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Policy Backlash: Measuring the Effect of Policy Venues using Public Opinion

Scott Barclay*
Andrew R. Flores**

INTRODUCTION

What happens to popular opinion after controversial, new policy positions are introduced as law is an essential part of understanding of the role of law as a means of changing individual behavior as well as the efficacy of social movement action in utilizing law to achieve desired policy goals in the face of entrenched and organized resistance. The answer to this question is of such singular importance that, as new movements emerge, it often dominates their initial discussions as they plan their tactics and the policy venues in which to pursue them.

Social movements have good reason to be highly interested in the answer. Legal scholars and political scientists have raised the prospect of a “backlash” in which the success of a new social movement in bringing about a new policy can, paradoxically, be the very catalyst that generates a popular reaction that leads not only to a revocation of the current policy by policymakers but the introduction of a more draconian version of the prior policy as well as the purging of more permissive social norms.¹ Accordingly, activists within newly emerging social movements and interest groups aligned with those movements are often advised to avoid utilizing legal change to achieve policy goals for fear of detracting from any positive effects previously achieved through the actions of social movements in altering the larger cultural discourse.²

I. TWO ASPECTS OF POLICY BACKLASH

Policy backlash has two aspects that are of particular interest to social movements as they engage in strategy and planning.

A. Policy Venue

The first aspect relates to the choice of policy venues: Is backlash more likely to occur in some policy venues rather than others? For example, some legal scholars have argued that policy making through judicial action is more likely to create the

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1 Representative of legal scholars, *see, e.g.*, MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013). Representative of political scientists, *see, e.g.*, Donald P. Haider-Markel, *Representation and Backlash: The Positive and Negative Influence of Descriptive Representation*, 32 LEGIS. STUD. Q. 107, 129 (2007).

2 *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

conditions fertile to subsequent policy backlash, but the proposition remains highly contested within academic circles.³

The presumption is that judges, who are appointed to the federal courts, as well as judges on some of the states' highest courts are more likely to act in direct contradiction to popular opinion as part of the counter-majoritarian tradition accorded courts.⁴ In contrast, popularly elected legislators are thought to be less inclined to act in direct contradiction to the popular will of the moment.⁵ There is an inherent logic to such an approach since, simply from consideration of electoral incentives, we might expect state legislators or congresspersons to ensure that the policies they newly enact accurately reflect changing social attitudes; a noted disjuncture between adopted policy positions and the popular position on a policy issue could easily leave elected officials vulnerable to future electoral challenge.⁶

B. Duration of Effect

The second aspect relates to the duration of any effect: Is backlash more likely to represent only a temporary shock to an existing trend or is it reflective of a longer-term reorientation in popular support? For example, some political scientists have questioned the long-term efficacy of policy change itself when it involves socially divisive issues and it is enacted primarily through judicial action.⁷ For social movements, the difference between a temporary setback and a long-term reversal could be definitive to the chances of eventually achieving desired goals.

In this Article, we use empirical data as analyzed through a statistical model to measure the effect of policy venues on policy backlash as well as offer insight on

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- 3 Arguing in favor of the idea that judicial involvement increases the likelihood of policy backlash on socially divisive issues: *see, e.g.*, GERALD N. ROSENBER, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICHIGAN L. REV. 431, 431–89 (2005). Challenging this approach, *see generally*, Benjamin G. Bishin, Thomas J. Hayes, Matthew B. Incantalup & Charles Anthony Smith, *Opinion Backlash and Public Attitudes: Are Institutional Advances in Gay Rights Counterproductive?*, 00 AMERICAN J. POL. SCI. 1, 2 (2015); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L. J. 2028, 2033 (2011); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC'Y REV. 151, 151–52 (2009); Rebecca J. Kreitzer, Allison J. Hamilton & Caroline J. Tolbert, *Does Policy Adoption Change Opinions on Minority Rights? The Effects of Legalizing Same-Sex Marriage*, 67 POL. RES. Q. 795, 796 (2014); Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–433 (2007); Richard S. Price & Thomas M. Keck, *Movement Litigation and Unilateral Disarmament*, Paper Presented at Annual Meeting of the Western Political Science Association (March 2013)
- 4 For a counter position based on empirical evidence, *see* Scott Barclay, *In Search of Judicial Activism in the Same-Sex Marriage Cases: Sorting the Evidence from Courts, Legislatures, Initiatives and Amendments*, 8 PERSP. ON POL., 111, 114 (2010); Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AMERICAN J. OF POL. SCI. 74, 75 (2011).
- 5 KLARMAN, *supra* note 1, at 167–68.
- 6 This form of logic underpinned the famous 1974 book by the political scientist, David Mayhew. *See* DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 2004).
- 7 *See, e.g.*, GARY MUCCIARONI, *SAME SEX, DIFFERENT POLITICS: SUCCESS AND FAILURE IN STRUGGLES OVER GAY RIGHTS* (2008); ROSENBERG, *supra* note 2.

the duration of any resultant effect. Specifically, we use annual, state-level public opinion estimates of support of marriage equality in the fifty states from 1992 through 2015 introduced into a cross-sectional time-series regression model designed to consider the impact on popular support of the introduction of state laws, state court decisions, and the successful ratification of state-wide constitutional amendments around marriage equality. The introduction of same-sex marriage in the 1990s and 2000s, alongside the introduction of racial integration into education in the 1950s and abortion rights in the 1970s, is often identified by researchers as a textbook example of a policy change that can be expected to generate policy backlash.⁸

