high correlation between opposition to gay marriage and opposition to gay adoption, then we would expect to see political entrepreneurs try to increase the salience of this issue. If the entrepreneurs can succeed, we expect that the pattern of constitutional restrictions on gay adoption will not follow attitudes alone. In particular, we would first expect to see this issue appear as proposed constitutional amendments in DCI states and in southern states.

To this point in the paper, we have described our theoretical framework as applying to the constitutional status of same-sex marriage across states. That said, we recognize that the basic methodological distinction we are making applies to other issues. So, when is the threshold model introduced above most useful? Our answer has two parts.

One part of our answer pertains to the distribution of opinion across states. If public opinion across states is sufficiently consistent and extreme in one direction, then there should be no policy variation to explain. In

such cases, a threshold model would likely restate the obvious. When public opinion gets closer to relevant thresholds in a number of states, however, attitude-amendment relationships can become more opaque. In these cases, threshold models can clarify where and how public opinion influences constitutional outcomes.

The second part of our answer relies on differences between constitutional amendments and statutes. We developed the model to explain comparative state constitutional outcomes. This version of our model is less applicable to statutory outcomes. The reason is that statutes provide an avenue for state-level judicial discretion that amendments do not. It is often impossible for state-level judges to rule that a constitutional amendment, which is technically part of the state constitution, is unconstitutional with respect to the same constitution. Judges have far more discretion over statutes. Indeed, statutes, particularly those passed by voters, are regularly challenged and often overturned by state level courts. Hence, the threshold model is best used to explain why state constitutions vary in their treatment of a given issue.

Conclusion

U.S. state constitutions differ widely in their legal treatment of same-sex marriages. While Americans also differ in how they feel about this topic, state-level variations in such attitudes are insufficient to explain contemporary constitutional outcomes. Better explanations come from integrating this information with knowledge of how relevant institutions convert public sentiment into constitutional change.

Acknowledgments

We are grateful for advice given by Charles Shipan and his graduate class, Ellen Ann Anderson, Fred Boehmke, Nancy E. Burns, John Dinan, Dean Lacy, Elisabeth R. Gerber, Donald P. Haider-Markel, HN Hirsch, Simon Hug, John G. Matsusaka, James D. Morrow, Rob Salmond, and Ken Sherrill. We are also appreciative of comments offered by participants at the 2009 annual meetings of the American Political Science Association (Toronto) and the 2009 Midwest Political Science Association, as well as the 2009 Ninth Annual Conference on State Politics and Policy (Chapel Hill) and the 2008 Interdisciplinary Workshop on Politics and Policy at the University of Michigan's Center for Political Studies. We thank Leann Atkinson and Grace Ren of Zogby International, J. Brad Coker of Mason-Dixon Polling and

Research, Steve Mitchell of Mitchell Research, and David Woodard of Clemson University for help in obtaining archival information from a series of state-level polls. We thank James D. King for assistance with data and advice on state politics in Wyoming and Robert Bastress for assistance in interpreting the West Virginia constitution.

Manuscript submitted 23 April 2009

Manuscript accepted for publication 19 February 2010

References

- Andersen, Ellen A. 2005. *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Legislation*. Ann Arbor: University of Michigan Press.
- Beckwith, Ryan Teague. 2008. "North Carolina Likely to Avoid Referendum" *Charlotte News and Observer*, November 17. Archived at http://projects.newsobserver.com/tags/gay_marriage.
- Besley, Timothy, and A. Abigail Payne. 2005. "Implementation of Anti-Discrimination Policy: Does Judicial Selection Matter?" London School of Economics and McMaster University. Unpublished manuscript.
- Boehmke, Frederick J. 2005. *The Indirect Effect of Direct Legislation: How Institutions Shape Interest Group Systems*. Columbus: The Ohio State University Press.
- Bowler, Shaun, and Todd Donovan. 2004. "Measuring the Effect of Direct Democracy on State Policy: Not All Initiatives Are Created Equal." *State Politics and Policy Quarterly* 4 (3): 345–63.
- Bowler, Shaun, Todd Donovan, and Ken Fernandez. 1996. "The Growth of the Political Marketing Industry and the California Initiative Process." *European Journal of Marketing* 30 (10/11): 166–78.
- Erikson, Robert S., Gerald C. Wright, and John P. McIver. 1993. *Statehouse Democracy: Public Opinion and Policy in the American States*. Cambridge: Cambridge University Press.
- Esckridge, William N, Jr. 1994. *Dynamic Statutory Interpretation*. Cambridge, MA: Harvard University Press.
- Franklin, Charles. 2008. "Gay Marriage Support and Opposition." http://www.pollster.com/blogs/gay_marriage_support_and_oppos.php (May 21).
- Gamble, Barbara. 1997. "Putting Civil Rights to a Popular Vote." *American Journal of Political Science* 41 (1): 245–69.
- Gerber, Elisabeth R. 1996. "Legislative Response to the Threat of Popular Initiatives." *American Journal of Political Science* 40 (1): 99–128.
- Gerber, Elisabeth, and Simon Hug. 2003. "Minority Rights and Direct Legislation: Theory, Methods, and Evidence." University of Michigan and Institut fur Politikwissenschaft. Unpublished manuscript.
- Goldman, Seth. 2008. "Is It OK to be Anti-Gay? Social Desirability, Elite Discourse, and Expressions of Intolerance." Paper presented at the annual meeting of the MPSA Annual National Conference, Chicago.
- Haider-Markel, Donald P. 2001. "Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict." *State Politics and Policy Quarterly* 1 (1):5–26.

