Pushing for Equality within the Backlash and in the Middle: Institutions, Public Opinion and Same-Sex Marriage in Upper Midwestern States

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Perhaps more than any other factor, federalism defines the parameters of LGBT policy change in the United States. States are the arenas where struggles over significant policies and policy areas are played out, including sodomy laws, family law and parenting, anti-discrimination laws, hate crimes, and relationship equality (same-sex marriage, civil unions, etc.). While federal policy also touches these areas, the bulk of law and policy exists at the state (and local) level, while the reverse is not true. Except for a few issues, such as the U.S. military's "Don't ask, don't tell" policy, an understanding of LGBT policy requires an understanding of comparative state policymaking. For example, with the highly salient issue of same-sex marriage, federal law makes policy decisions and distinctions based on marital status, while states do the same thing, as well as initially defining who can get married. In other words, policy responsibility is shared, with states often playing a primary role. Indeed, even with the election of Barack Obama as president and strong Democratic majorities in Congress, policy favorable to sexual minorities continues to stagnate in the U.S.[1]

This situation has created both opportunities and obstacles for LGBT policy advocates. While policies favorable to LGBT constituents have proliferated at the state level, they have also famously stalled. The best example of this dynamic can be seen in the uneven progress of relationship equality policy, the main topic of this paper. Fourteen states currently offer marriage, civil unions, and domestic partnerships for same-sex couples, while twenty-nine states have adopted constitutional bans on same-sex marriage, some even enacting comprehensive bans on strong relationship-equality policies. Institutional, cultural, and public opinion diversity have created the

environment for this policy stalemate. Relating to all of these factors, and central to the progress of and opposition to relationship equality, is the presence of litigation as a significant policy tool used by LGBT advocates and, increasingly, opponents.

As same-sex marriage litigation has proliferated, voices in the political arena and the academy have questioned the wisdom of this litigation given the "backlash factor." Despite some successes, the litigation, it is argued, has done more harm than good for the cause of LGBT equality by provoking a political backlash in the form of policies restrictive of LGBT rights at the state and national level. Because of the backlash threat, litigation from national LGBT rights groups has been confined to more progressive states, such as Massachusetts, Connecticut, California, Maryland, New Jersey, New York, and Washington. Interestingly, however, a remarkably successful same-sex marriage lawsuit was initiated in Iowa by Lambda Legal, and an unsuccessful domestic partnership suit was filed in Wisconsin by the state's ACLU chapter. These states possess upper Midwestern progressive traditions, but they also have robust conservative political movements. Indeed, the Wisconsin litigation was initiated in the middle of a contest over a constitutional amendment to ban marriage and civil unions for same-sex couples. Conversely, in Illinois, litigation has been consciously avoided by advocates, who have relied on a purely legislative strategy. So far, this has proved unsuccessful in this increasingly Blue state. Among the three states, Illinois is clearly the most liberal, but it is also the only one lacking a policy recognizing same-sex relationships.

Such a situation would appear to indicate that policy outcomes in these states are not driven exclusively by ideology or public opinion. Jeffrey Lax and Justin Phillips

have recently argued that public opinion most directly affects outcomes on LGBT policy, and that institutional factors do not have a significant effect.[2] While this may be true broadly, a more focused and detailed comparison yields significantly different results. The states in this study exhibit substantial institutional differences despite similarities in public opinion. While large-N studies are generally favored in comparative studies, broad statistical analysis sometimes misses the complexity of factors that combine to determine policy outcomes on the ground. If Lax and Phillips are correct, and Erikson, Wright, and McIver upon whom they build,[3] we would expect to see relatively similar policy outcomes in these states. In particular, we should see all states with a domestic partnership or civil union framework but not same-sex marriage. Instead, we find one state with same-sex marriage (Iowa), one with the most supportive gay rights public opinion with no state-wide policy (Illinois), and one with a constitutional ban on same-sex marriage or civil unions but with a limited domestic partnership framework (Wisconsin). In other words, a significant portion of the Midwest represents an exception to the rule in comparative state politics that public opinion drives policy outcomes. This anomalous situation gives us the opportunity to reconsider this quickly solidifying rule.

The findings in this paper are consistent with those made by Arthur Lupia, et al. Through an examination of differences in state constitutional amendment procedures, they find that the relationship between outcomes on same-sex marriage and public opinion to be "weaker than the conventional view suggests."[4] Instead, institutional differences, particularly differences in amendment procedures, shape outcomes more directly. Lupia, et al. are quick to note that "[i]nstitutions, however, do not act as independent force on constitutional outcomes. Instead, they condition the relationship

between attitudes and amendments in specific ways."[5] Thus, this institutionalism remains in the realm of behavioralist notions of institutionalism in that institutions channel and condition behavior, but they do not independently cause political outcomes. However, this study embraces a more robust assessment of institutionalism, one that views institutions as potentially equal to or more powerful than rational choice explanations.[6]

Also central to the analysis in this paper, and consistent with a robust institutional approach, is the concept of path dependency. Miriam Smith describes path dependency in the following manner: "Political institutions and policy legacies open up certain opportunities for social movement politics while foreclosing others and these opportunities influence the policy agenda of each movement."[7] Following this approach, this paper explores the use of litigation in Wisconsin, Iowa, and Illinois, and examines litigation strategies in the context of larger institutional, cultural, and opinion settings, with a particular emphasis on path dependency. This will point to institutional and cultural factors as drivers of policy outcomes, in addition to, and perhaps more directly than, public opinion.

Litigation as a Policy Tool and the Backlash Thesis

LGBT rights litigants use litigation as a policy tool no differently than policy advocates in a myriad of other policy areas. Going to court to achieve policy goals is a routine and embedded part of the policy process. Generally, litigation is used when other avenues are blocked (or perceived to be blocked) and in conjunction with other policy initiatives. Particularly in the United States, and increasingly in other countries, court-

based policymaking is often as common as legislative and executive policymaking. Scholars only focusing on "majoritarian" policymaking will overlook a large segment of empirical reality.

