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

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Abstract

Some states treat a same-sex marriage as legally equal to a marriage between a man and a woman. Other states prohibit legal recognition of same-sex marriages in their constitutions. In every state that has a constitutional restriction against same-sex marriage, the amendment was passed by a popular vote.

The conventional wisdom about allowing voter participation in such decisions is that they yield constitutional outcomes that reflect attitude differences across states. We reexamine the attitude-amendment relationship and find it to be weaker than expected. We then develop an alternate explanation that focuses on procedural variations in how states amend their constitutions. Integrating this institutional information with attitudinal data yields an improved explanation of why states differ in their constitutional treatment of same-sex marriage today. Our findings have distinct implications for people who wish to understand and/or change the future status of same-sex couples in state constitutions.

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

In the United States, the legal status of same-sex relationships varies across states. Some states, like Massachusetts, accord all of the legal advantages of marriage to same-sex couples. Other states write into their constitutions language that prohibits same-sex unions from receiving equal treatment. The number of states writing such restrictions into their constitutions surged in the decade spanning from Election Day 1998 to Election Day 2008.¹

The constitutional status of same sex marriage is important because a constitutional amendment is the most powerful legal statement that a state can make about the issue. To see why, note that while state officials are obligated to enforce both statutes and constitutional amendments, the two forms of law differ in how they can be challenged in a state's legal system. Statutes can be challenged and overturned when they are found to be inconsistent with a state's constitution (indeed, how state-level judges have interpreted same-sex marriage statutes are an important part of the current debate Matsusaka 2007 a,b). But amendments are constitutional *by definition*. Hence, their legality is more difficult, and often impossible, to challenge in state courts.

¹ The precipitating events of this era were decisions of State Supreme Courts in Hawaii and Massachusetts. These courts, in different ways, offered formal marriage rights to same-sex couples. These decisions, in turn induced states (who typically recognized marriages performed in other states) to react.

In this article, we examine why states differ in their constitutional treatment of same-sex marriages. We begin by noting that direct democracy has been used to pass all current state-level constitutional restrictions on such marriages. In every state except Delaware, citizens are empowered to participate in the amendment process in this way.

When direct democracy is used to make laws, there exists substantial evidence that policy outcomes better reflect mass preferences (see Matsusaka 2004, 2007 a,b for comprehensive studies of this topic). Moreover, a comprehensive study of state legislatures reveals that they act in ways that are generally responsive to variances in public opinion across states (Erikson, Wright, and McIver 1993). Collectively, such studies support the view that the constitutional treatments of same-sex marriage differ across states because the citizens of constitutionally restrictive states have different attitudes about same-sex marriage than do citizens in constitutionally permissive states (see, e.g., Gamble 1997, Riggle, Thomas, and Rostosky 2005, Silver 2009).

We have a different view. It is not that attitudes are irrelevant to constitutional outcomes. It is that the relationship between attitudes and outcomes is weaker than the conventional view suggests. This relationship is also weaker than a plausible alternative.

Our conclusions arise from the fact that states differ substantially in their requirements for constitutional change. Some states require little more than the assent of a majority of voters. Other states impose far higher barriers. In this paper, we show how specific institutional attributes condition the relationship between citizen attitudes about same sex-marriage and constitutional outcomes.

Our analysis proceeds in three steps. First, we use state-level polls to document how citizen attitudes about same-sex marriage relate to its constitutional status. We use this data to

characterize the attitude-amendment relationship and to establish a baseline against which we can compare other explanations. Our initial finding is that the relationship between attitudes and amendments is not as strong as the conventional wisdom suggests. For example, attitudes in many constitutionally restrictive states mirror attitudes in many constitutionally permissive states.

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

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

Institutions, however, do not act as independent force on constitutional outcomes. Instead, they condition the relationship between attitudes and amendments in specific ways. Thus, when states make different institutional choices, we should see systematic variance in attitude-amendment relationships across states.

Hence, our third analytic step entails the development of a *threshold model* that takes simultaneous account of voter attitudes and institutional specifics. We find that state-level

differences in the constitutional status of same sex marriages are better explained by an approach that explicitly integrates how institutions influence the relationship between attitudes and amendments into its logic. An implication of this analysis is that many states are constitutionally permissive of same-sex marriages today not because their citizens are “socially progressive,” but because their constitutions are difficult to amend.

We end the paper with an assessment of the future of same-sex politics in state constitutions. We describe why we expect relatively few states to adopt new constitutional restrictions against same sex marriage. We also use our analysis to clarify the likely next strategies of people who wish to leverage anti-gay sentiment for constitutional change and of people who wish to undo recently passed constitutional restrictions against same-sex marriage. In all such cases, assessing how and where such strategies will succeed requires knowledge of how institutions condition the relationship between voter attitudes and constitutional outcomes.

Do Amendments Follow Attitudes?

We begin by evaluating the hypothesis that amendments follow attitudes or, putting matters more precisely, that state-level constitutional outcomes follow state-level public opinion variations. Our dependent variable is whether or not a state constitutional amendment prohibits same-sex couples from receiving the same legal treatment as married heterosexual couples. To evaluate this hypothesis, we gathered state-level opinion data for the 47 states from which we could acquire comparable data on the topic of same-sex marriage.² The states for which we

² Most of our data come from polls commissioned by high-circulation newspapers. In six cases, the data came from other sources. Our California data is from a poll conducted by the Public Policy Institute of California in October 2008. Florida: Quinnipiac University Poll, September 2008. Idaho: 17th Annual Idaho Public Policy Survey, 2006. Louisiana: Statewide Survey of Louisiana Voters, March 2004. South Carolina: Winthrop University/ETV poll, February 2008. Wyoming: 2006 Wyoming Election Survey. See Appendix 1 for more information. In three cases

could not locate such data are Delaware (which does not allow citizens to vote on constitutional amendments), Mississippi and West Virginia.³ In our "attitudes only" analysis we omit these three states.

To permit comparability among polls, we searched for consistently-worded questions. We converged on two types: (1) questions that ask respondents whether they support or oppose a state constitutional amendment defining marriage as between a man and a woman and (2) questions that ask whether the respondent favors or opposes gay marriage in general.⁴ Other questions, such as those inquiring about civil unions, were not sufficiently prevalent in state polls to be included in our analysis. We found no systematic relationship between question type and the percent of respondents opposed to same-sex marriage generally or a specific amendment. Therefore, we pool the two question types in our analyses.⁵ For consistency, we term both the

(AL, NV, and SC), the polling data we could obtain occurred after state constitutional amendments passed.

³ In these states, we contacted state-level party organizations as well as state-level gay rights organization and public universities (and their associated survey research operations) but were unable to locate a representative statewide poll covering the topic.

⁴ We obtained amendment questions for the following states: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, North Dakota, Nebraska, Nevada, Ohio, Oklahoma, Tennessee, Texas, Utah, Virginia, and Wisconsin. We obtained general gay marriage questions for the following states: Arkansas, Connecticut, Hawaii, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, and Wyoming. In the cases of Louisiana and South Dakota we could only obtain questions that asked about a federal constitutional amendment. We could not locate any polling questions for Maine that asked only about an amendment or only about marriage. The question we used gave respondents a choice between marriage, civil unions and not marriage, or no legal recognition. To calculate the percentage of Maine respondents opposed to same-sex marriage we combined those who answered "no legal recognition" with those who answered "civil unions but not marriage." In all cases except four, data are from 2004 or later. Connecticut and Texas are from 2003, and Hawaii and Alaska are from 1998.

⁵ To consider whether there was any systematic relationship between type of question and public opinion results we ran a simple linear regression with public opinion as the dependent variable and a dummy variable indicating whether we located an "amendment" or "gay marriage"

proportion of people opposing same-sex marriage and the proportion of people supporting an amendment as the proportion of people who oppose same-sex marriage.

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

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

[FIGURE 1 ABOUT HERE.]

Figure 1 shows that the relationship between amendments and attitudes is not as strong as the conventional wisdom suggests. At the extreme edges of the figure, the conventional wisdom performs well. For example, only 3 of the 10 states with the lowest levels of opposition have passed restrictive amendments, while 9 of 10 states with the highest levels of opposition have done so. But there is substantial mixing of colors in the middle.