- Haider-Markel, Donald P., and Mark Joslyn. 2008. "Understanding Beliefs about the Origins of Homosexuality and Subsequent Support for Gay Rights: An Empirical Test of Attribution Theory." *Public Opinion Quarterly* 72 (2): 291–310.
- Herek, Gregory M. 2006. "Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective." *American Psychologist* 61 (6): 607–21.
- Kousser, Thad, and Mathew D. McCubbins. 2005. "Social Choice, Crypto-Initiatives and Policy Making by Direct Democracy." *Southern California Law Review* 78 (4): 949–84.
- Krislov, Marvin, and Daniel M. Katz. 2008. "Taking State Constitutions Seriously." *Cornell Journal of Law and Public Policy* 17 (2): 295–42.
- Lax, Jeffrey R., and Justin H. Phillips. 2009. "Gay Rights in the States: Public Opinion and Policy Responsiveness." *American Political Science Review* 103 (3): 367–86.
- Matusaka, John G. 2004. *For the Many or the Few: The Initiative, Public Policy, and American Democracy*. Chicago: The University of Chicago Press.
- Matusaka, John G. 2007a. "Institutions and Popular Control of Public Policy." University of Southern California. Unpublished manuscript.
- Matusaka, John G. 2007b. "Direct Democracy and Social Issues." University of Southern California. Unpublished manuscript.
- Penn, Elizabeth M. 2008. "A Model of Farsighted Voting." Harvard University. Unpublished manuscript.
- Riggle, Ellen D.B., Jerry D. Thomas, and Sharon S. Rostosky. 2005. "The Marriage Debate and Minority Stress." *PS: Political Science and Politics* 38 (2): 221–24.
- Schildkraut, Deborah J. 2001. "Official-English and the States: Influences on Declaring English the Official Language in the United States." *Political Research Quarterly* 54 (2): 445–57.
- Segura, Gary M. 2005. "A Symposium on the Politics of Same-Sex Marriage — An Introduction and Commentary." *PS: Political Science and Politics* 38 (2): 189–93.
- Shipan, Charles R., and William R. Lowry. 2001. "Environmental Policy and Party Divergence in Congress." *Political Research Quarterly* 54 (2): 245–63.
- Silver, Nate. 2009. "Will Iowans Uphold Gay Marriage?" *Fivethirtyeight.com*, April 3. <http://www.fivethirtyeight.com/2009/04/will-iowans-uphold-gay-marriage.html>.

Arthur Lupia is the Hal R. Varian Professor of Political Science, University of Michigan, 4252 Institute for Social Research, 426 Thompson Street, Ann Arbor, MI 48106-1248.

Yanna Krupnikov is Assistant Professor of Political Science, Indiana University, 210 Woodburn Hall, 1100 East Seventh Street, Bloomington, IN 47405-7110.

Adam Seth Levine is Graduate Student, Department of Political Science, University of Michigan, 5700 Haven Hall, Ann Arbor, MI 48109-1045.

Spencer Piston is Graduate Student, Department of Political Science, University of Michigan, 5700 Haven Hall, Ann Arbor, MI 48109-1045.

Alexander Von Hagen-Jamar is a Graduate Student, Department of Political Science, University of Michigan, 5700 Haven Hall, Ann Arbor, MI 48109-1045.