Building on the work of Robert Kagan, Thomas Burke has usefully framed the abundance of litigation-based policy efforts as stemming from deep currents in the U.S. constitutional and political systems, including, according to Burke, "profound distrust of centralized governmental power with a set of structures—federalism, separation of powers, an independent judiciary—designed to tame that power . . . [This] creates powerful incentives for activists—those who favor governmental action on social problems—to implement their schemes through courts."[8] As a result, any study of most policy areas requires an examination of litigation and its effects. This is especially true for civil rights policies. This also requires an institutionalist approach, in addition to examining public opinions and its effects. For example, the Lax and Phillips study only mentions litigation and its effects briefly while noting that the actual factor driving policy outcomes in the area of LGBT rights is public opinion. While this is an important study, its findings need to be supplemented by insights from institutional analysis, particularly analysis of the judiciary. Particularly in a common law, rather than civil law, polity where courts have always been deeply involved in policy debates and the creation of policy, litigation ought to be in important element of scholarly inquiry.[9]

Gerald Rosenberg is a critic of litigation strategies. He argues that courts are not change-makers, and that those who go to court hoping for change are naïve and will only hurt their cause by inducing a backlash.[10] Rosenberg has forcefully criticized activist lawyers working within the framework of legal liberalism on the issue of same-sex

marriage litigation. Indeed, Rosenberg views this litigation through the same prism as he perceives other progressive litigation of the past several decades: as a hijacking of grassroots movements by "a group of elite, well-educated and comparatively wealthy lawyers who uncritically believed that rights trump politics and that successfully arguing before judges is equivalent to building and sustaining political movements."[11]

A great deal of scholarship has attempted to take a more sophisticated look at cause lawyers, their motivations, strategies, successes, and failures. Many studies have demonstrated the tangible policy change that has resulted from this litigation and have noted that backlash is not unique to judicial efforts at progressive change.[12] In the end, despite the warnings of dire consequences, litigation has been used as a policy tool by gay rights advocates, even in unlikely places, given public opinion. However, this tool has been used (or not used) in a politically sophisticated manner, and its use has affected positive policy outcomes in two of the three states examined here.

Relationship Equality Litigation and Policy in Wisconsin

Wisconsin has been a state of contradictions concerning LGBT rights policy. It was the first U.S. state to adopt a sexual orientation antidiscrimination law in 1982, but it also enacted, by popular referendum, a sweeping anti-relationship equality constitutional amendment in 2006. It is a state with a storied progressive tradition alongside deep-seated cultural conservatism (reflective of a strong urban/rural split) and a politically active Catholic church. In terms of partisanship, the state is currently trending slightly Democratic, but Republicans have recently controlled the legislature and controlled the governor's office from 1987 to 2003. Indeed, it was Republican legislative control that

facilitated the passage of the constitutional amendment in 2006. The Republican party in the state has mirrored the national trend toward conservatism, away from the state party's more moderate history.[13] According to Gallup, Wisconsin is the twenty-eighth most Democratic state in the nation,[14] but the situation for the party is more positive when it comes to control of state government. Democrats took control of the State Senate in the 2006 elections, ironically in the same election where the amendment was enacted, and won a majority of seats in the State Assembly in 2008.[15] Democratic Governor James Doyle, elected in 2002, has been a strong supporter of LGBT rights, as demonstrated by his opposition to the amendment and push for domestic partnership benefits, chronicled below. Democrats thus have unified party control of the two branches for the first time since 1987. Despite the passage of the amendment, the Democrats have not been wary of enacting gay rights policies. Public opinion in Wisconsin is generally on their side. According to Lax and Phillips, mean opinion on gay rights is 57 percent in support, with 42 percent support for same-sex marriage and 50 percent support for civil unions.[16]

A lawsuit filed in 2005 by the ACLU of Wisconsin on behalf of state employees was designed to force the state to grant domestic partner benefits to same-sex couples. What is interesting about this suit are the facts that a similar lawsuit failed to achieve the same results several years earlier, and that the lawsuit was commenced in the middle of a highly visible and contested fight over a proposed constitutional amendment in the state banning same-sex marriage or its equivalent. The amendment was approved in 2006 with 59% of the vote, more than most observers had predicted.[17] Initiating litigation during this amendment fight, therefore, was controversial and potentially harmful to the efforts to defeat the amendment, but the ACLU and activists in the state saw it as an opportunity

to add to their communication efforts during the campaign against the amendment by highlighting the discriminatory treatment of same-sex couples.[18]

The earlier case was decided against the claims of a same-sex couple seeking family health insurance coverage from the state. This litigation was also supported by the ACLU. Interestingly, the suit was initiated before same-sex marriage litigation was made prominent and nationally coordinated after the Hawaii Supreme Court decision in 1993. However, the issue of same-sex marriage was directly implicated by the Wisconsin suit. As the appellate court wrote, “Understandably, most of [plaintiff] Phillips’s arguments on gender and sexual orientation discrimination/classification are grounded on the fact that Wisconsin does not recognition same-sex marriages.”[19] Thus, the issue was broached in the Wisconsin courts in the early 1990s. Nonetheless, the court rejected the statutory and constitutional claims, broadly deferring to the agency’s definition of “spouse” which did not include same-sex partners. The court was somewhat sympathetic toward the couple involved, describing their relationship as “a committed relationship that partakes of many of the attributes of marriage in the traditional sense,”[20] but the judges were not willing to defy the legislature and executive branch by creating a new right to same-sex state employee benefits.[21] The court acted formally and deferentially, refusing to make new policy for the state.