Another way to evaluate the conventional wisdom is as follows: treat “majority rule” as a baseline, as it is the typical voting rule for passing constitutional amendments via direct democracy in US states. If amendments follow attitudes and if majorities rule, then only states in which a majority of the public expresses restrictive attitudes should have a restrictive

question in that state. We found no statistically-significant effect of question type on expressed opinion.

amendment. In other words, only bars that stretch above the 50% line should be green. Here, the conventional wisdom explains 31 of 47 states (66%). In more than a few cases, amendments do not follow attitudes.⁶

Do Institutions Matter?

US states employ different procedures for amending their constitutions. In this section, we examine how two institutional variables relate to the current constitutional status of same-sex marriages. One variable pertains to whether or not a state constitutional amendment can originate outside of the state legislature. The other variable reflects the amount of legislative effort and voter support that are needed to amend the constitution. After defining these variables, we use them to reexamine why states differ in their constitutional treatment of same-sex couples.

DCI or Non-DCI?

The first procedural variable affects whether or not constitutional amendments must originate in a state's legislature. In fifteen states, citizens can place a potential constitutional amendment on the ballot without legislative participation or approval. Following Krislov and Katz (2008), we call this group Direct Constitutional Initiative (DCI) states. In all other states

⁶ An alternative hypothesis is that our classification of constitutional outcomes into the category of having or not having a restrictive amendment masks important differences in the content of constitutional restrictions. To evaluate this alternative, we used Lambda Legal (LL)'s categorization of constitutional outcomes. LL places every US state into one of five classes. Its "lowest class" contains states that have "inequality written into the constitution." Its "fourth class" includes states that have non-constitutional restrictions. The average percentage of opinion against same-sex marriages is 55% in the 10 LL fourth class states for which we have data and is 59% in the 26 LL lowest class states for which we have data. This difference is neither large nor statistically significant. Within the "lowest class" states, LL makes a further distinction between constitutional restrictions that have "not provided protections to reduce the harm" and constitutional restrictions that "might be read to cause even more harm." In the six "no protection" states for which we have data, the average percentage of opinion against same-sex marriage is 56%. In the 20 "might be read" states, the average is 60%. This difference is also not statistically significant.

except Delaware, constitutional amendments must be placed on the ballot by the legislature. We refer to these 34 states as “non-DCI.”

Potential amendments qualify for the ballot in DCI and non-DCI states in different ways. We will describe DCI state procedures first. In a DCI state, a proposal qualifies for the ballot if its supporters collect a required number of signatures from registered voters.⁷ The modal requirement is 10% of the total votes cast for governor in the state’s previous gubernatorial election. Today, nearly all signature collection efforts are accomplished by paying a professional firm to gather the needed signatures (Kousser and McCubbins 2005). So, to qualify for the ballot in a DCI state, the number of people supporting a proposed initiative not be big, but it helps if at least one or more of its supporters are rich enough to hire a competent signature collection firm.⁸

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

Simple Non-DCI or Complex Non-DCI?

⁷ We classify Illinois as a non-DCI state. In Illinois, DCIs are possible, but only for changes to Article IV of its constitution, whose scope is limited to the functioning of the legislature. So, any amendment to the Illinois constitution that pertains specifically to the legal status of same-sex couples would have to originate in the legislature.

⁸ Unlike political parties that live on to fight multiple policy battles, many amendment-oriented groups disband soon after the election in which their proposal is considered (Boehmke 2005). Also noteworthy is the fact that many of the people who participate in writing the draft, paying the firm, or collecting the signatures need not be residents of the state (Bowler, Donovan, and Fernandez 1996).

The second procedural variable specifies whether or not non-DCI states have erected special barriers to constitutional change. To simplify the explanation of this variable, we sort non-DCI states into two categories: *simple* and *complex*. In the eighteen *simple* states, a single legislative vote is sufficient to place a potential amendment on the ballot and the support of a simple majority of voters is sufficient for the amendment to pass. The sixteen *complex* states have additional requirements that are atypical of the normal legislative process and/or of the typical state election. If a non-DCI state requires votes in two separate legislative sessions to place a potential amendment on the ballot or if a simple majority of votes on Election Day is insufficient for passage, we code the state as complex.⁹ Table 1 lists states by their institutional requirements for passing constitutional amendments.

[TABLE 1 ABOUT HERE]

Analysis

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

1. Since non-DCI states have the extra burden of achieving a legislative coalition before placing an amendment on the ballot, DCI states are more likely than non-DCI states to have restrictive amendments.¹⁰

⁹ The modal supermajority Election Day requirement in complex states is a majority of *all votes cast*. To see how this requirement works, suppose that 1,000,000 people vote in an election in a state that has the modal supermajority voting requirement. Suppose, moreover, that only 800,000 cast a vote for or against the amendment. In this case, the amendment must get 500,001 votes (a majority of all votes cast) to pass.

¹⁰ Implicit in this presentation is the assumption that if a restrictive amendment is placed on the ballot, it can gain a majority of votes on Election Day even if pre-election polls show a majority opposed to the election. Besides the observation that such an outcome has now occurred in every state that has put an amendment on the ballot, other factors support the validity of this assumption. One factor is social desirability in polls. Goldman (2008), for example, has identified a segment of the population that is both reticent to admit to an interviewer that they oppose gay marriage but quite likely to support a restrictive amendment in the privacy of a

2. Since changing the constitution in complex states requires broader legislative and/or voter support than in simple states, simple states are more likely than complex states to have restrictive amendments.

How well does this hypothesis correspond to current outcomes? With respect to the first part of the hypothesis, the public has voted to constitutionally restrict same-sex marriages in *all* fifteen DCI states. The same is not true in non-DCI states. The pattern in non-DCI states, however, is consistent with the hypothesis' second part. Ten of the nineteen simple non-DCI states (53%) have restrictive amendments. Only five out of sixteen (31%) complex non-DCI states have such restrictions. Hence, a crude version of the hypothesis that reads, “simple and DCI states will have restrictions, complex states will not” explains current constitutional outcomes in 36 of 50 states (72%). This crude hypothesis performs at least as well as the “amendments follow attitudes” hypothesis.

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

[FIGURE 2 ABOUT HERE]

voting booth. A second factor is evidence that it is easier to motivate people who are opposed to same-sex marriage to go to the polls to defend their point of view than it is to motivate people who support equal marriage rights (see, e.g., Donovan, Tolbert, and Smith 2008).

Figure 2 reveals that the average of statewide opinions is nearly identical in the three categories of states. Hence, the figure reinforces the idea that differences in constitutional outcomes across states are not simply an artifact of amendments following attitudes. The present-day state constitutional status of same-sex marriage corresponds at least as well to basic institutional decisions made long ago as it does to current state-by-state public opinion variations.

Integrating Institutions and Attitudes: A Threshold Model of Constitutional Change

The previous section suggests that knowing whether or not a state allows direct constitutional initiatives and understanding how difficult amending the constitution is in non-DCI states can help explain the current state constitutional status of same-sex marriage. These institutional attributes have explanatory power because they establish the voter and legislative support thresholds that constitutional change requires. In this section, we examine those thresholds more explicitly, integrate them with our polling data, and use the combination to offer an improved explanation of the current constitutional status of same sex marriage.

Figure 3 depicts our threshold model of constitutional change. The top of this figure represents the constitutional status of same-sex marriages as of the mid 1990s. At that time, no states had restrictive amendments. The bottom of the figure represents our expectation of the constitutional status of same-sex marriage today.

[Figure 3 about here.]

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

Election Day requirement, we mean the percentage of voters whose formal assent is required to pass a potential amendment.

Since citizens in a DCI state can place a constitutional amendment on a ballot directly, legislators in DCI states do not cast a formal vote. Hence, the procedural requirement in DCI states is "zero." Moreover, the typical DCI state Election Day requirement is a simple majority.¹¹ With respect to both requirements, there is more variation across non-DCI states. Table 2 lists detailed requirements for these states.

[Table 2 about here.]

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

First, we assume that where the constitutional status of same-sex marriage is contested on partisan grounds, Republican legislators will support placing restrictive constitutional amendments on the ballot. Preservation of traditional definitions of marriage is, for many social

¹¹ The exceptions are Florida (which requires 60% of votes cast for or against the proposal), Nebraska (which requires 50% of votes cast for or against the proposal and 40% of the total votes cast in the election), and Nevada (which requires voter majorities in two consecutive general elections).

conservatives, a vitally important issue. As social conservatives are a core component of Republican Party supporters across the country, we expect Republican state legislators to support ballot access for restrictive amendments.