II. DEFINING POLICY BACKLASH

According to the current literature on policy backlash, public support for a new policy on a socially divisive topic is thought to decline, often increasingly so, after the introduction of the policy change itself. In many ways, this is counter-intuitive since the relevant social movement, interest groups, and supportive policymakers obviously had sufficient backing initially to convince some set of policymakers, whether courts or legislators, to adopt their desired policy. The logical presumption would be that prior trends of support continue, or even increase, after the formal adoption of the policy. Instead, the literature on backlash proposes that the introduction of a new law, reflecting a new approach to these socially divisive topics, generates a crystallization of popular opinion that fosters a subsequent increase in opposition to the prior policy change. The new law becomes simultaneously a focusing event and a rallying point that facilitates opposition to the new policy, such that there is a decline over time in the level of support for the earlier policy change.

Policy backlash is often demarcated in the current literature by a sufficient popular reaction as to lead to a revocation by policymakers of the current policy and/or the introduction of a counter policy.⁹ Yet, the approach does not by necessity require a complete policy reversal for backlash to be evidenced. Instead, backlash can be also more broadly defined, as Bishin et al. have proposed defining backlash as “a large negative and enduring shift in opinion against a policy or group that occurs in response to some event that threatens the status quo.”¹⁰

It is this latter definition that we rely upon in this article, primarily because it allows backlash as a phenomenon to be separated conceptually from policy diffusion—that is, the more normalized spread of a policy response to a newly emerging policy

8 On racial integration, see, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). On abortion rights, see, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (2006). But note the empirical challenge to the evidence for backlash on abortion rights offered in Post & Siegel, *supra* note 3; Greenhouse & Siegel, *supra* note 3. On same sex marriage, see, e.g., KLARMAN, *supra* note 1; MUCCIARONI, *supra* note 7; ROSENBERG, *supra* note 3.

9 MUCCIARONI, *supra* note 7, at 112–13; ROSENBERG, *supra* note 3, at 75–82; Haider-Markel, *supra* note 1, at 112–13.

10 Bishin et al., *supra* note 3, at 626.

issue.¹¹ In addition, it removes the unnecessary threshold of requiring the reaction to generate sufficient counter-pressure to revoke the existing policy change. Finally, it offers the potential to re-situate the idea of backlash in the normal discussion of popular and policy responses to focusing events.¹²

In the present Article, we also constrain the understanding of backlash to the consideration of the effects on popular opinion *within* the original jurisdiction that passed the new policy into law.¹³ Many current policy backlash models, especially those focused on same-sex marriage, have identified the introduction of new legal restrictions *outside* of the original jurisdiction as offering evidence of a backlash against the original policy change.¹⁴ As such, proponents of this model often fail to demonstrate either a reversal of the policy change *within* the original jurisdiction and/or a decline in popular opinion *within* that same jurisdiction.¹⁵ The problem with this approach is that new legal restrictions outside of the original jurisdiction are equally likely to occur as a result of normal within-state policy processes or as a result of policy diffusion more generally.¹⁶

In keeping with a state-centric approach to policy backlash, we adopt the proposition that states individually determined whether to engage with marriage equality as well as the timing and policy direction they subsequently pursued.¹⁷ In contrast to a national-level approach, which would posit that all states are responding to a single, common policy enactment, we treat federal action on this policy issue as largely separate and removed in its expected effects from action involving the specific state's population. Notwithstanding ongoing congressional debate on the issue and the successful passage in 1996 of the Federal Defense of Marriage Act,¹⁸ policymaking on marriage equality almost exclusively involved state-level action. It is only after 2013 that the federal courts truly began to emerge as the determinative actors in defining the validity of the array of state-level policy changes that were already underway. Accordingly, we focus only on state legislative action, state judicial action, and state constitutional amendments rather than more recent decisions by the federal courts.

11 Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841 (2008) (discussing policy diffusion).

12 THOMAS A. BIRKLAND, AFTER DISASTER: AGENDA SETTING, PUBLIC POLICY, AND FOCUSING EVENTS 22 (1997) (discussing the role of focusing events in influencing policy making).

13 Compare Haider-Markel, *supra* note 1, at 107 (discussing the influence of LGBT state legislators on LGBT-related legislation and policy backlash), with Birkland, *supra* note 12, at 4.

14 Compare ROSENBERG, *supra* note 3, at 10, 72, with Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WILLIAM & MARY BILL RTS. J. 1493, 1493–95 (2006) (discussing that more attention should be paid to legislative and political arenas regarding policy backlash).

15 Price & Keck, *supra* note 3, at 881, 883.

16 Much of the proposed impact associated with policy backlash resemble the normal mechanisms of policy diffusion across states. See Shipan & Volden, *supra* note 11, at 841–43.

17 Barclay, *supra* note 4, at 114, 116.

18 Federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

III. MARRIAGE EQUALITY AS A POLICY ISSUE AT THE STATE-LEVEL

Marriage equality is an apt policy issue through which to consider the question of the effects of policy backlash. Since its strong re-emergence in the wake of the 1993 Hawaii Supreme Court decision in *Baehr v Lewin*,¹⁹ this policy issue has evidenced policy change at the state level, both proscribing marriage equality and permitting marriage equality.