Notably, the court cited a California decision from 1985 denying same-sex dental benefits for state employees to bolster its decision.[22] These cases indicate that lawsuits concerning state employees in same-sex relationships were, in some ways, the second phase of relationship equality litigation, the first having been commenced in the early

1970s in the wake of the Stonewall riots and increased gay and lesbian visibility and activism.[23]

The negative precedent from 1992 makes the filing of the 2005 case in Wisconsin empirically interesting and strategically problematic. The ACLU obviously felt that a change in legal and political conditions would lead to more active court policymaking. The filing of the suit in April 2005 was accompanied by a public relations campaign carried out by the ACLU and Action Wisconsin, the leading LGBT advocacy organization in the state. A lead ACLU attorney on the case, Larry Dupuis, appealed to citizens' sense of basic fairness with a bit of Clintonesque political rhetoric: "Wisconsin has a long tradition of fairness: If you work hard, and play by the rules, you should be able to support your family. It's unfair that these people who work as hard as their neighbor in the next cubicle, the teacher in the next classroom, are not able to share in the kinds of benefits that their co-workers share in."[24] Indeed, the suit included a broad range of state employees, from teachers and researchers to corrections employees.[25] Chris Ott, the executive director of Action Wisconsin, emphasized that "[t]his is not the issue that it once was. It's really becoming mainstream."[26] While advocates of the litigation emphasized equality, fairness, and lack of novelty, opponents saw the lawsuit as an activist attempt to change policy through the courts. Referencing cost and utilizing a common conservative narrative about liberal judicial activism, a leading anti-gay politician, Assembly Speaker John Gard stated, "It is disappointing that when Wisconsin can least afford it, the ACLU is trying to legislate their liberal social agenda through the court system."[27]

The litigation was initiated largely in response to legislative inaction on the issue of relationship equality, particularly under Republican control. Domestic partnership insurance benefits legislation was consistently rejected by the legislature.[28] At the same time, the years preceding the lawsuit witnessed highly visible legislative deliberations over the issue of relationship equality, mostly centered on the marriage and civil unions amendment eventually approved in 2006. Given that this amendment required legislative approval in two consecutive sessions, it remained on the political agenda in the state for some time.

Predicating the denial of benefits on the lack of recourse to same-sex marriage in the state, the lawsuit centered on a state equal protection claim on the basis of sexual orientation, gender, and marital status, and described the couples bringing the suit as identical to heterosexual married couples.[29] According to the complaint, "Plaintiff couples view themselves and hold themselves out to their families and communities as committed, loving intimate couples, who are as committed to one another as spouses in a marital relationship."[30] Thus, even though the relief sought in the suit is substantially less than the full rights and benefits of marriage, the suit utilizes the language of same-sex marriage litigation. This particularly makes sense if part of the goal of the lawsuit is to shape public perception about same-sex couples. Indeed, much of the complaint describes the couples, their lives together, and the challenges they face without legal protections for their relationships.

However, if the goal of the lawsuit was to assist in the defeat of the constitutional amendment, advocates were not successful. In fact, the strategy may have backfired. The amendment passed with 59% support, surprising many, including the gay activist

community in the state. Polling had indicated a much closer vote, especially during the months preceding the elections.[31]

After the amendment passed, a consensus emerged that the amendment, while it banned marriage and civil unions, may still allow for minimal domestic partnership protections, such as health insurance coverage. The outgoing Attorney General, Peggy Lautenschlager, asserted exactly this point in a letter to the city attorney of Madison, a municipal government that provides domestic partner benefits, and Governor Jim Doyle, a Democrat and strong supporter of gay rights, continued to propose benefits for state employees.[32] At the same time, the amendment has provided a powerful resource for conservative groups to challenge existing domestic partner benefits at the local government level.[33]

Nearly three years after the passage of the amendment, a trial court judge ruled against the ACLU and the plaintiffs. In the end, the negative precedent of the *Phillips* case prevailed, with the judge indicating sympathy for the arguments about discrimination but ultimately feeling bound by precedent, not an unusual act for a trial court judge. The court applied *Phillips*'s holding that the statutes in question categorize on the basis of marital status, not gender or sexual orientation.[34]

However, the judge made a clear finding that the 2006 amendment did not prohibit domestic partner benefits, based on the legislative history of the amendment and public debate about the amendment, and ruled that the amendment had no bearing on the case.[35] In fact, the court used the amendment as evidence of the powerlessness of sexual minorities and used this to justify categorizing sexual orientation as a suspect

classification, also relying on recent high court decisions from Iowa, California, and Connecticut that did precisely this.[36]

Thus, it was the early 1990s *Phillips* litigation that was the truly unwise litigation. This negative precedent clearly complicated more recent litigation efforts. Given this fact, the decision to initiate the 2005 litigation may not have been as productive as litigation in other states without similar legal and political barriers.

While the lawsuit was not sufficiently visible in 2006 to negatively affect the outcome on the amendment, it certainly did not add to the efforts of advocates. The fight in Wisconsin became a typical contest over the morality of same-sex marriage, and progressives were overwhelmed by conservative rhetoric and were not able to successfully frame the issue as one of equal rights and fairness.

By the time the trial court ruling was handed down in late May, 2009, it was eclipsed by activity in the legislature to enact a domestic partnership law for all state citizens, not simply the state employees that the lawsuit envisioned. Governor Doyle included a provision in the state budget to grant about forty rights to same-sex couples who register with the state as domestic partners. The policy was enacted and took effect on August 3, 2009, making Wisconsin the first state to enact such a law after the passage of an anti-relationship state constitutional amendment. Legislators were careful to not ask for too much, given the debate over the amendment, such as adoption rights. According to Mark Pocan, an openly gay Democratic legislator, "We tried to find out what things were the most needed immediately. Most of the benefits (afforded by the registry) are probate- or health-care-related. What we do in the future will be based on where we see the need and what we feel can be accomplished."[37] This represents the first

legislative enactment aimed at relationship equality in the Midwest and is arguably a remarkably positive turnaround given the policy landscape immediately following passage of the amendment in 2006.

Even this minimal policy has triggered a lawsuit from conservative opponents who claim that it is a violation of the 2006 amendment, indicating that opponents are not simply protecting heterosexual marriage but are, contrary to public opinion in the state, out to oppose any pro-gay policies.[38] In addition, gay rights groups have been reluctant to sign on to a lawsuit challenging the amendment, especially as the state high court has become more conservative.[39] This is noteworthy because gay rights proponents are often portrayed in the media, and even the scholarly literature (recall Rosenberg's arguments), as anti-majoritarian crusaders. Clearly, this narrative needs to be reevaluated.