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

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

All 53 Senate Republicans (100%) supported DOMA as did 224 of 225 (99.6%) of House Republicans who cast a vote. Southern Democrats acted similarly. Seven of eight (88%) of southern Democratic senators voted for DOMA, as did 42 of 48 southern Democratic House members (88%). Non-southern Democrats were more split. Two thirds of non-southern Democratic senators (25/38) supported the bill as did just over half of the non-southern House Democrats who cast a vote (77/136).

Ten years later, a constitutional amendment to prohibit same-sex marriage was introduced in the House (HJ RES 88) and the Senate (SJ RES 1). In the Senate, a motion to consider the bill was killed by a party line vote. In the House, the resolution failed by a vote of

236-187. The bill was supported by 88% of voting House Republicans (202/229) and by 18% of voting House Democrats (34/193). Amongst Democrats, however, the regional split continued to persist. Almost half of the southern Democrats who voted (26/55) supported the bill. Outside the South, only 6% of House members who voted (8/138) did the same.¹²

To be sure, ours is a crude assumption that is certainly false in important cases.¹³ We know of Republicans and southern Democrats who have opposed constitutional restrictions against same-sex marriage and we know of non-Southern Democrats who support restrictions. However, given the evidence that we have reviewed, the assumption works as a simple and relatively accurate representation of how various legislators tend react to proposals that would affect the constitutionality of same-sex marriage.

To generate a set of expectations about the constitutional status of same-sex marriage in non-DCI states, we integrate the procedural information from each state with the poll data from earlier in the paper, the legislative preferences assumption just stated, and data on the partisan makeup of non-DCI state legislators.¹⁴ We do this for every state and every year from 1997 to

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

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

¹⁴ We integrate institutional provisions with public opinion data as follows. First, we use Carl Klarner’s dataset on partisanship in state legislatures (accessed via the State Politics & Policy Quarterly Data Resource). As Klarner’s data contained information through 2007, we obtained 2008 data from the National Conference of State Legislatures. To consider whether there was a sufficient number of Republican legislators (sufficiency based on the institutional requirements)

2008. If a state ever satisfied both the election day and legislative thresholds in a single year (or if it satisfied these requirements in consecutive years as some complex non-DCI states require), then our expectation is that the state will have a constitutional amendment. Table 3 documents these expectations.

[Table 3 about here.]

Our expectations are correct in 42 of 49 states for a cumulative success rate of 86%.^{15 16}

This is twenty percentage points higher than the success rate of the "amendments follow

to pass the bill, we focused on the partisan breakdown of both houses of the legislature from 1997 to 2008. As we could not precisely estimate how public opinion would translate to outcomes where state policy required that an amendment must obtain majority of all votes cast to pass, we simply considered whether or not a simple majority of citizens opposed same-sex marriage.

¹⁵ The numbers in both the numerator (states predicted correctly) and the denominator (total states in study) reflect the availability of poll data. Recall that there are three states – Delaware, Mississippi and West Virginia for which we have no polls. The fact that Delaware and West Virginia never meet the legislative requirements necessary to begin the amendment process is sufficient for us generate an expectation: we expect no amendment in these states. However, the fact that we do not have public opinion for these two states they are excluded from Figure 4. Mississippi's legislature, on the other hand, does meet the legislative requirement. Since Mississippi's Election Day requirement is a simple majority in support of changing the constitution, If we had a poll showing majority support for a constitutional restriction (and it is worth noting that the 2004 constitutional ballot measure banning same-sex marriage in Mississippi passed with over 86% of the vote), our expectation would be that Mississippi would have one. But we have no such data for Mississippi. Hence, we exclude it from this part of the analysis.

¹⁶ Our results in this section are a product of the polling data described earlier in the paper. It is reasonable to ask about the extent to which our results are sensitive to other plausible measures of state-level attitudes on same-sex marriage. Lax and Phillips (2009) have generated such estimates using a very rigorous approach that includes multilevel regression and poststratification. Relying on a dataset of 26 national polls conducted between 1996 and 2005, they model individual responses as a function of demographic characteristics and state of residence. Next, the authors conduct a poststratification where estimates for each respondent type are weighted by the percentage of each respondent type in actual state populations. This produces state-level estimates of public opinion on same-sex marriage. This work constitutes an important substantive advance.

We replicated our analysis using Lax and Phillips's (2009) measures of public opinion instead of our own. There are no states for which the Lax and Phillips estimates improve our original explanation. In fact, using their data yields different predictions in two cases: Iowa and Indiana.

attitudes" hypothesis and twelve percentage points higher than the "amendments follow procedures" hypothesis.¹⁷

Of course, one could argue that because we have used an assumption about legislative preferences to derive this revised estimate, attitudes have found their way back into the explanation. To the extent that attitudes lead voters to choose some legislators rather than others, it is certainly true that such attitudes help to produce the explanatory improvement of our approach. But any such effect is indirect and necessarily limited by the fact that *voters choose state legislators for a wide range of reasons* – only one (at most) of which is the legislator's view on the constitutional status of same-sex marriage. Put in more general terms, our argument is not that attitudes are irrelevant to the pattern of constitutional amendments on same-sex marriage. Our argument is that explaining why state constitutions differ in their treatment of same sex marriage requires more than just information about voter attitudes. It also requires knowledge of the institutions that define relevant legislative and voter support thresholds.

Figure 4 contains another way to depict the explanatory benefits of looking beyond attitudes to explain why states vary in their constitutional treatments of same-sex marriage. Its

In both cases, using our data with our model yields the correct prediction but using our model with the Lax and Phillips estimates yield the wrong prediction. A likely cause of this difference is that while we base our state-level estimates on fewer polls than Lax and Phillips, the polls we use are newer. The national trend towards permissiveness in attitudes towards same-sex marriage may explain why our measure produces less public opposition to same-sex marriage in those states.

¹⁷ In Appendix 2, we examine the seven states for which our estimations were incorrect. A summary of that appendix is as follows. In Alaska and Kansas, a small number of democrats voting contrary to the broad assumptions of this section were sufficient to render our expectation incorrect. In Wyoming and Pennsylvania, there have been enough Republican defections from amendment proposals to block ballot access. In North Carolina, our expectation was undermined by a significant number of "southern" democrats voting like non-southern democrats. In Kentucky, our expectation was undermined by the opposite being true. Our coding of Hawaii as "incorrect" relies on a technicality. Technically, Hawaii does not have an amendment that literally renders same-sex marriage constitutional, which is what we expect. However, it does have an amendment that yields the same outcome, so we code our expectation as incorrect.

content is the same set of bars that inhabited Figure 1. Recall, from that figure, that the color of each bar reflects the current constitutional status of same-sex couples in a given state. Green bars represent states where amendments have passed. Blue bars represent states with no such amendments.

[Figure 4 about here.]

Now, we sort these bars into three categories: DCI states, non-DCI states where poll information or the partisanship of state legislators lead us to expect no amendment, and non-DCI states poll information or the partisanship of state legislators lead us to expect an amendment. Sorting states in this way yields nearly solid color blocks. This outcome, unlike that seen in Figure 1, reinforces the idea that variations in relevant constitutional procedures are critical in explaining why states differ in their constitutional treatment of same sex marriage.

Our findings further imply that states like California, Colorado, and Michigan, which currently have constitutional restrictions against same-sex couples though public opinion on the matter is nearly evenly split, would have different outcomes if they were non-DCI states with supermajority legislative requirements. In other words, our estimates imply that there is not enough public opposition to same-sex marriages in such states to induce their legislatures to propose restrictive amendments. By contrast, we estimate that states such as Maryland, Minnesota, and Virginia, which do not have constitutional restrictions against same-sex marriage, would do so if they were DCI states. These states are constitutionally permissive of same-sex couples today not because their citizens are more permissive on the issue of same-sex

marriage than many of the other states listed in this table, but because their constitutions are harder to amend.¹⁸

Before moving to a discussion about the implications of our findings, we briefly compare our findings to other recent work. Like us, Matsusaka (2007 a, b) argues that institutions condition the relationship between public opinion and policy outcomes. His main explanatory variables reflect how states implement the initiative process and the primary means of empirical inference is statistical.

