Gay Marriage and the Citizens' Initiative: A Comparative Analysis

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Abstract

The legalization of gay marriage has become a contentious issue in the United States, especially for individual state governments. The variation between gay marriage policies in US states ranges from complete ban of all partnership benefits to complete marriage equality for homosexual couples. This study seeks to explain this variation by looking at the possible mechanical factors that could affect state gay marriage policies. Specifically, this study looks at the influence the presence or lack of the citizens' initiative process has on the gay marriage movement. The sample is seven states that have previously or currently legalized gay marriage through at least one branch of the state government. The results show that a correlation does exist between the citizens' initiative process and the repeal or retention of state gay marriage laws. A state in which citizens' do not have access to the citizens' initiative will be more likely to retain gay marriage laws than a state where the initiative process is allowed.

Introduction

The debate over marriage equality has spread throughout the world at an alarming pace over the last decade. Currently, ten nations have legalized gay marriage: Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Sweden (2009), Norway, (2009), Iceland (2010), Portugal (2010), and Argentina (2010). The United States is among the nations still wrangling over same-sex unions. Only five of the 50 states have legalized gay marriage, while about 30 states have passed constitutional bans against legal recognition. The issue of gay marriage has developed into a heated public debate since the Hawaii Supreme Court became the first political entity to deem the practice legal under the state constitution in 1993 (Killian, 2003, p. 54). However, marriage licenses were never granted to same-sex couples because the decision was soon overturned by the Hawaii State Legislature. Nevertheless, the monumental case caused a surge of anti-gay marriage sentiments across the United States that eventually resulted in the passage of the Defense of Marriage Act of 1996 by Congress (Rimmerman and Wilcox, 2007, p. 304). This officially reserved marriage for heterosexual couples at the federal level. Currently, the majority of US states narrowly define marriage as one man and one woman, while others are moving toward marriage equality for all sexual orientations. The purpose of this study is to compare the status of gay marriage laws in states. The key component of this study is determining the factors that contribute to the passage or impediment that may occur. Factors like religiosity, education levels, and public opinion of the electorate are common explanations for the status of gay marriage in a state. However, this study takes a slightly different approach by examining the citizens' initiative process as a key factor of the repeal of gay marriage laws. This study looks at the citizens' initiative's effects on the seven states that have already legalized gay marriage.

While public opinion plays a major role in determining a state's gay marriage policies, this argument is limited. For example, the Public Policy Institute of California (PPIC) reported that Proposition 8, which amended the constitution of California to limited marriage to one man and one woman, was approved by California voters 52 percent to 48 percent in 2008. Moreover, in 2010, more Californians supported gay marriage than opposed it in their state (Baldassare, Bonner, Petek, & Willcoxon, 2010). Meanwhile, public support for gay marriage in Iowa remains well under 50 percent, with the University of Iowa reporting a 28 percent approval rating just before the Iowa Supreme Court legalized the practice in 2008 (UI Political Scientists Examine Support for Gay Marriage in Iowa, 2008, par. 1). Since public opinion provides a limited explanation of whether a state will legalize gay marriage or not, other factors, like the citizens' initiative, should be examined.

One obvious pattern among states that have legalized gay marriage is the citizens' initiative law. According to the Initiative and Referendum Institute Website, of the five states that condone same-sex marriages, four do not have any form of citizens' initiative, with Massachusetts being the exception (Matsusaka, 2009). The citizens'

initiative is a key democratic mechanism that affects the status of gay marriage in states. This could explain why California, which has much greater support for gay marriage, continues to reject same-sex couples the right to marry, while more conservative Iowa allows the same relationships that title of marriage. In fact, while the Iowa State Legislature again blocked a constitutional amendment from a popular vote, Danny Carroll of the Iowa Family Policy Center stated that "our resources and efforts are focused on letting the people of Iowa vote" (Same-Sex Marriage in Iowa, 2010). The popular vote appears to be a valuable tool for anti-gay marriage groups to achieve their goals.

With factors like public opinion failing to fully explain the variation in US states' gay marriage policies, the mechanisms at play in individual states' policy processes must be considered. How does direct democracy affect gay marriage policies in US states? To answer this question, I developed the following hypothesis:

> Initiative states are more likely the non-initiative states to repeal gay marriage laws after one or more of the governmental branches have legalized gay marriage.

This study will examine the effects that the presence or lack of the citizens' initiative has on the gay rights campaign in the states that have at one point legalized gay marriage. By comparing these states' gay marriage policies and direct democracy laws, the study sheds light on the popular initiative's effects the gay marriage movement's push for equal protection of homosexual marriages.