Initial examination of the litigation in Wisconsin points to an over-reliance on this litigation and its role in the broader fight for relationship equality in Wisconsin. Given that the political process was already pushing the domestic partnership issue, particularly through the governor's office, the ACLU and Action Wisconsin might have been better off holding off on the lawsuit. There is little evidence that the lawsuit assisted in the fight over the amendment, and the domestic partnership policy recently enacted was not driven by the lawsuit. However, activists in Wisconsin thought the lawsuit was going to be a net benefit in their broader fight. This indicates a continued reliance on the legal framework among cause lawyers and their allies.

Same-Sex Marriage Litigation in Iowa

Iowa is the site of perhaps the most successful litigation strategy for same-sex marriage to date, given the sweeping nature of the unanimous decision and the fact that the decision was not expected in many quarters. The decision of the Massachusetts high court is its only equal in mandating same-sex marriage policy without having been overturned. The outcome was the result of an extremely careful and thoughtful litigation strategy.

Iowa's politics are similar to those in Wisconsin, with recent Democratic Party control of the governorship and the legislature after a period of more divided control. According to Gallup, Iowa is the twenty-third most Democratic state, with similar party identification as Wisconsin.[40] Lax and Phillips give Iowa a mean opinion of 56 percent support of gay rights, with 38 percent for marriage and 51 percent for civil unions.[41]

The same-sex marriage lawsuit filed in Iowa in December 2005 was in line with similar litigation from national litigation groups in the past decade. Lambda Legal filed the suit in Polk County, Iowa in a determined effort to affect relationship equality policy in the state. The lawsuit argued that the prohibition of same-sex marriage in Iowa violates due process and equal protection provisions of the Iowa Constitution. Lambda Legal attorneys believed that the Iowa Constitution and due process and equal protection jurisprudence in the state create a highly favorable forum for the suit. According to Lambda Legal lawyer Camilla Taylor, Iowa was chosen as the venue for its litigation because of favorable legal and political factors. In an interview, Taylor noted that Iowa citizens are highly educated as a result of the Iowa caucuses, and they observe a custom of respect for the views of others. She also noted the "live and let live" ethic in Iowa

political culture, particularly in the Iowa courts.[42] In their public messages about the litigation, Lambda drew upon these traditions, while also using language common to public description of litigation efforts. In a press release Taylor declared, "This is a question of fairness and equality for same-sex couples across Iowa, and we are asking the court to decide based on clear Iowa legal principles."[43]

Lambda Legal was likely encouraged by a related case recently handled by the Iowa courts, an "accidental" case concerning relationship equality. In 2003, a district court judge in western Iowa dissolved a civil union between two women that had been performed in Vermont in 2002. Judge Jeffrey Neary claims that he did not recognize that the parties were both women but later stood by his decision to approve the dissolution after he was aware that he was dissolving a same-sex relationship, citing the full faith and credit clause of the U.S. Constitution.[44] Neary was a newly appointed judge; Governor Tom Vilsak, a Democrat, appointed him to the district court in 2002.[45] In response to considerable attention drawn by the case, particularly from conservatives in the state, Neary emphasized that his decision was legally routine. "I'm not here crusading for anything or anybody. I'm dealing with legal problems," he stated in defense of his decision.[46] Neary eventually amended his order, replacing the word "marriage" with "civil union."[47]

This did not quiet the controversy in the state, however. A conservative public policy group, the Iowa Family Policy Center, campaigned to defeat Neary in a retention election. They, along with legislators and a church from northwestern Iowa, also filed a lawsuit with the state Supreme Court attempting to invalidate Neary's ruling. They viewed his decision as an attempt to legalize same-sex marriage in the state. The

decision, according to the center's president Chuck Hurley, was a "nuclear missile [aimed] at the nuclear family."[48] The retention election became a high-profile campaign, which was quite unusual for retention elections in the state. In the end, Neary was retained, but 41% of voters in the rural, Republican district voted to remove him, despite a clear statement by Neary that he opposed same-sex marriage.[49] The case also contributed to a decision by Republican lawmakers to propose an anti-same-sex marriage constitutional amendment in early 2005, but split partisan control of the state Senate and the eventual Democratic takeover of both chambers has neutralized these efforts.[50] Clearly, though, the "lesbian divorce" case was highly salient in the state.

The legal attempt to challenge the ruling failed when the Iowa Supreme Court ruled that those challenging Neary's decision lacked standing.[51] And by not overturning Neary, the unanimous court appeared to downplay the rhetoric of conservatives in the state about the threat to marriage posed by the decision and seemingly left the door open to the idea of legal space for civil unions in the state. As Chief Justice Lewis Lavorato wrote: "We fail to see how the district court's action in dissolving a civil union of another couple harmed in any specific way these plaintiff's marriages . . . We therefore agree with amicus that these plaintiffs have claimed an interest in Iowa and federal marriage laws that has nothing to do with the district court's decision."[52]

Interestingly, amicus was none other than Camilla Taylor of Lambda Legal. Indeed, Taylor was substantially involved in the litigation after the initial decision on an amicus basis, as well as by making public statements about the case. She characterized the attempt to challenge Neary in court and in his election as an attempt at judicial intimidation. Taylor also viewed the controversy as an opportunity for Lambda and other

gay rights groups to portray conservative opponents of same-sex marriage as extremists while defending the privacy and integrity of same-sex, and opposite-sex, relationships. "Iowans want to know that they can go to court and have their private legal matters resolved, without having their issues hijacked by extremist groups and used as a vehicle to further their political agendas," Taylor declared after the Supreme Court decision.[53] Roughly six months after the decision, Lambda Legal filed its same-sex marriage suit. The fact that Neary's decision held up most certainly was taken as a cue from the Iowa courts that some form of relationship equality was possible in the jurisprudence of the state.