Matsusaka's analysis derives important explanatory power from a variable measuring whether or not judges stand for election (also see Besley and Payne 2005). His argument for this effect is that because the threat of elections should limit exercises of judicial discretion that counter public opinion, policy outcomes are more likely to reflect public opinion when judges are elected. We examined this hypothesis with our data. In 26 of the 37 (70%) judge-election states for which we have polling data, the state constitutional status of same-sex marriage matches state-level attitudes. The same is true in 7 of the 10 (70%) non-election states for which we have data. Hence, in the case we are studying (state constitutional amendments), the election of judges appears to offer no explanatory improvement. This difference in results is likely due to

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

the fact that we focus exclusively on constitutional amendments, while Matsusaka focuses primarily on statutes. As we described in the introduction, judges can overturn statutes that they find to be inconsistent with a state's constitution. But amendments are constitutional by definition. Since an amendment's legality is more difficult, and often impossible, to challenge in state courts, amendments offer less opportunity for the kind of judicial discretion that statutory interpretation can allow (see, e.g., Eskridge 1994). Hence, the effect of judicial elections found by Matsusaka should have the same relevance to our analysis.

Lax and Phillips (2009:i), by contrast, find that “[s]tate political institutions do not condition policy responsiveness” to public opinion on policies affecting the GLBT community. They conclude (2009: 31) that, "The attention paid in the discourse surrounding gay rights to the role of state political institutions in hindering or advancing the gay rights movement may be misplaced." This is the opposite of our finding. Two factors may explain the difference. First, with respect to same-sex marriage, Lax and Phillips's dependent variable is whether or not states allow it. At the time they did their work, two states allowed it and forty-eight did not. Hence, their dependent variable has almost no variance. Second, Lax and Phillips derive their claim from multivariate regressions where the effect of the institutional variables we are discussing in this paper are represented by the coefficient of an interaction term between public opinion and a dichotomous variable that indicates whether or not a state uses the direct initiative process for statutes and/or amendments. In other words, their treatment ignores the voter and legislative thresholds that form the core of our approach. Given the lack of variance in their dependent variable and the absence of a threshold-based logic in their argument, the lack of statistical significance of their coefficient is not surprising and is an extraordinarily weak indicator of the proposition that political institutions do not affect the relationship between attitudes and policy

outcomes. Put another way, focusing on whether or not a state allows initiatives is an important step in explaining attitude-outcome relationship, but stopping there is equivalent to assuming that the additional procedural and election day requirements described earlier in this section are inconsequential. Our results suggest that the thresholds are quite consequential in explaining the current variation in how state constitutions treat same-sex marriages.

The Future of Political Action and the Legality of Same-Sex Marriage

To this point, we have focused on the question of whether a state will come to have a constitutional restriction after not having one. There has not yet been a case where a state reverses a restrictive amendment (by passing a new amendment that is less restrictive). However, many polls suggest that Americans are becoming gradually more tolerant of gay marriage (Franklin 2008).¹⁹ Suppose this trend continues. We can use a simple extension of our model to yield predictions about which states are most and least likely to change their constitutional treatment of same-sex marriage.

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

¹⁹ Research about why beliefs are evolving as they are continues to clarify how and why people come to have beliefs relevant to same-sex marriages (see, .e.g., Haider-Markel and Joslyn 2008).

bare majorities currently in favor of restrictions, relatively small changes in opinion could provide an opportunity for less restrictive amendments to proceed. Stating this notion more generally, an increase in permissive attitudes would – all else constant – be more likely to lead to constitutional changes in DCI states than they would in states where constitutions are more difficult to amend. For once a majority of voters in a DCI state come to favor greater permissiveness, it would only take a small group of policy entrepreneurs to write a new law, collect a sufficient number of signatures, and prevail at the polls.

By contrast, the prospects for undoing restrictive amendments in non-DCI states at any time in the near future are bleak. Following our logic, a non-DCI state should move from being constitutionally restrictive to constitutionally permissive only if two conditions are satisfied. First, it must have once been the case that “% Restrictive Legislators > Procedural Requirement” and “% Restrictive Voters > Election Day Requirement.” Many non-DCI states have satisfied this condition. Second, at some point in the future, it must be the case that “% Permissive Legislators > Procedural Requirement” and “% Permissive Voters > Election Day Requirement,” where "permissive legislators" and "permissive voters" refer to people who would support a future constitutional amendment that is more permissive of same-sex marriage. No non-DCI state that has passed a restrictive amendment has yet satisfied this condition.

Indeed, this second condition implies that a substantial change in legislative attitudes is required for permissive constitutional shifts. For example, in a state where two-thirds of a legislature is required to place a restrictive amendment on the ballot, two-thirds of the same body will be required to place a permissive amendment on the ballot. Hence, a permissive constitutional shift will require a change in the views of at least one-third of the legislature. Barring an unprecedented acceleration of permissive attitude changes amongst Republicans or

southern Democrats, or wholesale changes in many state-level partisan voting patterns, it is likely to be a very long time before many non-DCI states will be capable of making their constitutions more permissive.

An exception is Wisconsin. There, public opposition to same-sex marriage already hovers close to 50% and Republican majorities in both houses have been shrinking. Moreover, in Wisconsin an amendment can be proposed by a simple majority of legislators in both houses and can be approved by a simple majority of voters. Hence, Wisconsin is one non-DCI state where greater constitutional permissiveness towards same-sex couples does not seem out of reach.

Idaho, by contrast, is an example of a state where a more permissive constitutional treatment of same sex couples is very unlikely even though its poll numbers are not too dissimilar from those of Wisconsin or Colorado. Although public opinion in support of an amendment is also close to 50%, both houses of the Idaho legislature have strong Republican majorities. In 2008, for example, Republicans comprised 80% of Idaho's upper house and 73% of the lower house. Given that Idaho law requires a 2/3 vote in each house to propose a constitutional amendment, over half of the Republican legislators in Idaho would have to come to support greater permissiveness, Democrats would have to make gains of historical proportions, or one would need a sufficiently large combination of Democratic victories and Republican attitude changes to enable any kind of constitutional shift toward constitutional permissiveness.

Our predictions contrast with others who have analyzed potential reversals of restrictive amendments. For example, Silver (2009) predicts that Idaho will pass a permissive amendment *before* Wisconsin and that a DCI state such as Michigan would pass a permissive amendment well after many non-DCI states that have strong Republican legislative majorities. These and

other importance differences in our expectations arise because Silver's analysis focuses only on opinions and ignores varying institutional thresholds.

Having addressed the prospects for greater constitutional permissiveness towards same-sex marriage, we can use the same approach to generate expectations for new constitutional restrictions on same-sex couples. In this case, the implications of our study are mixed. We expect that state constitutional restrictions on same-sex marriage will cease to be a focal political issue in coming years. The reason has little to do with an expectation of changing attitudes, though we are compelled by longitudinal analyses that document slow changes in a more permissive direction (Franklin 2008). Instead, our expectation is driven by the observation that all of the "low hanging fruit" has now been picked. As we have argued, constitutional changes are easiest to achieve in DCI states. In the elections of November 2008, the remaining three DCI states that did not have constitutional amendments restricting same-sex marriage (Arizona, California, and Florida) passed them. No more opportunities like this are available. If more states are to pass restrictive amendments, legislatures will have to be involved and, in most cases, large legislative supermajorities will have to openly support such measures.

According to our data, there are very few states where new restrictive amendments are likely to occur in the next few years. The best bet is Wyoming where Republicans are numerous in both legislative chambers. Other states could also move in this direction with Republican legislative gains or the emergence of Democrats who are willing to support restrictive amendments. If such moves occur in 2010 or 2012, restrictive amendments in non-DCI states like Pennsylvania could be back on the table.

While we expect the constitutional status of same-sex marriage to wane as a focal issue in state politics, our data also suggest that political entrepreneurs may tap public apprehensions

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

More generally, our efforts can speak to the general matter of how much opinion change will be needed to change or preserve current constitutional outcomes. For as long as majorities of voters are against treating same-sex marriages the same way as heterosexual marriages, we can expect states that currently have restrictions to keep them. If attitudes were to shift in a permissive direction, constitutional changes could follow. Using the logic stated above, we would expect DCI states to be quickest to react. Given the relatively small number of people required to qualify a proposed amendment for ballot access in DCI states, a small group of advocates paired with enough money to satisfy the signature requirement would have a strong incentive to seize the first possible opportunity to reverse the restriction. Those seeking change in non-DCI states face higher barriers. There, greater legislative and/or voter support is required. So, compared to other states, the current constitutional outcome is “locked in.” In general, those who wish to change or preserve the content of state constitutions will be more effective if they base their strategies on knowledge of the rules by which states convert legislative efforts and mass attitudes into constitutional outcomes.