Literature Review

This project deals with the citizens' initiative process and gay marriage policy; therefore, it requires review of the bodies of literature concerning both research areas. Matsusaka defines the citizens' initiative as the process by which "citizens…propose and pass legislation without the consent of their elected representatives" (2004, p. 1). The literature surrounding the citizens' initiative process (also called the popular initiative process) is extensive, because many scholars have debated the process' merits since members of the Progressive Movement began pushing the idea in the early 1900s (Smith and Tolbert, 2004, p. 2). Since South Dakota first implemented its citizens' initiative in 1898, a total of 24 states have adopted some form of popular initiative (Dye and MacManus, 2009). Over the last century the citizens' initiative has become an integral part of the policy process in these 24 states and is used by citizens each year.

Even though the process is popular and widely used in the United States, scholars remain deeply divided over the legitimacy of the citizens' initiative process. Matsusaka provides a clear overview of the current debate in his book, *For the Many or the Few: The Initiative, Public Policy, and American Democracy*. He explains that supporters of the citizens' initiative, including Matsusaka, argue that the initiative process is the most effective method of assuring that policies with the most public support are implemented by the government. They further argue that because citizens can overrule or prevent the legislature from passing unpopular legislation, the initiative process is necessary for legitimate state governments. However, those that are opposed to the use of citizens' initiative claim that the initiative process is simply another tool for special interest groups to use. Opponents argue that the organization that can mobilize the most money can launch the more effective campaign and therefore win a ballot initiative. For example, many opponents of citizens' initiatives believe that the passage of California's Proposition 8 was a result of well funded campaign rather than public opinion. Overall, Matsusaka showed in his study that the results citizens' initiatives often correlate with public opinion. However, he only studied initiatives that dealt with fiscal policy; therefore, this finding is limited when studying morality policy, such as gay marriage (2004, p. 2-4).

Other scholars have taken different approaches to studying the citizens' initiative process. Gerber, Lupia, McCubbins, and Kiewiet studied the citizens' initiative process during the implementation phase. They argue that the effectiveness of the initiative process is limited because politicians that do not agree with a policy are unlikely to enforce the new law. In other words, the initiative process is designed to sidestep elected government officials to make policy decisions, but those same officials are also responsible for enforcement of laws. Untimely, if elected representatives do not agree with the initiative, the law will not be implemented (2001, p. 1-5). However, Gerber et al. also argue that highly salient issue, such as gay marriage, demand a lot of transparency, so politicians are more likely to implement those policies (2001, p. 6). As a result, citizens' initiatives concerning gay rights policies are very likely to be implemented.

Smith and Tolbert also have a unique take on the citizens' initiative process. Their argument in favor of the popular initiative rests on the educational benefits that they claim can be gained from using this process. These benefits include boosting voter turnout, increasing political discussion and knowledge among citizens, and raising confidence in the government. Overall, Smith and Tolbert believe these educational benefits were mostly

overlooked by progressives throughout the twentieth century and attempt to insert these benefits into the discussion of the popular initiative's merits (Smith and Tolbert, 2004).

Are minority groups affected, or even targeted, by the popular initiative process? This is the most significant question that is left unanswered by the literature surrounding the citizens' initiative process. Both Matsusaka and Smith and Tolbert address this issue (2004, p. 117; 2004, p. 144). They agree that majority tyranny may be an issue that harms minority groups, including homosexuals. However, the analysis is mostly speculative and very little evidence is presented to support or reject this claim. My research will help fill this gap in the literature by providing insight into the possibility that minority groups are discriminated against through the initiative process, specifically the gay population.

The second body of literature that is necessary for this project deals with gay marriage policy in the United States. Vanhorn suggests, "The literature that exists on homosexuality can be divided into two different groups. The first group focuses on the formation of attitudes and public opinion towards homosexuality. The second group of research focuses on the general policy process from formation to outcome as it relates to all aspects of homosexuality" (2008, p. 7). This study focuses on the second group of research that Vanhorn defines, specifically dealing with gay marriage. Furthermore, Werum and Winders argue that much of the research done on gay marriage policy follows that assumption that "the structure of the state determines the extent to which different social classes or groups shape policy formation" (2001, p. 389). This assumption allows this study to look at the policy processes of individual states to determine why states' gay marriage laws do not necessarily reflect the public opinion.