For the current purposes, marriage equality also offers sufficient time after the enactment of each policy change to generate meaningful statistical insights; that is, there is sufficient variation over time for effects to be evidenced. From the point in time when the first states introduce each policy change, there exists at least a decade of subsequent data on popular opinion. For example, by 1995, four states had enacted statutes proscribing recognition of marriage equality. By July 2000, Vermont had enacted civil unions.²⁰ By December 2002, three states had state constitutional amendments prohibiting same-sex marriage. And, by May 2004, Massachusetts had enacted same-sex marriage.²¹

Figure One, below, represents the changing legal positions from 1992 through 2014 across states around the four major legal actions associated with marriage equality: two proscribing same-sex marriage and two permitting relationship recognition for same-sex couples.

Prior to 1992, only a select few states, California and Maryland among the most notable, had any restriction on the recognition or celebration of same-sex marriages formalized into law.²² In fact, rarely was such a proscriptive policy even formalized within administrative rules for the state agency responsible for regulating the criteria for marriage. If such a policy restriction existed, it was an accidental by-product of specifying the number of parties to a marriage; generated initially by earlier state action to proscribe polygamous marriages.²³

Starting in the early 1990s, most, but certainly not all, states developed a new policy designed specifically to proscribe the recognition or celebration of same-sex marriages. This policy change was subsequently introduced via statute, ballot initiative, state court decision, and /or state constitutional amendment—in some states, by all of the above methods and in most other states, by two or more of these methods. In the twenty-two year period between January 1992 and January 2014,

19 *Baehr v. Lewin*, 852 P.2d 44, 65–68 (1993).

20 Barclay, *supra* note 4, Table 1.

21 *Id.*

22 Scott Barclay & Shauna F. Fisher, *The States and the Differing Impetus for Divergent Paths on Same-Sex Marriage, 1990-2001*, 31 POL'Y STUD. J. 331, 335 (2003).

23 William Eskridge has written extensively around this point. WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 1 (2002); William N. Eskridge Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1472–72 (1993).

thirty-seven states introduced statutory prohibitions and thirty states passed state constitutional amendments prohibiting state recognition of same-sex marriage.²⁴

In contrast, a small number of states permitted the recognition and celebration of same-sex marriages or civil unions (or an equivalent such as fully comprehensive versions of domestic partnerships or similar wide-ranging recognition for same-sex relationships).²⁵ This new policy was subsequently incorporated into the formal law via statute, ballot initiative, state court decision, and/or federal court decision. In the twenty-two year period between January 1992 and January 2014, nineteen states introduced legal recognition of same-sex marriage and nine states introduced legal recognition of civil unions (or an equivalent, such as comprehensive domestic partnerships).²⁶ Prior to this action, most states had no such comprehensive relationship recognition for same-sex couples formalized into law.

In the chosen time period, many states adopted only one of these policy changes, either prohibiting recognition of same-sex marriage, or conversely permitting same-sex marriage or civil unions. However, thirteen states—California, Colorado, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Nevada, New Hampshire, Oregon, and Washington—proscribed marriage equality and, notwithstanding this earlier policy enactment, the same state later reversed its position in order to introduce either marriage equality or civil unions.²⁷

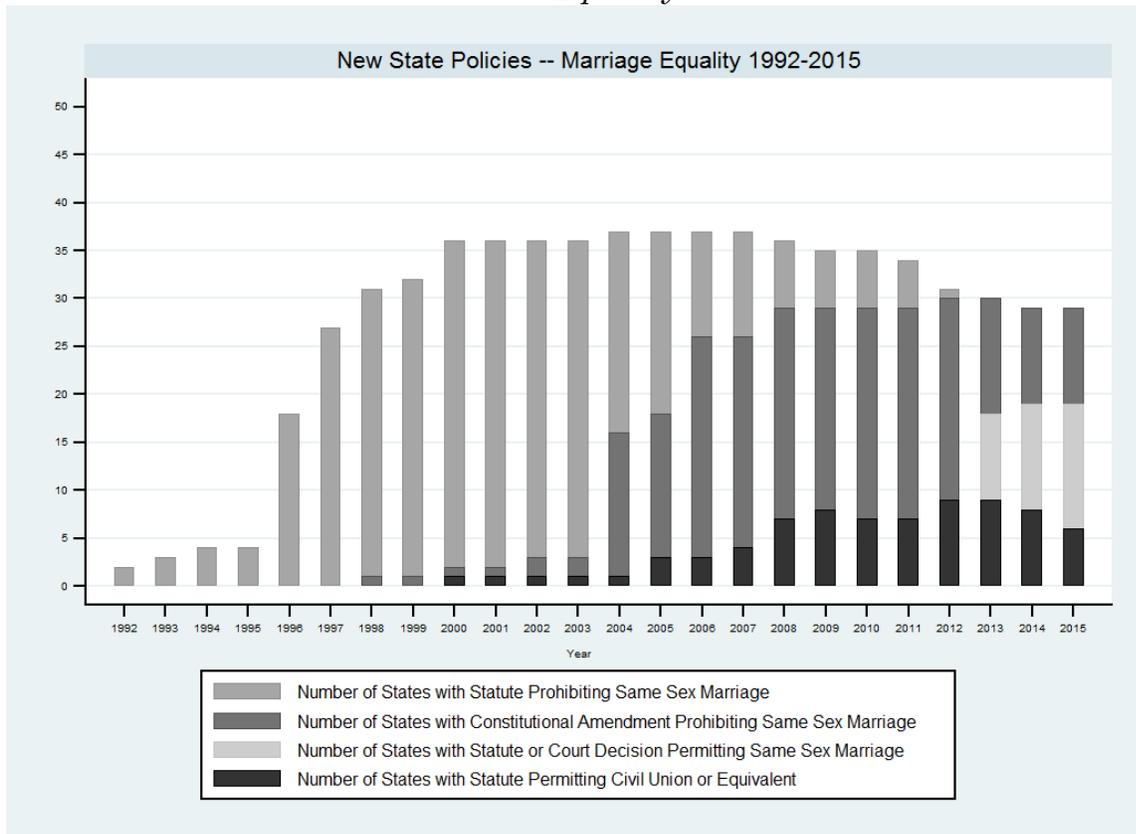
24 Andrew R. Flores & Scott Barclay, *Trends in Public Support for Marriage for Same-sex Couples by State*, WILLIAMS INS. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trends-in-Public-Support-for-Same-Sex-Marriage-2004-2014.pdf> (Apr. 2015).