Lambda's summary judgment brief created a strong narrative that emphasized the rights and dignity of same-sex couples. It also argued that Iowa jurisprudence fully supports claims for same-sex marriage on the basis of equal protection and fundamental rights analysis with its "strong jurisprudence in defense of rights of personhood" and "storied tradition of protecting personal liberty and equality against majority tyranny."[54] Thus, while Lambda's involvement in the lesbian civil union dissolution emphasized libertarian concerns and the right to be left alone, this litigation relies on a much richer notion of rights and argues that Iowa jurisprudence can sustain this richer view.[55]

In their legal arguments, but especially in their public statements about the litigation, Lambda emphasized the importance of same-sex marriage for children. Nearly half of the press release announcing Lambda's brief is devoted to a discussion of issues relating to children, emphasizing the large numbers of same-sex couples raising children and the positive child development literature on same-sex parenting.[56] This is increasingly a common theme and tactic for same-sex marriage advocates and litigants,

and it was used successfully, both legally and politically, in the Massachusetts litigation.[57]

Lambda's filings for the case included extensive affidavits from family law and LGBT legal and history scholars, indicating an attempt to educate both the courts and the public about misperceptions concerning gay history and family issues.[58] However, the emphasis was clearly on the litigation. Unlike the Vermont case, where grassroots political organizing preceded the litigation, the litigation came first in Iowa. Lambda is aware of the educational effects of litigation and is developing grassroots efforts to supplement and broaden the process, but this is secondary to the litigation efforts. Lambda and supportive groups in Iowa hired a grassroots political coordinator, but this, again, was initiated after the litigation was commenced.[59] The tool for policy change being used in Iowa is a lawsuit, not a well organized and orchestrated grassroots political campaign.

The litigation strategy, of course, was highly effective. Following the trend of trial court judges ruling in favor of same-sex marriage,[60] a Polk county judge ruled that same-sex couples were entitled to access to the state's marriage framework and that the state's 1998 defense of marriage act was unconstitutional in late August, 2007. Beyond its relative aggressiveness, this decision is noteworthy for several reasons. Judge Hanson was highly skeptical of religious and policy arguments against same-sex marriage, finding that the exclusion of same-sex couples from the array of rights and benefits under the state's marriage laws was arbitrary and most likely based on animus, rather than legitimate policy concerns.[61] While the level of review invoked was the generally

deferential rational basis test, the decision was sweeping in its support for same-sex marriage arguments, in substance and tone. Hanson declared:

> As a result of their exclusion from the civil institution of marriage, Plaintiffs, their relationships and their families are stigmatized . . . . Through the marriage exclusion the State devalues and delegitimizes relationships at the very core of the adult Plaintiff's sexual orientation and expresses, compounds, and perpetuates the stigma historically attached to homosexuality, for them and all gay persons.[62]

Lambda certainly found a sympathetic judge.

The decision also highlights a crucial element of comparative institutional policy analysis. Judge Hanson was quite skeptical of several of the defendant's witnesses that proposed to testify to the religious and historical underpinnings of traditional, heterosexual marriage and ruled that these witnesses would likely be inadmissible at trial.[63] In doing so, Hanson noted that "[t]he views espoused by these individuals appear to be largely personal and not based on observation supported by scientific methodology or based on empirical research in any sense."[64] This reflects a phenomenon noted by Evan Gerstmann, whereby state courts are increasingly rejecting arguments based on tradition and religion in favor of more "rational" approaches that support egalitarian outcomes in the same-sex marriage debate.[65] This role is important, especially given the way that morality politics occurs outside of the courts. According to Christopher Mooney, "morality-policy politics" are defined by several factors: "conflicts of first principle, technically simple policy, potential for high salience, and high levels of citizen participation."[66] When in the arena of majoritarianism, LGBT rights policies generally fare poorly, because opponents are able to mobilize clear, focused opposition, sometimes based on majoritarian sentiment, sometimes not, but always visible to policymakers.[67] In this arena, all arguments, including those based on religion and tradition, have standing.

However, in litigation, the range of argument can be limited, which can give more standing to pro-LGBT arguments.

Reaction from conservatives to the decision was predictable, but they were limited in their ability to respond through policy, given the Democratic control of the state government. Calls for a constitutional amendment or the impeachment of Judge Hanson went largely unheeded. However, the decision caused discussion of the issue of same-sex marriage during the lead-up to the 2008 Iowa caucuses.[68]

On April 3, 2009, the Iowa Supreme Court ruled unanimously that same-sex marriage was required by the state constitution.[69] The court viewed the issue as a civil rights issue, not an issue of traditional morality and religion. Indeed, the court went out of its way to recognize, but ultimately fence out, religious objections to same-sex marriage, arguments that are front and center in non-legal debates.[70] Instead, the court framed its discussion on the expert opinion of medical and professional groups on the worth of, and obstacles faced by, families with same-sex parents, and the policy discrimination faced by same-sex couples.[71] The court also heavily referenced its role as an innovator in the area of civil rights and equality, particular its role in the early elimination of slavery and segregation in the state and its leading role concerning the rights of women.[72]

The decision received a great deal of attention nationwide and signaled a new turning point in the debate about same-sex marriage, particularly because it was the first positive news for same-sex marriage advocates since the passage of Proposition 8 in California. It was followed by legislative enactments of same-sex marriage in Vermont, New Hampshire, and Maine and spurred activity in other states, such as New York.

Discussion immediately focused on a constitutional amendment to overturn the decision, particularly from the state's conservative and Republican leaders and citizens; however, the governing Democrats mostly have opposed this. Indeed, the state party platform endorses same-sex marriage. Soon after the decision, Democratic legislative leaders issued a statement in support of the decision, echoing the court's logic and emphasis on civil rights leadership in the state, and they have resisted calls to take up a constitutional amendment.[73] However, it should be noted that Democratic Governor Chet Culver, who publicly opposes same-sex marriage, has exhibited more ambivalence about the litigation.[74]

At any rate, the Iowa Constitution is not as easily amended as other state constitutions. Rather than a simple referendum, an amendment needs approval from two consecutive sessions of the Iowa legislature before it is put to voters. Alternatively, a state constitutional convention can be called by a majority vote of the state's voters in a constitutionally required vote that takes place every ten years. This would be followed by a popular vote to ratify the results of the convention.[75] The next vote possibly triggering this process will be in 2010. Even if an amendment is enacted, same-sex marriage will be legal in Iowa for several years. This lag time in the amendment process is likely one of the main reasons that the state was targeted for litigation.

Same-sex marriage was thus legalized in Iowa through judicial policymaking with acquiescence from the other political branches after the initiation of a carefully planned and orchestrated litigation strategy. This reflects a policy outcome that goes beyond the parameters of public opinion in that civil unions, which do have public support, were not allowed by the state high court.