Before concluding this section on implications, we would like to address a methodological topic that some readers have brought up. To this point in the paper, we have been purposefully conservative in a key aspect of our presentation. We have described our theoretical framework as applying to the constitutional status of same-sex marriage across states. That said, we recognize that the basic methodological distinction we are making is more broadly applicable. Specifically, our method has been to highlight a contrast between an approach to explaining policy outcomes that focuses on attitudes only and an approach that self-consciously incorporates institutional attributes *into the logical structure of the analysis*. As a general matter, we share the view that attempts to integrate attitudinal and institutional factors are of high potential value for political science. We see this effort as a modest step in that direction.

Conclusion

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

Appendix 1. Public Opinion Sources

Notes: As most of these polls were obtained using newspaper articles, exact question wording is not available in all cases as not all newspapers published full questions. Error is in percentage points.

Key:

N=number of respondents

QW=reported question wording

Error=reported error

NR=no report

Alabama

Poll: Huntsville Times, Auburn University Jan. 24 through Feb. 3, 2008

N: 624

QW: NR

Error: 4

Results: 54 percent said they strongly supported a constitutional amendment, 4 percent mildly supported it, 11 percent were indifferent, 5 percent mildly opposed it, and 23 percent strongly opposed it.

Alaska

Poll: Dittman Research (Anchorage)

Date: October 1998

N: 544 likely voters

QW: NR

Error: NR

Results: 61% would vote for constitutional amendment banning same-sex marriage; 34% against such an amendment

Arizona

Poll: Cronkite/Eight Poll conducted by KAET-TV, Sept 25-28, 2008

N: 976 registered voters

QW: Proposition 102, which will appear in the November ballot, would amend the Arizona Constitution to define marriage as between one man and one woman while maintaining the current statutory law of the state of Arizona which prohibits marriage between persons of the same sex. Will you for or against this proposition?

Error: 3.1

Results: 49% favor; 42% oppose; 9% dk/no opinion

Source: www.arizonapbs.org

Arkansas

Poll: University of Arkansas, conducted October 8 -17, 2005

N: 766

QW: Which of the following policy positions most closely resembles your own view

regarding relationships between two people of the same sex?

Error: 3

Results: 54% favor “no legal recognition” of a same-sex relationship; 15% favor marriage; 22% favor civil union but not marriage.

California

Poll: Public Policy Institute of California, Oct 12-19, 2008

N: 2,004 California adults

QW: NR

Error: 2

Results: 49% opposed allowing gay and lesbian couples to legally marry in California, whereas 47% were in favor.

Colorado

Poll: The Denver Post, conducted by the Mason-Dixon Polling & Research Inc, in February 2006

N: 625 registered voters

QW: NR

Error: 4

Results: 50% support amendment to ban same-sex marriage; 36% oppose such an amendment; 50% support same-sex partnerships with rights (but not marriage); 41% oppose such partnerships.

Connecticut

Poll: Quinnipiac University Poll, conducted October 1-7, 2003

N: 1,519

QW: (1) Would you support or oppose a law that would allow same-sex couples to form civil unions, giving them many of the legal rights of married couples? (2) Would you support or oppose a law that would allow same-sex couples to get married?

Error: 2.5

Results: 51% support civil unions, 43% oppose civil unions; 36% support marriage; 59% oppose marriage.

Note: We use the marriage question only.

Florida

Poll: Quinnipiac University, conducted September 2-4, 2008
N: 1427

QW: Another proposed constitutional amendment would specifically define marriage as a legal union between a man and a woman making same-sex marriage illegal in Florida. Do you support or oppose this constitutional amendment defining marriage as a legal union between a man and a woman?

Error: 2.6

Results: 55% support, 41% oppose, 4% dk/na

Georgia

Poll: The Atlanta Journal-Constitution/ Zogby America, 2004

QW: NR

N: 503 likely voters

Error: NR

Results: 61% of respondents said that they would vote for an amendment that defined marriage as between a man and a woman.

Hawaii

Poll: Star Bulletin/NBC Hawaii News 8, conducted August 5-7, 1998

N: 417 registered voters

QW: Do you approve of legalizing same-sex marriage?

Error: 5

Results: 24% approve; 63 % oppose.

Idaho

Poll: 17th Annual Idaho Public Policy Survey, 2006

N: 534

QW: How strongly do you support a constitutional amendment to the Idaho Constitution to ban same-sex marriages?

Error: NR

Results: 52.3% either strongly support or support a constitutional amendment

Illinois

Poll: Mason-Dixon Polling and Research, March 8-10, 2004

N: 625

QW: NR

Error: 4 points

Results: 60% oppose legalizing gay marriage; 27% support legalizing. 34% support an amendment banning gay marriage; 53% oppose such an amendment.

Indiana

Poll: Tue Nov 27, 2007, Indianapolis Star and WTHR-TV, was conducted by Selzer & Co. of Des Moines, Iowa, from November 13-16, 2007

N: 600

QW: NR

Error: 4

Results: 49% support constitutional marriage ban

Iowa

Poll: Des Moines Register, February 17 and 20

N: 801

QW: NR

Error: 3.5

Results: if the state constitution should be amended to block same sex marriage 48 percent said yes while 47 percent said no. Five percent had no opinion. 62 percent of prospective voters believe marriage should be available only to opposite-sex pairs. On the issue of civil unions more than half of those who responded said they would support the idea. About 40 percent were opposed.

Kansas

Poll: *The Wichita Eagle & KWCH 12 Eyewitness News* May 2004

QW: NR

Error: NR

Results: 56% support a constitutional amendment banning same-sex marriage

Kentucky

Poll: *Courier-Journal*, AP Louisville, May 2004

QW: NR

Error: NR

Results: 70% favor the *state* constitutional amendment on the Nov. 2 ballot

Louisiana

Poll: Southern Media and Opinion Research of Baton Rouge, conducted March 17, 18, 22-29, 2004

N: 700

QW: (about federal amendment to US Constitution)

Error: 3.8

Results: 62% favored federal ban, 30% opposed it, 8% expressed no opinion

Maine

Poll: Portland Press Herald, Conducted by Strategic Marketing Services, Feb 28-March 3, 2004

N: 400 "likely voters"

QW: NR

Error: 4.9 points

Results: 30.3% support full marriage rights; 35.5% support civil unions (but not marriage); 31.8% oppose any legal recognition of gay couples; 2.5% don't know.

Maryland

Poll: Baltimore Sun, conducted Jan 6-9, 2008

N: 904

QW: NR

Error: 3.5

Results: 19% support gay marriage, 39% back civil unions, 31% oppose gay marriage and civil unions, 11% unsure/declined to answer.

Massachusetts

Poll: University of Massachusetts, conducted March 30-April 4, 2004

N: 463

QW: NR

Error: 5

Results: 40% support same-sex marriage; 28% support civil unions, but no marriage. 17% oppose both civil unions and gay marriage; 11% don't care.

Michigan

Poll: Detroit Free Press Poll, conducted Sept 2004

N: 830 registered voters

QW: NR

Error: 3.5

Results: 50% support constitutional ban on same-sex marriage, 40% oppose it; 6% undecided.

Minnesota

Poll: Star Tribune Minnesota Poll, conducted March 28-31, 2004

N: 562 likely voters

Error: 4.1

QW: Would you vote for or against an amendment to the state constitution that says that marriage, both religious and civil ceremonies, can only be between a man and a woman?

Results: 58% favor, 35% oppose, 7% no opinion

QW: Do you favor or oppose allowing gay and lesbian couples to enter into a legal union that would give them many of the same rights as married couples?

Results: 35% favor strongly, 12% favor not strongly, 6% oppose not strongly, 36% oppose strongly.

Missouri

Poll: St. Louis Post-Dispatch/KMOV-TV, January 2004

N: 804 likely Missouri voters

QW: (1) Would you favor or oppose allowing same-sex couples the same legal benefits and protections now extended to married couples in Missouri? (2) Would you favor or oppose an amendment to the U.S. Constitution which would define

marriage as a union between a man and a woman in order to prohibit any future efforts to allow gay and lesbian couples to marry?

Error: 3.5

Results: 53% favor an amendment banning gay marriage, 36% oppose, 11% not sure. 62% oppose equal benefits, 34% favor equal benefits, 4% not sure.