My review of the current literature about gay marriage policy shows support for the notion that citizens' initiative laws have a great influence on the gay marriage movement in individual states. Mucciaroni states that "the opponents of same-sex marriage have used the ballot initiative extensively and successfully to get voters to approve bans on gay marriage" (2008, p. 219). Similarly, Killian recognized the citizens' initiative as the paramount policy tool that can disrupt other variables that may determine the gay marriage status of a state. She asserts that many states, including California and Maine, "[have] the confounding variable of allowing popular referendum and ballot initiative, an important consideration but one that could render other variables moot" (2003, p. 14). Scholars recognize citizens' initiative as a major factor in the gay rights movement, but specific evidence to support this claim is difficult to pinpoint in the current body of literature on the subject. My hope is that this study will provide further evidence that shows the citizens' initiative process as a serious detriment to gay marriage activists. My research will accomplish this by specifically examining the citizens' initiative as a leading variable in the passage and/or repeal of gay marriage laws, unlike most other studies.

Additionally, Werum and Winders explain the use of citizens' initiatives by anti-gay marriage groups, "If central state arenas like state courts and local legislatures appear predisposed to siding with gay rights advocates, opponents may have had to rely on more peripheral arenas" (2001, p. 404). They further explain that during the 1990s, gay marriage advocates were no longer political "outsiders" and possessed much more influence in governmental institutions. Therefore, anti-gay rights groups turned elsewhere to push their agendas. In the past three years there has been a resurgence of the use of citizens' initiatives by anti-gay marriage groups and these laws are again a main influence in the gay rights movement in the United States.

Methodology

The framework for this study will mostly deal with the citizens' initiative as a tool of social policy. Direct democracy laws exist to give the public greater control over their government, including state legislatures, courts, and executives. However, the use of citizens' initiatives in the anti-gay rights movement, as well as other social movements, is specifically to deny minority rights. Therefore, these laws create a direct avenue for a majority to target minorities. This phenomenon presents a problem for our democratic ideals because majority rule turns into majority tyranny when minority group's rights cannot be protected by the government. I approached the campaigns in my cases with this majority tyranny in mind and look for specific methods and events that explain how anti-gay marriage groups use citizens' initiatives to discriminate against homosexuals as a marginalized group.

This study focuses on the gay marriage laws in the seven states that have already legalized gay marriage: California, Connecticut, Iowa, Maine, Massachusetts, New Hampshire, and Vermont. (It is important to note that I considered adding both Hawaii (repealed gay marriage law) and the District of Colombia (gay marriage legal) to my sample, but the methods used by each to determine gay marriage laws were significantly different than the seven-state sample.) I chose to limit my sample to these states because I am able control for the types of laws that have been passed throughout the country. The extreme variation in marriage policies among the 50 states includes complete marriage restrictions to civil unions to full marriage equality. Isolating the states dealing with repealing equal marriage laws already in place allows me to observe the effects of the initiative process without having to

distinguish between a variety of different policy questions. For example, the question of legalizing gay marriage is vastly different than the question of allowing limited partnership benefits.

Data collection for this portion was mostly based on archival research. I focused on government documents. I paid particularly close attention to state constitutions when studying each states direct democracy laws. Also, the amendment formula for each state constitution was a consideration while studying the sample. Next, I used the information from government records to research newspapers and campaign advertisements that were/are in use. This allowed me to get specific knowledge of the dates and methods used to repeal (or attempt to repeal) the state's gay marriage laws.

Results

After a review of each state's gay marriage policy, I compiled my findings in Table 1. All seven states legalized gay marriage either by ruling of the state supreme court or through approval by the state legislature. Of these seven states, five still allow same-sex couples to wed. Two of the seven (California and Maine), both repealed their gay marriage laws through the citizens' initiative process. Four of the five states in which gay marriage is currently legal are non-initiative states.

Table 1. Results by State

State	Method of Initial Legalization	Currently Recognizes Gay Marriage?	Initiative Process?
California	Courts	No	Yes
Connecticut	Courts	Yes	Yes
Iowa	Courts	Yes	No
Maine	Legislature	No	Yes
Massachusetts	Courts	Yes	Yes
New Hampshire	Legislature	Yes	No
Vermont	Legislature	Yes	No

This initial findings is supportive of my hypothesis because a strong correlation between the initiative process and the retention of gay marriage laws. In every instance that either the state legislature or courts legalized gay marriage, the law was removed by a popular initiative. California voters overturned the California Supreme Court's ruling that prohibiting gay marriage in unconstitutional in 2008, with the famous Proposition 8. The public in Maine repealed the marriage law enacted by the Maine State Legislature in 2009 (Winstein, 2009). As previously stated, four of the five states that currently allow gay marriage are non-initiative states. This correlation shows that the initiative process has an impact of the repeal of gay marriage laws in US states.