Illinois: Avoidance of Litigation and Legislative Stalemate

From the perspective of relationship equality policy advocates, Illinois is the worst of both worlds—it has both an unsympathetic judiciary and legislature, neither reflective of public opinion in this deep Blue state. Based upon Democratic party dominance and strong public opinion support for LBGT rights, Illinois would be expected to enact relationship equality legislation. However, a bill legalizing civil unions has been stalled in the legislature for several years. The state is solidly Democratic, with large party majorities in the legislature and all-Democratic constitutional officers. According to Gallup, the state is the seventh most Democratic state.[76] According to Lax and Phillips, mean public opinion support for gay rights in Illinois is 60 percent, with 53 percent support for civil unions and 42 percent support for same-sex marriage.[77] As measured by public opinion, Illinois is the most supportive of LGBT rights, among the three states examined here, but it is also the only one of the three that does not recognize same-sex relationships.

Advocates in Illinois have intentionally focused on a legislative, rather than judicial, strategy to enact a relationship equality policy. In fact, the courts have been actively avoided as potential policymakers. This dynamic does not only apply to LGBT rights issues; progressive causes in the state have generally been wary of the courts. According to Samuel Gove and James Nowlan, "The Illinois political system and culture seem to discourage the state from being a national leader in progressive causes, and the courts are generally conservative and nonactivist."[78]

The avoidance of social activism not only describes the Illinois courts; the other branches of state government tend to focus more on "bread and butter" issues like taxes,

spending, etc. In a state where political patronage has a long history, “who gets what” has long been the focal point of politics. As one of the leading commentators on Illinois politics, Kent Redfield, states, "In a system like Illinois that's very pragmatic and job-oriented, we tend to not work on the social issues. If I vote pro-life and abortion is not criminalized, the people that voted for me are not going to throw me out of office. But if I don't get a road paved like I promised, watch out."[79] As a result, LGBT rights issues have struggled to gain a foothold on the policy agenda, and enactment of policy has lagged far behind generally supportive public opinion.

Before working to enact civil unions, activists in Illinois worked for years on adding sexual orientation and gender identity to the state’s antidiscrimination law. The bill was able to get through the Democratic House, but always failed in the Republican Senate. In 2002, Democrats took control of the legislature and the governorship, opening up the stalemate. However, even the Democrats acted slowly, finally enacting the law early in 2005.

This indicates that partisan control is important in Illinois, but it is not a guarantee of LGBT rights successes. Legislation enacting civil unions has languished for two consecutive legislative sessions. A same-sex marriage bill was introduced, but lacked support, forcing advocates to focus on the civil union approach. In fact, the civil union legislation would apply to unmarried heterosexual couples as well, and advocates have argued that the legislation would assist elderly heterosexual couples in particular.

Indications are that votes for passage exist in the senate but that sufficient votes for passage do not currently exist in the house. The House speaker, Michael Madigan, is a fairly conservative Democrat, and he wields tremendous power in the chamber. His

primary focus is the reelection of Democrats to the House in 2010, and he is notoriously risk averse, particularly in a climate where Democrats could be vulnerable given a lingering budget crisis and the ethical cloud caused by former Democratic Governor Rod Blagojevich. In addition, if the Republican nominee for governor, the socially conservative Bill Brady, wins in November, it is likely that civil unions will be off the table for his four-year term, pushing enactment to 2015, at the earliest.

Supportive public opinion has not yet translated into relationship equality policy in Illinois. Litigation was never a realistic tool for advocates, and the legislature has not been as responsive as one might expect in such a Blue state. Policy change may come in the new few years, but the state currently lags behind its less liberal neighbors to the north and west.

A Note on Minnesota

Developments in Minnesota mirror those in Illinois and are consistent with the findings of this paper that public opinion is often marginal to policy outcomes on relationship equality. Minnesota is, of course, part of the Upper Midwest, as are the other states in this study. According to Lax and Phillips, mean opinion on pro-gay policies is 58 percent, slightly lower than Illinois (60 percent) and slightly higher than Iowa (56 percent) and Wisconsin (57 percent). Mean opinion for health benefits for same-sex couples is 60 percent and for civil unions is 51 percent.[80]

This would seem to point in the direction of the enactment of policies granting rights to same-sex couples in the state. However, policy in the state lags behind Iowa and Wisconsin. Bills to enact civil unions and same-sex marriage have failed to get a hearing

in the legislature. A recent attempt by the legislature to provide same-sex couples with death benefits was vetoed by Governor Tim Pawlenty.[81] This decision is clearly connected to the governor's presidential aspirations. It is not public opinion in Minnesota the governor is heeding but the much more conservative Republican primary voters. The governor's approach is frustrating for advocates in the state, because, like activists in Illinois, they have pursued a mostly legislative strategy. This tactic is the result of the negative precedent of *Baker v. Nelson*,[82] an early same-sex marriage challenge that went against same-sex marriage advocates.[83] As a result, leading activists in the state have actively discouraged any litigation in the state and have criticized a recent lawsuit initiated by rival activists. In sum, despite favorable public opinion as with Illinois, a legislative stalemate combined with low probability of judicial intervention describes the current policy landscape in Minnesota.

Conclusion

In these generally LGBT rights supportive states, we see tremendous institutional and cultural complexity framing policy outcomes. While the finding by Erikson, Wright, and McIver that state political systems generally reflect the ideological makeup of its citizens (none of the developments chronicled here would likely be possible in the most conservative states or more conservative Midwestern states), it is imperative that scholars of comparative state politics explore the complexity within ideologically similar states to explain disparate policy outcomes.[84] Particularly in the realm of morality politics, litigation must be recognized as an integral part of the policy process. Indeed, it is nearly impossible to accurately assess LGBT rights policy in the states without examining the

role of litigation, given that majoritarian institutions have been very hospitable to arguments and activism stemming from traditional morality and religion, often forcing LGBT activists to push for policy change through the courts.