25 *Id.*

26 *Id.*

27 Barclay, *supra* note 4, at 114.

Figure One: The 50 States and the Two Major Policy Change around Marriage Equality²⁸



IV. GENERATING ANNUAL STATE-LEVEL PUBLIC OPINION ESTIMATES

In order to consider the effects of policy change on subsequent levels of popular support within each of the fifty states, we generated state-level public opinion estimates of support of marriage equality for each year from 1992 through 2015 for each of the fifty states. Actual polling of a sample of a state's adult population is rare and it is usually conducted only at the height of an active political campaign on the policy issue. This preference of the timing of state-level polling introduces a potential selective bias into both its availability and its reported results.

To overcome this limitation on the availability of state-level polling data, we turned to a well-established, statistical procedure: multilevel regression and poststratification (e.g., (MRP)). It utilizes national survey data, which tends to be collected with greater regularity, to effectively model state-level opinion on highly salient policy issues. As such, MRP has previously been used by political scientists to generate reliable sub-national, opinion estimates from accumulated, geo-coded,

28 This graph was created through original research by the authors related to this Article.

national-level polling data.²⁹ And, more importantly, it has empirically proven to produce state-level opinion estimates that are both consistent and reliable in relation to policy issues involving lesbian and gay rights, including the question of marriage equality.³⁰

MRP, as a statistical technique, allows us to simply “marry” two pieces of information—polling data representing the position of a wide variety of respondents in each state, and the demographic breakdown of similarly-situated individuals in each state—to generate consistent and reliable estimates of popular support of marriage equality among adults in each state in each year between 1992 and 2015.

The geo-coded, national-level polling data was accumulated from two sources: (1) proprietary public opinion data obtained exclusively by the authors as part of their involvement in a big-data project at the Williams Institute at the UCLA School of Law; and (2) public opinion data from public sources, such as the data held by the Roper Center and ICPSR data archives. The combined data from these two sources allowed the authors to aggregate the current national-level data to generate large enough samples in each year to capture support for marriage equality in each state as it occurs within a variety of social demographic sub-groups.

In the period between 1992 and 2013, national-level polling data that incorporated a question on marriage equality averaged 6,224 respondents per year, with a minimum of 801 respondents in 1995 and a maximum of 19,740 respondents in 2012. But, consistent with the increasing resonance of the issue over time with commensurate greater sampling on this issue, the sample size grew as time progressed—it averaged 2,545 per year in the years from 1992 through 2000, 8,001 respondents per year in the years 2001 through 2010, and 11,333 for the remainder of the period.

To accumulate this sample size, the authors used several versions of the survey question on marriage equality as were deployed across scientifically rigorous, national surveys throughout this period. There was great similarity in question wording across polling source as the proprietary surveys tended to closely emulate their public counterparts for enhanced data consistency. The authors independently conducted extensive statistical consideration of the effects created by differences in question wording and polling source. It revealed only limited variation of a random

29 MRP has been well-tested by political scientists. Jeffrey R. Lax & Justin H. Phillips, *Gay rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 368 (2009); Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 148–49 (2012); Julianna Pacheco, *Using National Surveys to Measure Dynamic U.S. State Public Opinion: A Guideline for Scholars and an Application*, 11 ST. POL. & POL’Y Q. 415, 415 (2011); David K. Park, Andrew Gelman, & Joseph Bafumi, *Bayesian Multilevel Estimation with Poststratification: State-Level Estimates from National Polls*, 12 POL. ANALYSIS 375, 375–76 (2004); Christopher Warshaw & Jonathan Rodden, *How Should We Measure District-Level Public Opinion on Individual Issues?* 74 J. POL. 203, 203–04 (2012).

30 Matthew K. Buttice & Benjamin Highton, *How Does Multilevel Regression and Poststratification Perform with Conventional National Surveys?*, 21 POL. ANALYSIS 449, 458 (2013); Jeffrey R. Lax & Justin H. Phillips, *How Should We Estimate Public Opinion in the States?*, 53 AM. J. POL. SCI. 107, 107–08 (2009).

nature, which did not indicate the possibility of introducing inherent bias into the sample from question selection.