The only initiative state that allows gay marriages is Massachusetts. However, Massachusetts is an anomaly, because even though it is an initiative state, the state constitution forbids citizens to vote on initiative that would overturn a Massachusetts Supreme Court decision (Matsusaka, 2009). Since gay marriage was legalized through the Supreme Court in that state, the popular initiative could not be legally employed by anti-gay marriage groups. This unusual limitation to the initiative process in Massachusetts further supports my hypothesis, because, even though it is an initiative state, the citizens of Massachusetts do not have access to the repeal of the Massachusetts Supreme Court's decision. Taking this constitutional limitation into account, every instance where the citizens' initiative was not available to overturn the state's gay marriage law, the practice remains recognized by the state. The correlation is even stronger if Massachusetts is not considered an initiative state in this instance.

Discussion

The results above show that the variation among state regarding gay marriage laws are partly due to mechanical factors, namely the citizens' initiative process. Thus, I accept my hypothesis that initiative states are more likely the non-initiative states to repeal gay marriage laws after one or more of the governmental branches have legalized gay marriage. This study shows that presence of the citizens' initiative process does have an effect on the gay marriage policies in US states. In states where citizens have access to direct democracy, the gay marriage laws that were passed by one branch of government were overturned by popular vote.

With a strong correlation established between the citizens' initiative process and gay marriage laws (at least for the repeal of such laws), two important implications must be considered. Initially, the pro-gay marriage movement's goal is to reach full marriage equality for homosexual and heterosexual couples. This goal is pursued mostly through state legislatures or courts. However, the presence of the citizens' initiative presents an avenue for the repeal of gay marriage laws, even after they have been successfully passed by the state government. In states where the initiative process is legal, the battle over gay marriage moves from the legislative and judicial arenas to the electorate. The result is extensive campaigns for both sides of the gay marriage debate and increases the amount of media attention on the gay marriage movement.

Second, even though public opinion is an important factor in determining gay marriage policy in US states, mechanical factors also must be considered. The previously mentioned example contrasting the public opinion of Iowa and California shows that public opinion does not fully explain the variation among states on gay rights issues. This study helps explain how gay marriage laws can be contrary to popular opinion about gay marriage. Because mechanical factors influence the policy process, the views of the electorate are not necessarily reflected in a state's policy toward gay marriage. This is true for both states in which the public supports gay marriage and in states where the public opposes the practice.

Three additional observations can be drawn from these results. First, since the debate over gay marriage centers around the constitutionality of the practice, a state's constitutional structure plays a major role in determining the fate of state gay marriage policies. Again this is illustrated by comparing the amending formulas of California and Iowa. California's constitution can be amended by the public very quickly and easily compared to most state constitutions. The California state constitution can be amended by a majority vote on an initiative like Proposition 8 in 2008. On the other hand, Iowa's constitution is very difficult to amend in comparison with other states. In Iowa, an amendment must pass two consecutive legislatures and then a popular vote. A constitutional amendment in Iowa takes a minimum of two and a half years to become fully realized. New Hampshire, Vermont, and Connecticut constitutions have similar amending procedures as the Iowa constitution (Matsusaka, 2009). The ease of amending the state constitution is an important factor in whether a state's gay marriage law is repealed or not.

The second observation deals with the initial mechanism of gay marriage legalization, either the state legislature or state supreme court. In this study, I found that the fate of a state's gay marriage law was not significantly affected by the means by which gay marriage was first legalized in the state. Lastly, the presence of the citizens' initiative did not determine the activity of anti-gay marriage movements within a state. Anti-gay marriage movements where present in all the states in my sample. The strength of the organizations varied by state, but not according to the state's direct democracy laws.

Conclusion

The outlook of the gay marriage movement has progressed significantly since the Hawaii Supreme Court first ruled that denying homosexuals the right to marry was unconstitutional in 1993. Even though public opinion and other factors help explain the status of gay marriage in US states, this study shows that the citizens' initiative is an important variable that influences the repeal of gay marriage laws even after they have been passed by one or more branches of the state government. Since this study was limited to seven states, future research should explore the relationship of gay marriage laws and popular initiatives on a national scale. A 50 state study would also shed light on the influence of state constitutions, legislative versus judicial initial passage, and the strength of anti-gay marriage movements. Additionally, future research should also be conducted on the level of influence the citizens' initiative has on the gay marriage movement in relation to other factors, such as public opinion. This study shows that the citizens' initiative process must be considered when determining the ability of gay marriage laws to be repealed or withheld by US states.

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