The study of comparative state politics has relied heavily on the aggregation and analysis of data to create insights about the operation of politics at the state level. The emphasis is primarily on the elimination of complexity in the interest of making broad and predictive claims about politics. In other words, the subfield has been dominated by traditional behavioralist approaches common to the study of American politics. However, this study indicates that scholars of comparative state politics may need to also apply the insights of comparative political analysis to the study of state politics to capture the full complexity of the dynamics of policy making at the state level. Paying attention to path dependency, institutional analysis, and political culture can illuminate dynamics unseen by more typical studies. Rich narrative explorations of a small number of cases are necessary to complete the picture.

When scholars of state politics focus exclusively on public opinion and finding the most broadly explanatory variables to explain state policymaking, much of the story is missed, and our understanding is diminished. Supplementing this approach with cultural and institutional approaches is, then, imperative. If we rely mostly on the aggregation of opinion date to understand policy outcomes, we will have a distorted picture of political reality. This approach, while vitally important, needs to be complemented by a close examination of politics on the ground, including institutions and political and legal culture. In short, the approach of Lax and Phillips cannot explain policy outcomes for a significant part of the country. Hopefully, this study creates a

more complete picture of policy developments in this area. Rather than whittling down our understanding of comparative states politics to one variable, scholars should embrace complexity, particularly to understand politics in the middle of the country, geographically and politically.

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[1] See Jeffrey R. Lax and Justin H. Phillips, "Gay Rights in the States: Public Opinion and Policy Responsiveness," *American Political Science Review,* 103:3 (2009) for a discussion on how states are more responsive to pro-gay public opinion than the federal government. The authors note that this appears to be different than the situation with African-American civil rights.
[2] Lax and Phillips.
[3] Erikson, Robert S., Gerald C. Wright, and John P. McIver, *Statehouse Democracy: Public Opinion and Policy in the American States* (New York: Cambridge University Press, 1993).
[4] Arthur Lupia, Yanna Krupnikov, Adam Seth Levine, Spencer Piston and Alexander Von Hagen-Jamar, "Why State Constitutions Differ in their Treatment of Same-Sex Marriage," paper presented at the Annual Meeting of the American Political Science Association, Toronto, Ontario, Canada, August 23, 2009, 2.
[5] Lupia, et al., 3.
[6] See Rogers Smith, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," *American Political Science Review*, 82 (1988), 90-102 and Howard Gillman, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in *The Supreme Court in American Politics: New Institutionalist Interpretations*, Howard Gillman and Cornell Clayton, eds. (Lawrence: University Press of Kansas, 1999).
[7] Miriam Smith, "The Politics of Same-Sex Marriage in Canada and the United States," *PS: Political Science and Politics*, 37:2 (April 2005), 226.
[8] Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society* (Berkeley: University of California Press, 2004), 7.
[9] For an excellent discussion of these points, see Patrick Atiyah and Robert Sommers, *Form and Substance in Anglo-American Law* (New York: Oxford University Press, 1987).
[10] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd ed. (Chicago: University of Chicago Press, 2008).
[11] Gerald Rosenberg, "Courting Disaster: Looking for Change in All the Wrong Places," *Drake Law Review*, vol. 54 (Summer 2006), 795-830.
[12] For an overview of this literature, see Thomas M. Keck, "Beyond the Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights," *Law & Society Review*, 43:1 (March 2009), 151-186 and Jason Pierceson, "Deconstructing the Backlash: Same-Sex Marriage Litigation and Social Change in the United States and Canada," in *Same-Sex Marriage in the Americas: Policy Innovation for Same-Sex Relationships*, Jason Pierceson, Adriana Piatti-Crocker, and Shawn Schulenberg, eds. (Lanham, MD: Lexington Books, 2010).
[13] Patricia Simms, "Legislature Is Like the Hatfields and the McCoys," *Wisconsin State Journal*, February 1, 2005, A1.
[14] Jeffrey M. Jones, "Political Party Affiliation: 30 States Blue, 4 Red in '09 So Far," Gallup.com, August 3, 2009, http://www.gallup.com/poll/122003/Political-Party-Affiliation-States-Blue-Red-Far.aspx.
[15] Indeed, there was speculation that turnout by young voters against the amendment helped to elect Democrats to the legislature.
[16] Lax and Phillips, 373.
[17] http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/.
[18] I was on the Board of Directors of Action Wisconsin from 2003-2005, then the leading LGBT rights advocacy organization in the state. This information is derived from participation in conversations about the litigation and its relationship to the amendment fight.
[19] *Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205 (Ct. App. 1992), 213, note 1.