Montana

Poll: Mason-Dixon Polling and Research Inc, for Lee Newspapers of Montana, conducted Sept 20-22, 2004

N: 625 likely Montana voters

QW: NR

Error: 4

Results: 61% say they would support a constitutional ban on gay marriage; 32% would not support such a ban; 7% undecided

Nebraska

Poll: World Herald Poll (polling firm RKM Research and Communication), conducted October 25-27, 2000

N: 1,007 registered voters

QW: Please tell me whether you would vote for or against the following initiative. If you don't think you'll vote on the initiative

please feel free to say so.

Initiative 416 deals with same-sex marriages. A vote for Initiative 416 will amend the Nebraska Constitution to provide that only marriage between a man and a woman shall be valid or recognized in Nebraska, and to provide that the uniting of two persons of the same sex in a civil union, domestic partnership or other similar same-sex relationship shall not be valid or recognized in Nebraska. A vote against Initiative 416 will not amend the Nebraska Constitution in the manner described above.

Error: 3.1

Results: 60% favor; 32% oppose; 1% will not vote; 7% don't know.

Nevada

Poll: Commissioned by Review-Journal, conducted by Mason-Dixon Polling & Research, March 15-17, 2004

N: 625 registered voters

QW: Question 2 on the state ballot would amend the Nevada Constitution to provide that 'only a marriage between a male and a female person shall be recognized and given effect in the state.' If you were voting today, how would you vote?

Error: 4

Results: 60% approve; 36% reject; 4% undecided

New Hampshire

Poll: Concord Monitor, conducted December 18-20, 2006

N: 600

QW: NR

Error: 4

Results: Two separate questions, one about marriage and one about civil unions. 35% support same-sex marriage, 55% opposed, and 10% not sure. 44% support civil unions, 48% oppose it, and 16% weren't sure.

New Jersey

Poll: Rutgers-Eagleton, conducted Oct 18-23, 2007

N: 1002

QW: NR

Error: 3.1

Results: 48% support gay marriage; 45% oppose it.

New Mexico

Poll: Albuquerque Journal, conducted by Research and Polling, Inc, March 10-15, 2004

N: 404 adults

QW: NR

Error: 5 points

Results: 61% oppose same-sex marriage; 29% favor same-sex marriage; 48% oppose civil

unions; 43% approve civil unions.

New York

Poll: New York Times, conducted June 6-11, 2008

N: 1062

QW: "Which comes closest to your view? Gay couples should be allowed to 1) legally marry, 2) form civil unions, 3) do neither, 4) don't know.

Error: 3

Results: 38% support same-sex marriage; 28% support civil unions, but no marriage. 29% oppose both civil unions and gay marriage; 5% don't know.

North Carolina

Poll: The News & Observer (Raleigh, NC), conducted Jun 13-16, 2008

N: 600 likely voters

Error: 4

QW: Should North Carolina and the US Constitutions be amended to prohibit gay and lesbian couples to marry, or is it enough to prohibit marriage by law without amending the Constitution?

Results: 56% favored amending, 38% didn't, 6% unsure.

Other Results: 51% oppose allowing same-sex couples to

marry, 37% favored it, 12% were not sure.

North Dakota

Poll: The Forum of Fargo-Moorhead/WDAY-TV, October 2004

N: 623 likely voters

QW: NR

Error: 4 points

Results: 52% favor amendment banning gay marriage; 36% opposed; 11% undecided.

Ohio

Poll: Commissioned by the Cleveland Plain Dealer; conducted by Mason-Dixon Polling and Research, Sept 10-14, 2004

N: 1,500

QW: NR

Error: 2.6

Results: 64% of people favored the ban on same-sex marriage; 30% opposed; 6% were undecided

Oklahoma

Poll: Tulsa World and KOTV Channel 6, July 8-12, 2004

N: 756 registered voters

QW: NR

Error: 3.5

Results: 82% support the proposed amendment, 15% were opposed, 3% undecided.

Oregon

Poll: The Oregonian, conducted March 4, 2004

N: 400

QW: NR

Error: NR

Results: 54% do not think same-sex marriage should be legal.

Pennsylvania

Poll: Philadelphia Inquirer, conducted Mar 9-15, 2004

N: 1022 registered PA voters

QW: NR

Error: 3

Results: 63% would not support a law allowing same-sex couples to marry, 31% favored such a law, and 6% were undecided.

Rhode Island

Poll: Greenberg Quinlan Rosner Research, conducted April 6-9, 2006

N: 500 "likely voters"

QW: NR

Error: 4.4

Results: 45% support same-sex marriage; 39% oppose it.

South Carolina

Poll: Winthrop University/ETV Poll, February 2 to 17, 2008

N: 722 "randomly selected South Carolinians over 18"

QW: In South Carolina, it is unconstitutional for gays and lesbians to marry. Assuming that this will not change, do you believe that long term same sex couples should have legal rights similar to those of married heterosexual couples even though they are not allow to marry?
Error: 3.65
Results: 35% say yes, 59% say no; 5% are not sure.

South Dakota

Poll: Commissioned by the Argus Leader and KELO-TV, conducted by Mason-Dixon Polling and Research, September 20-22, 2004
N: 800 likely voters
QW: NR
Error: 3.5
Results: 63% favor a federal amendment to define marriage as between a man and a woman; 25% against; 12% undecided.

Tennessee

Poll: Chattanooga Times Free Press, conducted Sept 25-27, 2006
N: 625 registered and likely voters
QW: NR
Error: 4

Results: 73% would vote yes to a state constitutional amendment defining marriage as between a man and a woman, whereas 20% would vote no.

Texas

Poll: San Antonio Express-News, 2003
N: NR
QW: NR
Error: 4
Results: 63% of Texans said that they support a state ban on the recognition of gay marriage

Utah

Poll: Deseret Morning News/KSL-TV, Sept 6 –9, 2004
N: 915 registered voters
QW: NR
Error: NR
Result: 63% in favor of amendment to ban gay marriage, 30% opposed, 7% undecided or didn't know.

Vermont

Poll: Associated Press, exit poll conducted November 2004
N: NR
QW: NR
Error: NR
Results: When given the options of full marriage, civil unions, or no recognition, 40% supported

marriage, 37% civil unions, and 21% neither.

Virginia

Poll: Mason-Dixon Polling & Research, October 17-19, 2006
N: 625 registered voters
QW: NR
Error: 4
Result: 52% support amendment to ban gay marriage; 42% opposed to amendment

Washington

Poll: Wirthlin Worldwide, October 6-9, 2004
N: 402 Washington residents
QW: NR
Error: NR
Result: 57% oppose gay marriage, 41 % support it.

Wisconsin

Poll: Diversified Research, paid for by WisPolitics.com, Sept 20 – 21, 2006
N: 600 “likely voters”
QW: NR
Error: 4
Result: 53% support amendment banning gay marriage; 39% were against it; 8% didn't know or refused to answer.

Wyoming

Poll: 2006 Wyoming Election Survey
N: 639 households
QW: “Now I would like to read you several statements. Please tell me if you strongly agree, agree, disagree, or strongly disagree: Homosexual couples should be allowed to get married.”
Error: 4
Results: 61.3% either said that they disagree or strongly disagree.

Appendix 2. Our Incorrect Expectations

Alaska:

Our expectation is that Alaska would not have a constitutional restriction. In Alaska, 2/3 of each legislative chamber is required to place a potential amendment on the ballot. In 1998, the Alaska Senate was 70% Republican and the House was 62.5% Republican. On straight party line votes, the Republicans in 20-member Senate would have been able to place an amendment on the ballot by a party line vote, but the 40-member House would have been two votes short. However, the proposal passed in both Houses.

The House vote on SJR 42 occurred on May 11, 1998. Thirty-five of forty House members (88%) voted as we anticipated – Republicans voted for the bill, Democrats voted against. The five exceptions, however, led to the bill's passage. Four of 15 Democrats (Foster, Ivan, Moses, and Williams) supported placing the amendment on the ballot. One of 25 Republicans (Bunde) voted against. The bill passed by a vote of 28-12.

Hawaii

Our expectation is that Hawaii would not have a constitutional restriction. Hawaii, however, presents a unique challenge. For many people, the modern debate over same-sex marriage began with a 1993 Hawaii state Supreme Court decision that prohibited the state from denying marriage rights to same-sex couples. In 1998, the state became the first to take an explicit constitutional action about same-sex marriage by a popular vote. The amendment allowed the state legislature to enact a ban on same-sex marriage, which it subsequently did.