Current Population Survey data from the US Census Bureau determined the distribution of the relevant social demographic sub-groups in each time period in each state. Examples of such sub-groups might be: the number of college-educated, under-thirty-five women in each respective state, or the number of over-sixty-five, African American men in each respective state. The utilization of these social demographic characteristics as a component in determining the values of the dependent variable makes us a little reticent about deploying them subsequently as part of our explanatory measures.³¹

Although they are generated by a fairly complex means, underlying the resulting opinion estimates are the actual responses of respondents within the respective state reacting to the appropriate question in each respective year. Therefore, these opinion estimates reflect the peaks and troughs over time usually found in traditional public opinion polling on a policy issue. This fact is well demonstrated by Figure Two, which graphically displays the generated estimates of popular support for marriage equality in the State of New York in the period from 1992 through 2015.

Overall, the state-level estimates of support for marriage equality range from a minimum of twelve percent support in Mississippi in 2006 to a maximum of eighty percent support in the District of Columbia in 2013. According to these estimates, all states increased in their support for marriage equality over the twenty-two-year period from 1992 to 2014. There was an average rate of increase in support of 26.16% during this time period.

31 Unique social demographics configuration affect and determine the state's political culture. See ROBERT S. ERIKSON, GERALD C. WRIGHT & JOHN P. MCIVER, *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* 47 (Cambridge Univ. Press 1993). Data exists on early application of social demographic factors to subsequent state policy actions on marriage equality. See Barclay & Fisher, *supra* note 22, at 339.

Figure Two: Opinion Estimates of Popular Support for Marriage Equality—New York³²



Fifteen states saw a twenty percent *or less* increase in support for marriage equality from 1992 through 2014 (from lowest to highest among the fifteen state group): Utah, South Carolina, Louisiana, North Dakota, West Virginia, Kansas, Oklahoma, Alabama, Alaska, Idaho, Kentucky, Nebraska, Arkansas, Mississippi, and Texas.

Conversely, eighteen states and the District of Columbia saw an increase of thirty percent *or more* in support for marriage equality during this same period (from lowest to highest among the eighteen state group): California, Michigan, Montana, Oregon, Pennsylvania, Illinois, Iowa, Connecticut, Massachusetts, New Mexico, Nevada, Rhode Island, New Jersey, Washington, Colorado, Maryland, Vermont, and Hawaii.

V. AN ALTERNATIVE APPROACH TO CAPTURING SOCIAL MOVEMENT ACTIVITY

Our current analysis does not incorporate direct measures of the activities of social movements or interest groups around marriage equality. There are a number of reasons, both methodological and theoretical, for adopting this approach.

First, despite their connection to a respective state, state-level groups were often assisted by a wide variety of national organizations.³³ This assistance might

32 This graph was created through original research by the authors related to this Article.

33 See generally AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX 59–61 (Univ. of Minn. Press 2012).

include campaign expertise, polling information, campaign personnel, personnel training, and direct financial support for targeted media and voter outreach campaigns. On the pro-marriage equality side, these national organizations include, but are not limited to, the National Gay and Lesbian Task Force, Human Rights Campaign, Freedom to Marry, Lambda Legal, ACLU, National Center for Lesbian Rights, and the Equality Federation. On the anti-marriage equality side, these national organizations include, but are not limited to, the National Organization for Marriage and the Family Research Council. Given the nature of these interventions, it is difficult to disentangle potentially meaningful variation in social movement capability at the state level.

Another factor that confounds the ability to accurately account for influential social movement activity at the state level is the fact that the policy change occurs through different institutional mechanisms, often involving an array of policymakers pressured by a variety of social movement actions. Policy changes at the state level have been generated by one or more of the following: litigation in an array of state courts by cause lawyers on behalf of their respective movements, legislative action influenced by sustained interest group lobbying, the decisions of state attorney generals influenced by emerging legal precedent, gubernatorial prompting based on electoral calculations, as well as the multifarious motivations that underpin successful statewide popular initiatives and statewide referendums. Since these various movement activities are often occurring both contemporaneously and in reaction to one another, it can be difficult to discern the effective points of pressure exerted by individual elements of the larger social movement in this dynamic policy interaction.³⁴

Further, different institutional mechanisms for policy shift may become the province of specific movement organizations as movement organizations separate into disparate areas of expertise and focus in an attempt to avoid more direct competition with similarly-situated counterparts for the larger movement's limited resources and supporters.³⁵ Yet, due to intra-movement politics, these various organizations may act in only limited coordination and occasionally they will act in contradiction to the efforts of one another, even if they are all in pursuit of a single goal of marriage equality.³⁶ Thus, even simple advances in policy might involve multiple social movement organizations; each with varying resource deployment at different times and each reflecting only a small component in a larger whole that is likely less than the sum of its collective parts.

Finally, social movements almost always act in relation to counter-movements around the same policy issue. Certainly, that is true in the case of marriage

34 Scott Barclay & Shauna F. Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 84, 84–100 (Austin Sarat & Stuart A. Scheingold eds., Stanford Univ. Press 2006).