[20] *Phillips v. Wisconsin Personnel Commission,* 219.
[21] *Phillips v. Wisconsin Personnel Commission*, 227.
[22] *Hinman v. Department of Personnel Administration*, 213 Cal. Rptr. 410 (Cal. App. 1985). Cited in Phillips at 221.
[23] For a discussion of the early litigation, see Pierceson, *Courts, Liberalism, and Rights*, 104-107.
[24] Phil Brinkman, "Same-sex couples file benefits lawsuit; State plans discriminate, suit alleges," *Wisconsin State Journal*, April 21, 2005, A1.
[25] Plaintiff's amended complaint, *Helgeland v. Dept. of Employee Trust Funds*, Dane County, Wis. Circuit Court, Case Number 05-CV-1265, June 8, 2005.
[26] Brinkman, A1.
[27] Brinkman, A1.
[28] "Domestic partner legislation re-introduced," *Capitol Times*, November 19, 2001, 3A.
[29] Amended complaint, 30.
[30] Amended complaint, 29.
[31] Bill Glauber, "State voters say 'I do' to marriage amendment; Civil unions may be banned; lawsuits could follow," *Milwaukee Journal Sentinel*, November 8, 2006, A9; Judith Davidoff, "Conflicted state; outside Madison, voters wrestle with gay marriage and civil unions question; backers mostly quiet," *The Capitol Times*, October 26, 2006, A1. As the story notes, a St. Norbert College poll found 51% support for the amendment, with 44% opposed in October.
[32] Letter from Peggy A. Lautenschlager, Attorney General of Wisconsin to Michael P. May, City Attorney, Madison, Wis., December 27, 2006.
[33] Ryan J. Foley, "Marriage ban creates uncertainty for gay couples," *The Associated Press State & Local Wire*, November 8, 2006.
[34] *Dunnum v. Dept. of Employee Trust Funds*, Dane Co. Wisconsin Circuit Court, May 29, 2009, slip opinion, 46. For a criticism of this aspect of *Phillips*, see William B. Turner, "The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation," *Wisconsin Women's Law Journal*, 22:91 (2007).
[35] *Dunnum*, 28.
[36] *Dunnum*, 39.
[37] Jessica VanEgeren, "Wisconsin's domestic partnership registry is open for business," Madison.com, August 3, 2009, http://www.madison.com/tct/news/stories/460603.
[38] Ryan Foley, "Lawsuit challenges Wis. domestic partnership law," *The Associated Press,* July 23, 2009.
[39] The lawsuit was brought by an individual citizen and not as yet joined by Fair Wisconsin and Lambda Legal, but Fair Wisconsin has voiced support. See Judith Davidoff, "Citizen McConkey: A one-man battle against state's gay marriage ban," *The Capital Times*, July 15, 2009, http://www.madison.com/tct/news/458312.
[40] Jones, "Political Party Affiliation."
[41] Lax and Phillips, 373.
[42] Phone interview with Camilla Taylor, Lambda Legal Midwest Office, January 5, 2007.
[43] "Lambda Legal Asks Iowa Court Today to Rule for Same-Sex Couples Seeking Marriage," Lambda Legal Press Release, January 30, 2007.
[44] David Pitt, "Same-sex divorce fuels argument over effect on marriage law," *The Associated Press State & Local Wire*, December 12, 2003.
[45] "Group forms to oust judge who approved lesbian divorce," *The Associated Press State & Local Wire*, August 14, 2004.
[46] "Judge who signed divorce for lesbians said issue needs solution," *The Associated Press State & Local Wire*, December 22, 2003.
[47] Mike Wilson, "Judge amends order in lesbian divorce case," *The Associated Press State & Local Wire*, December 30, 2003.
[48] "Judge denies he's promoting homosexual agenda," *The Associated Press State & Local Wire*, October 12, 2004.
[49] "Political battle over judge draws cash contributions," *The Associated Press State & Local Wire*, October 20, 2004; Amy Lorentzen, "Chief justice calls lesbian divorce a 'thorny' issue," *The Associated Press State & Local Wire*, January 14, 2005.

[50] "Gay marriage amendment filed in Iowa," 365Gay.com, January 27, 2005, http://www.365gay.com/newscon05/01/012705iowa.htm.
[51] *Alons v. Iowa Dist. Court for Woodbury County*, 698 N.W.2d 859 (Iowa 2005).
[52] *Alons*, 870, 873.
[53] Mike Glover, "Supreme Court refuses to tamper with termination of civil ruling," *The Associated Press State & Local Wire*, June 17, 2005.
[54] Plaintiff's brief for summary judgment, January 30, 2007, *Varnum v. Brien*, Polk County, Iowa District Court, Case no. CV5965, 13-14.
[55] I develop the issue of positive rights and same-sex marriage claims extensively in my book, *Courts, Liberalism, and Rights*.
[56] "Lambda press release, January 30, 2007.
[57] Pierceson, *Courts, Liberalism, and Rights*, 145.
[58] See affidavit from leading experts, http://data.lambdalegal.org/pdf/794.pdf.
[59] Interview with Camilla Taylor.
[60] Trial court judges have ruled in favor of relationship equality claims in Oregon, Washington, California, Maryland, New York, and Iowa. This is noteworthy given that trial court judges tend not to be policy innovators.
[61] *Varnum v. Brien*, Iowa District Court for Polk County, Case No. CV5963, slip opinion, August 31, 2007, 60.
[62] *Varnum*, 22.
[63] The case never proceeded to trial but was decided on a motion for summary judgment.
[64] *Varnum*, 7.
[65] Evan Gerstmann, "Litigating Same-Sex Marriage: Might the Courts Actually Be Bastions of Rationality?" *Political Science and Politics* 38:2 (2005), 217-220.
[66] Christopher Z. Mooney, "The Decline of Federalism and the Rise of Morality-Policy Conflict in the United States," *Publius* 30:1 (Winter, 2000), 171-188, 174.
[67] Donald P. Haider-Markel and Kenneth J. Meier, "The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict," *Journal of Politics* 58 (May 1996), 332-349.
[68] Bob von Sternberg, "Gay marriage in Iowa gets wary reception," *Minneapolis Star Tribune*, September 1, 2007, 1A.
[69] *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).
[70] *Varnum*, 904-906.
[71] *Varnum*, 874.
[72] *Varnum*, 877-878.
[73] "Lawmakers React to Same-Sex Ruling," KCCI.com, April 3, 2009, http://www.kcci.com/news/19077529/detail.html; Jason Hancock, "State Legislative Leaders Vow No Action on Gay Marriage," *The Iowa Independent*, May 29, 2009, http://iowaindependent.com/15568/state-legislative-leaders-vow-no-action-on-gay-marriage.
[74] Monica Davey, "Iowa Court Voids Gay Marriage Ban," *The New York Times*, April 4, 2009, http://www.nytimes.com/2009/04/04/us/04iowa.html.
[75] Iowa Constitution, http://www.legis.state.ia.us/Constitution.html#a10s1.
[76] Jones, "Political Party Affiliation."
[77] Lax and Phillips, 373.
[78] Samuel K. Gove and James D. Nowlan, *Illinois Politics and Government: The Expanding Metropolitan Frontier* (Lincoln: University of Nebraska Press, 1996), 148.
[79] Quoted in Mary Massingale, "House passes gay rights bill," *The State Journal-Register*, January 12, 2005, 9.
[80] Lax and Phillips, 373.
[81] Jason Hoppin, "Pawlenty vows veto of same-sex measure," *St. Paul Pioneer Press*, May 13, 2010, http://www.twincities.com/politics/ci_15073921?nclick_check=1.
[82] 191 N.W.2d 185 (Minn. 1971)
[83] Rochelle Olson, "Same-sex couples file action against marriage law," *Minneapolis Star Tribune*, May 12, 2010, http://www.startribune.com/local/93410259.html.
[84] Erikson, Wright, McIver, *Statehouse Democracy*.