Strictly speaking, the Hawaii constitution does not directly ban same sex-marriage, which is consistent with our expectation. However, the amendment effectively produced such a ban by leaving the matter to the legislature. Given that the legislature has been traditionally controlled by Democrats, our expectation is that the legislature would have rescinded its ban at some point perhaps even to the extent that it sought to reverse the 1998 amendment. This expectation is fueled by the fact that state public opinion polls suggest that Hawaiians have become substantially more permissive towards same-sex marriage (Wu 2008).

As a non-DCI state, legislative support would be required to change the constitution. Both chambers of the state legislature have Democratic majorities far in excess of the numbers required to qualify an initiative. While some Hawaii Republicans favor legalization, we count our expectation for Hawaii as being false because Hawaii Democrats are divided on the matter (Wu 2008). So while conversations about legalization continue, the legislature has not yet taken concrete steps in this direction.

Kansas:

Our expectation is that Kansas would not have a constitutional restriction. In Kansas, 2/3 of each legislative chamber is required to place a potential amendment on the ballot. In 2004, the legislature considered a proposal, HCR 5005, to place a restrictive constitutional amendment on the ballot. The proposal passed in the heavily Republican Senate but failed in the less-Republican House.

In 2005, a new proposal with identical language was introduced. That year, the Senate was 75% Republican, and the proposal passed in that chamber with 72% of the vote. In the lower

house, 83 of 125 (66.4%) members were Republicans. This would have left Republicans one vote short of a majority on a party line vote.

The House voted on SCR 1601 on February 2, 2005. Sixty-eight of eighty-one Republicans (84%) voted in favor as did eighteen of 42 Democrats. While three-quarters of the legislature voted as we anticipated, the divergence from a party line vote amongst Kansas Democrats was sufficient to pass the bill. The bill passed by a vote of 86 to 37.

Kentucky:

Our expectation is that Kentucky would not have a constitutional amendment as it is considered a non-Southern state and over the past 10 years Republicans have always been a minority in the lower house. In 2004, Senate Bill 245 proposed amending the constitution to prohibit same-sex marriage. The bill passed the House on April 12 by a vote of 85-11 and passed the Senate on April 13 by a vote of 33-5. Given that at the time there were 16 Democrats in the Senate and 63 (a majority) Democrats in the House, these votes suggest that the bill was supported by a majority of Kentucky Democrats. Hence, our expectation for Kentucky fails because Kentucky Democrats have acted differently than most non-Southern Democrats. Indeed, from the pattern of legislative votes on this bill, Kentucky resembles a southern state.

North Carolina:

Since North Carolina is a southern state and since a majority of voters are opposed to same-sex marriage, our expectation is that it would have a constitutional restriction. While there is no constitutional restriction in the state, North Carolina passed a statutory ban on same-sex marriages in 1996. Since 1996, the North Carolina legislature has never seen a Republican majority in the Senate, and has been almost evenly split between Republicans and Democrats in the House. At various times in recent years, legislative proposals for a restrictive constitutional amendment have surfaced, but these attempts have been blocked by Democratic legislators (Beckwith 2008). Hence, our expectation for North Carolina fails because North Carolina Democrats have acted differently than most other Southern Democrats.

Pennsylvania:

Our expectation is that Pennsylvania would have a restrictive constitutional amendment given polling data on voter attitudes, the fact that legislative majorities in consecutive sessions are sufficient to place a potential amendment on the ballot, and the fact that Republicans controlled both legislative chambers over multiple legislative sessions. Pennsylvania does prohibit same sex marriage at the statutory level. It adopted DOMA as state law in 1996.

The closest that Pennsylvania came to placing a constitutional amendment on the ballot was in 2006. In that year, the state Assembly passed a vote to place a restriction on the ballot by a vote of 136-61. The Senate then passed a similar bill by a 38-12 vote. Nearly all Republicans in both legislative chambers supported the bills. While this Republican support was sufficient to pass the bills, the wide margins are the result of a significant number of Democrats in each chamber also supporting the bills. With these outcomes in hand, the process ground to a halt. The House and Senate bills were not identical. The Senate's bill did not prohibit civil unions and domestic partnerships. In subsequent months, the House and Senate were not able to reconcile their differences. Soon, thereafter, Republicans lost majority control of the Assembly. Efforts to place a restrictive amendment on the ballot, while discussed, have not again progressed as far as they did in 2006.

Wyoming:

Our expectation is that Wyoming would have a constitutional restriction. Wyoming is one of a handful of states that had a statute restricting marriage in Wyoming to a man and a woman prior to DOMA. Changing the constitution requires assent by two-thirds of each legislative chamber and support of a majority of all voters voting in an election. Since 1998, however, Republicans have retained strong majorities (70% or more) in both of Wyoming's houses. Given that Wyoming has long had substantial Republican majorities in both chambers of its state legislature and polls that suggest substantial support for a constitutional restriction, our expectation is that Wyoming would have one. But Wyoming, which calls itself "The Equality State," has not pursued such an amendment. We do not have a good explanation for this outcome; though it has been pointed out to us that the Wyoming legislature has extremely short legislative sessions and that religion-based conservative interest groups are not as powerful in Wyoming as elsewhere. That said, in early 2009, a number of socially conservative groups from other states, such as Focus on the Family, have concentrated their efforts on Wyoming in an attempt to have a constitutional restriction passed.

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Figure 1: Public opinion and marriage amendments