35 Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. Davis L. Rev. 1667, 1713 (2014).

36 STONE, *supra* note 33, at 1713.

equality.³⁷ In fact, the backlash model usually posits the actions of a counter-movement as one of the factors that crystallizes popular opinion to turn against the new law.³⁸ Measuring the overall effects from the combined effort of these two competing movements, especially absent movement capability measures, is problematic in the current context.

To resolve these methodological and theoretical problems in ways that allows us to effectively capture the impact and dynamics of social movement effects, we begin from a simple assumption: a successful social movement campaign will lead at some point to a policy change, whereas an unsuccessful social movement campaign will lead to ongoing lack of success around the desired policy change. Accordingly, the capability and effectiveness of social movement activities at the state level are measured by evidence of a policy change becoming law within that state. The failure of the social movement is manifested in an absence of action on the movement's policy preference.

This approach allows us to capture the comprehensive, actual effects of competing social movements upon policy outcome as well as capture them as they impact upon different institutional forums, including state courts and state legislatures. But, beyond resolving the methodological and theoretical problems noted above, this approach has the added benefit of allowing us to distinguish between long-term effects attributable solely to the act of incorporating the policy into law, which is the focus of this current article, from both (a) the more immediate effects of a successful state-level social movement campaign, and (b) the more diffuse effects nationally related to social movement activity more generally.

First, at the state-level, social movement activities are the important aspect of the subsequent decision to act by the respective policymaker—state courts for judicial orders, state legislatures and state governors for statutes, and the state population for ballot initiatives and state constitutional amendments. Consequently, social movement activities are operationalized in the current equation through individual consideration of each of these actions by these policymakers. Thus, we can capture the more immediate heightened focus on the policy issue that might be expected from an active social movement campaign, a well-watched court decision, or a highly-reported legislative debate and vote.

Second, the dynamics between social movements and counter-movements are important elements in framing regional and national policy discourses that may, in turn, shape the larger policy environment for state-level policy effects and policy outcomes.³⁹ These regional and national policy discourses reflect the level of popular resonance around the policy shift that social movements have generated more generally. This aspect is operationalized in the current equation through incorporation of the accumulated policy shift evident at the regional and national level. When many new laws are introduced around one of the policy shifts in a large

37 Shauna F. Fisher, *It Takes (at Least) Two to Tango: Fighting With Words in the Conflict Over Same-Sex Marriage*, in *QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW* 207, 207–30 (Scott Barclay, Anna-Maria Marshall, & Mary Bernstein eds., NYU Press 2009).

38 See generally MUCCIARONI, *supra* note 7, at 210; ROSENBERG, *supra* note 2, at 210.

39 Fisher, *supra* note 37, at 210.

number of states, it is an indication of increasingly successful and effective social movement associated with that policy—the social movement is patently manifesting policy change in state after state.

In the current analysis, our primary goal is to distinguish the long-term effects of creating a new policy—after all, it is incorporation into policy that is supposed to catalyze ongoing backlash—from the immediate effects of social movement campaigns. The present approach to incorporating social movement effects allows us to achieve this goal by effectively separating out the site and manifestation of social movements' effects within a state from the ongoing effect of law itself in relation to the same policy shift.

We assume that at the state-level, social movement activities are the important aspect of the subsequent decision to act by the respective policymaker—state courts for judicial orders, state legislatures and state governors for statutes, and the state population for ballot initiatives and state constitutional amendments. Consequently, social movement activities are operationalized in the current equation through individual consideration of each of these actions by these policymakers. Thus, we can capture the more immediate heightened focus on the policy issue that might be expected from an active social movement campaign, a well-watched court decision, or a highly-reported legislative debate and vote.

A similar approach is adopted for regional effects. We assume that when many new laws are introduced on the policy in a large number of states, it is an indication of increasingly successful and effective social movement associated with that policy—the social movement is patently manifesting policy change in state after state.

VI. STATISTICAL MODEL

To investigate the effects of the policy change around marriage equality, we generated a cross-sectional time-series Gaussian regression equation that modeled changes in the level of popular support for marriage equality in the fifty states. To correctly model the expected effects from state action, we introduced ten explanatory variables into the equation. The description of the explanatory variables and their subsequent operationalization in the regression equation is largely self-evident from the information provided in Table One below.

The equation structure in the regression is constructed to correctly model cross-sectional, time-series data by utilizing model characteristics to reduce the potential for inherent bias introduced by using repeated measures of these same locations over time. Since we were primarily interested in the ability of policy change to alter popular opinion *within* a state, the current regression equation relies on a fixed effects approach, which tends to prioritize within-location effects in the selected form of the regression equation. Such an approach allows the consideration of influences external to each respective state, but primarily highlights how such external influences shape opinion levels within each state. It uses a Maximum Likelihood Estimation approach to correctly parameterize the underlying model.

Despite the incorporation of cross-sectional, time-series characteristics into the regression equation, the reliance on a Normal probability distribution in this case

aids the ease of interpretation of the results by reflecting many of the norms of interpretation traditionally associated with OLS regression models, including in interpreting strength, sign and significance. Consequently, for a one unit change in the relevant independent variable, we can expect a coefficient's change in the percent of popular support for marriage equality evinced among a state's population. And, the constant reflects the minimum baseline of popular support generally on marriage equality across the fifty states during this entire period, which is 28.6% in the current equation.

Table One: Fixed-Effects Cross-Sectional Time Series Gaussian Regression Model of the Level of Public Support for Marriage Equality in the 50 US States, 1992 –2015⁴⁰

Independent Variables	Coeff (Std Err) Min Max
<i>Policy Change Within State:</i>	
Introduction of Policy Change into Law – Long-Term Effects	
Number of Years State has Constitutional Prohibition	0.26 (0.09)* Min: 0 Max:
Number of Years State Recognizes Marriage Equality	17
	1.18 (0.22)* Min: 0 Max:
	11
Number of Years State Recognizes Civil Unions	0.55 (0.18)* Min: 0 Max:
	11
Change in State Law – Social Movement Campaign Effects	
State introduces Constitutional Prohibition of Same-Sex Marriage	- 3.41 (0.70)* Min: 0 Max:
	1
State's Legislature Passes Bill on Marriage Equality/ Civil Unions	5.10 (0.84)* Min: 0
	Max: 1
State's Highest Court Supports Marriage Equality/ Civil Unions	- 1.89 (0.97)* Min: 0 Max:
	1
<i>Policy Change Nationally and Regionally:</i>	
Number of States Nationally with Constitutional Prohibition	- 0.23 (0.03)* Min: 0
	Max: 30
Number of States Nationally with Statutory Prohibition	0.01 (0.01) Min: 0
	Max: 37
Number of States Nationally with Civil Unions	2.11 (0.13)* Min: 0
	Max: 9
Number of States in Region with Marriage Equality	1.01 (0.25)* Min: 0
	Max: 6
<i>Baseline Support</i>	
Constant	28.63 (0.37)*
N = 1224 Groups = 51 [50 States + Washington DC] Time: 23 consecutive years [1992-2015]	
Correlation Structure: Fixed Effects (Within State) R ² = 0.64; Sigma = 5.67; Rho = .56	
F(10, 1163) = 206.24 P = 0.000	
* Significant at the .05 level	

VII. FINDINGS ON POLICY BACKLASH

Consistent with our expectations, social movement campaigns and the policy change they manifest have immediate and substantial impact on the subsequent levels of popular support for marriage equality evinced in the respective state, according to the current regression equation. And, the short-term impact on popular support is in the expected direction. For example, the social movement campaigns that accompany a statewide referendum to successfully pass a state constitutional prohibition on same-sex marriage lead to an expected 3.41% decline in support for marriage equality in that same state in the year of the referendum.

More importantly, the results from the current regression equation speak directly to the two aspects of policy backlash of most interest to social movements: the question of different likelihood of policy backlash in different policy venues, and the question of the duration of any noted backlash effect.

A. Policy Venues

Consistent with the arguments of Klarman, Rosenberg and Mucciaroni, there appears to be a clear divergence, at least in the short term, between the levels of popular support that accrues from judicial action by a state's highest court and the normal policy processes of a state legislature.⁴¹

In the current regression equation, an opinion by a state's highest court endorsing such relationship recognition led to a 1.89% *decline* in support for marriage equality in the respective state in that same year. This finding appears to endorse those legal scholars who attribute part of the source of popular backlash on socially divisive policy issues, such as marriage equality, to the fact that it often arises from judicial action.

And, further supporting their arguments, this decline associated with judicial action stands in direct contrast to the popular response when the respective state legislature successfully passed a bill permitting comprehensive relationship recognition—either marriage equality or civil unions—of same-sex couples. On those occasions, we can expect a 5.10% *increase* in subsequent support for marriage equality by a state's population in that same year.

Overall, the current findings endorse the proposition that state legislative action around socially divisive policy issues appear to generate less popular backlash in the short-term than its judicial counterpart. On the policy issue of marriage equality, these findings are especially impactful. State courts were the major players in facilitating the public engagement over marriage equality from the early 1990s.⁴² For example, in Vermont in 2000 state courts prompted the state legislature into action on the issue and in Massachusetts in 2004 and Iowa in 2009, they legalized same-sex marriage by judicial order. And, in California in 2008, Connecticut in 2008,

41 See generally KLARMAN, *supra* note 1; MUCCIARONI, *supra* note 7, at 243; ROSENBERG, *supra* note 3, at 107.

42 Barclay & Fisher, *supra* note 34, at 96.

and New Jersey in 2013, they prompted state law that extra yard from existing domestic partnerships or civil unions to allow the state to eventually introduce same-sex marriage.

However, as we will discuss in the section immediately below, the impact of such backlash finding is somewhat countered by the short duration of the effect. At most, it can be identified as a temporary setback for the social movement.

B. Duration of Effect

Interestingly, the policy backlash appears to have both a short-term response related to judicial action noted above and, at least in the example of marriage equality, a longer-term, but opposing, version. As the current regression equation notes, the *decline* (of 3.41%) in popular support for marriage equality associated with the initial passage within a state of a constitutional prohibition is offset over time by a 0.26% *increase* in popular support for marriage equality within a state *for each additional year* that a state maintained a constitutional prohibition on same-sex marriage. That is, the initial negative effect slowly decays away to be replaced by a small, but significant, positive effect in support of marriage equality as the years since passage pass. Although just over a quarter of a percentage point increase per year is a small effect, it is worth noting that the state with earliest introduction of a proscriptive state constitutional amendment, Alaska, which passed one in 1998, is equivalent through 2014 of a 4.16% increase in expected popular support for marriage equality.

This long-term effect is itself a form of policy backlash; a backlash in opinion against the incorporation of a proscription on same-sex marriage into law. Returning to the definition of opinion backlash borrowed from Bishin et al. of “a large, negative, and enduring shift in opinion against a policy,” the current long-term change in the direction of opinion certainly meets these parameters, even as it is counter-intuitive to think of policy backlash around marriage equality as the reaction against proscriptive marriage laws.⁴³

According to these regression results, a form of negative policy backlash occurs temporarily after a social movement introduces a change in policy via judicial action. But, over the longer-term, social movements can offset these negative effects as opinion shifts in support of contrary policies. Although surprising, these current findings are, in fact, consistent with recent empirical research on backlash by political scientists. Notably, Egan and Persily found that backlash followed a trend similar to our present finding; a short-term decline in support countered by long-term increases in popular support for marriage equality.⁴⁴ Moreover, the present findings also validate the empirical research by Keck, Kreitzer et al., and Bishin et al. who question

43 Bishin et al., *supra* note 3, at 2.

44 See generally Patrick J. Egan & Nathaniel Persily, *Court Decisions and Trends in Support for Same-Sex Marriage*, THE POLLING REPORT, August 17, 2009.

the validity of any apparent long-term, anti-marriage equality backlash.⁴⁵ As these scholars note, there appears to be no lasting negative impact from the introduction of statutory or state constitutional prohibitions on marriage equality.

This finding on duration may explain why the existing scholarship on policy backlash is divided on its supposed effects. Legal scholars, including Klarman, postulate negative effects, especially from judicial decisions.⁴⁶ In contrast, political scientists testing for these effects using a variety of empirical approaches have rarely found strong evidence for long-term policy backlash against the introduction of new policies on socially divisive issues, including abortion and marriage equality.⁴⁷ The current research offers one point of possible reconciliation by recognizing a likely source of the divergence: the difference in focus between short-term negative effects and long-term positive responses associated with the same policy issue.

CONCLUSION

Given what we know about the potential impact of social movements pursuing policy change, the current findings should not be very surprising. Socially divisive policy issues become socially divisive precisely because existing social practices and the social norms that have long reinforced them become contested, often for the first time, by social movements and cause lawyers. The aim of the social movements is to de-naturalize these accepted practices until, at least for some, they are identified as an injury.

As noted above in the case of same-sex marriage prior to the 1970s, a pervasive and unquestioned social norm can be a truly effective barrier to change for a very long time, even in the absence of a formal legal prohibition on the activity in question. It is the very act of contestation of the norms, and the social practices they support, by social movements and cause lawyers that usually catalyzes legislatures into codifying into law—or, in some cases, further codifying—the existing norm as a way of buttressing a previously accepted social practice. Thus, norms may become embedded into policy at the very point that they are most contested, and their formalization into law can be identified as a sign of vulnerability rather than a sign of increasing imperviousness to change.

From this perspective, it is not unexpected that both proscriptive and permissive versions of a policy would appear contemporaneously across different states, as we see amply demonstrated in Figure One. In light of this underlying contestation, it is even logical that we might expect to see some states migrate in policy terms from proscriptive to permissive laws (and occasionally back again), as we witnessed with thirteen states around marriage equality before 2014. And, it explains the current findings. Although we see evidence of popular reaction in the

45 See generally Bishin et al., *supra* note 3; Keck, *supra* note 3; Kreitzer, Hamilton & Tolbert, *supra* note 3.

46 KLARMAN, *supra* note 1.

47 A variety of methodological approaches attempt to identify empirical evidence of backlash. See Bishin et al., *supra* note 3; Keck, *supra* note 3, at 165; Kreitzer, Hamilton & Tolbert, *supra* note 3.

immediate aftermath of cause lawyering that successfully leads to a court-ordered policy change toward permitting marriage equality or civil unions, in the long-term the regression equation notes that legal recognition of marriage equality and civil unions, as result from *any* actions by state policymakers including by judicial order, lead to increasing positive support for marriage equality.

The very nature of this contestation also acts to mitigate any potential impact from policy backlash related to the introduction of a new policy, especially if introduced via judicial order. Instead, the current findings appear to support the idea that the backlash quickly dissipates and the trend of public support moves on to reflect the newly prevailing norm. This finding should bring some solace to social movements that are forced by circumstances or resources to pursue litigation strategies; the courts are not the problematic policy venue that they are often portrayed to be, as long as one has a slightly longer time horizon.

Rather than sustained backlash, it appears that public support is most sensitive to the appearance of counter-majoritarian action by courts; notwithstanding that it is the role of constitutionally-charged courts to engage in such activity and that such courts rarely drift far from public opinion on a policy issue.⁴⁸ In many ways, this finding is strangely reassuring in democratic terms: the public does not like when it appears that the judiciary is countering their democratic majoritarian decisions, but such a feeling does not preclude in the long term these same court decisions from embodying and enforcing policy choices that the public will increasingly support and endorse.

48 Barclay, *supra* note 4, at 120; Casillas, Enns & Wohlfarth, *supra* note 4, at 79.