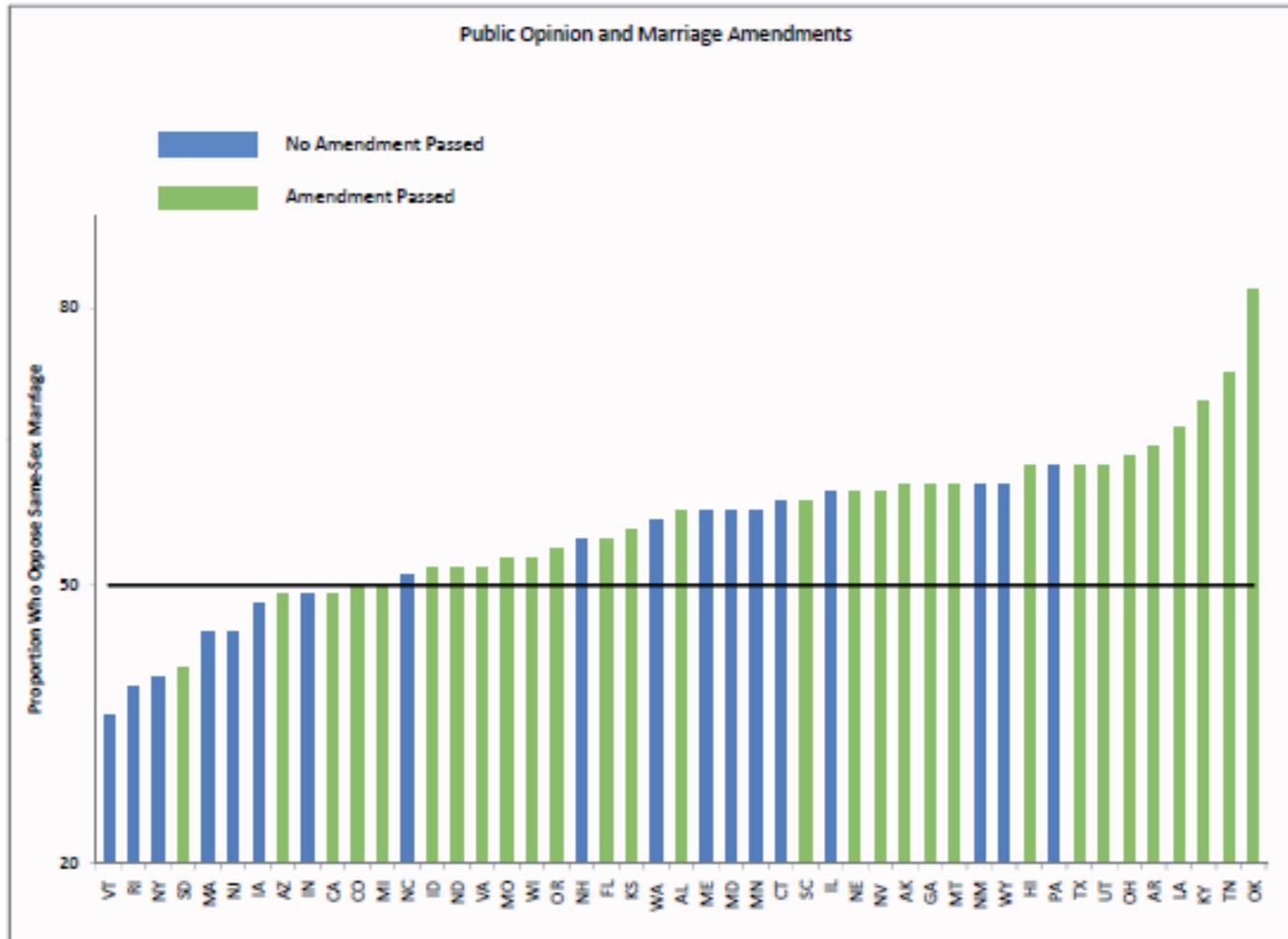


Figure 2. Comparisons of Attitudes and Outcomes by State Type

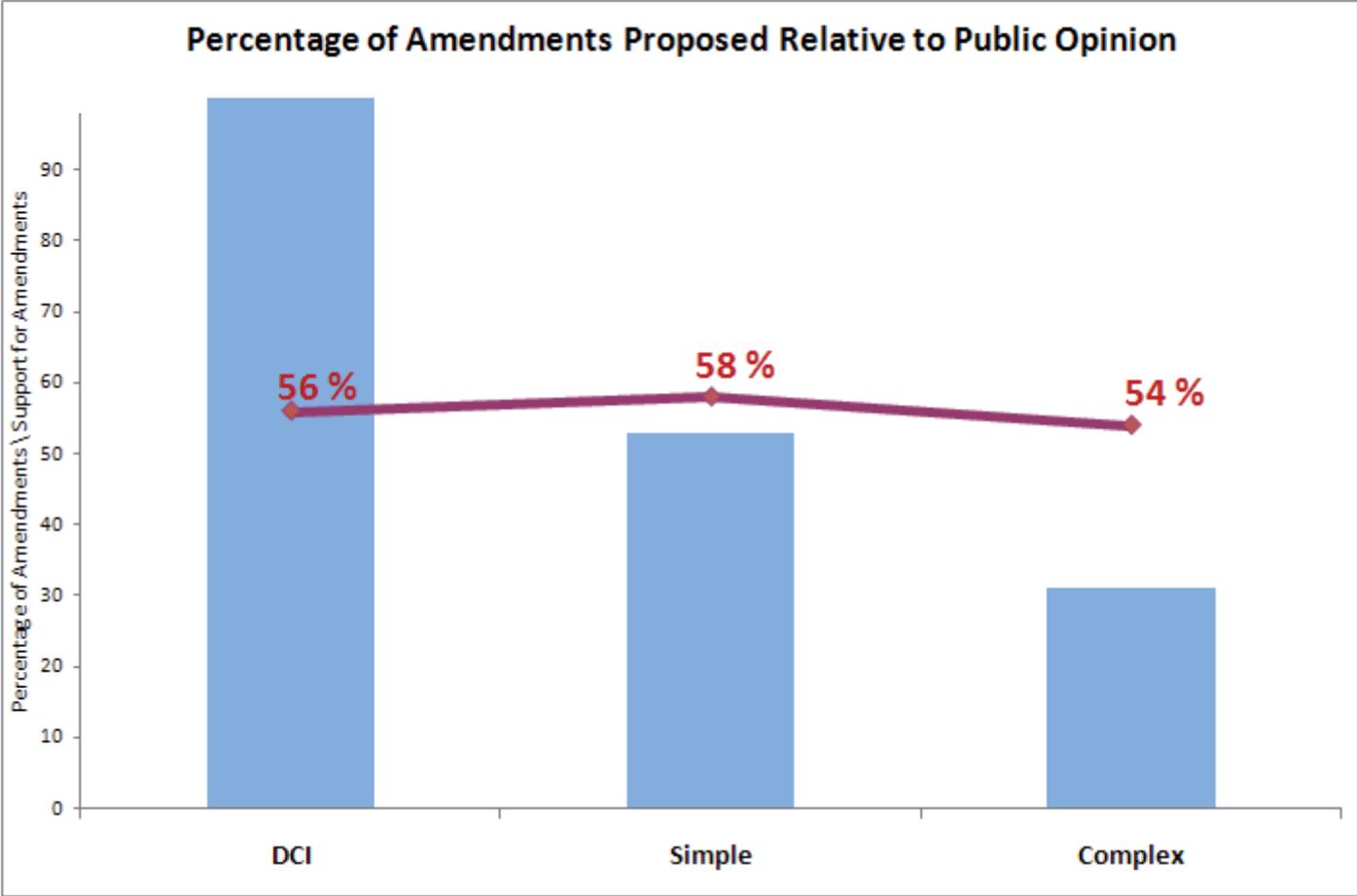


Figure 3. Constitutional Change Flow Chart

Bold font represents whether or not a state is expected to have a constitutional amendment that restricts same-sex marriage. **Red arrows** on the figure indicate places where attitude shifts can affect constitutional outcomes directly by affecting votes cast on proposed amendments that make it on to Election Day ballots. **Blue arrows** show where shifting public attitudes on any of a number of issues can lead voters to elect persons who have particular points of view on the constitutional status of same-sex marriage.

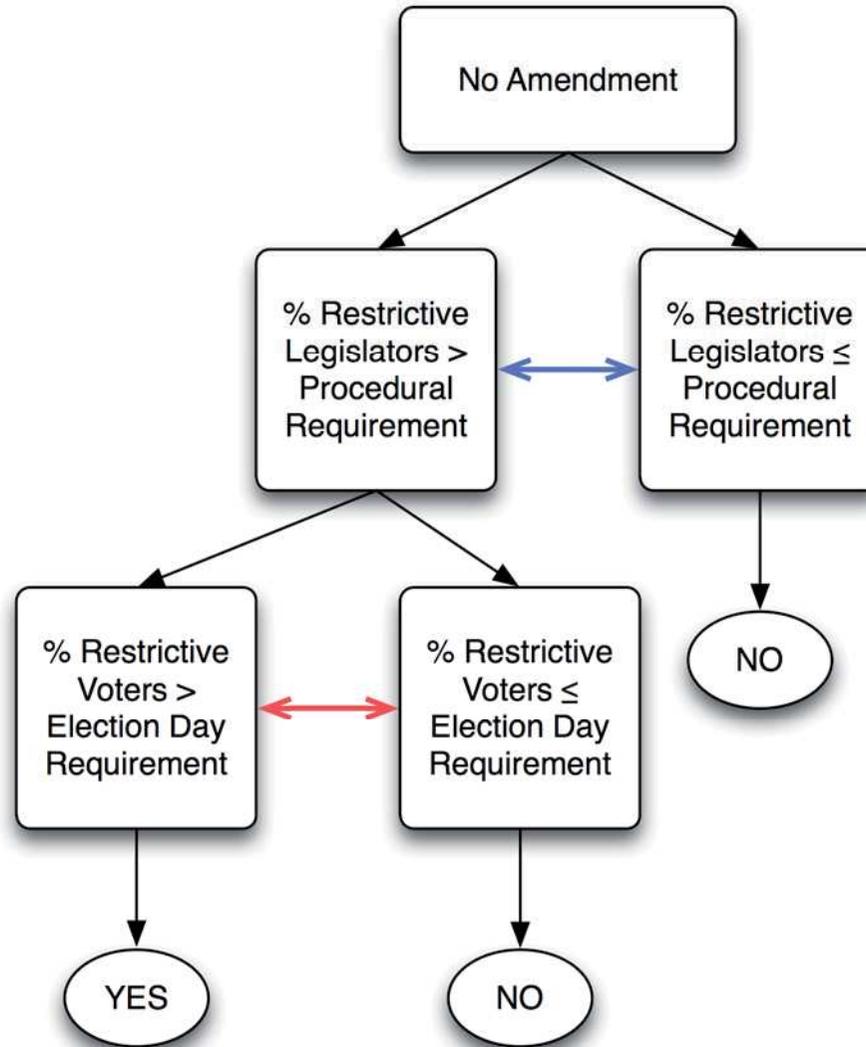


Figure 4. Public Opinion, Institutional Arrangements and Expectations

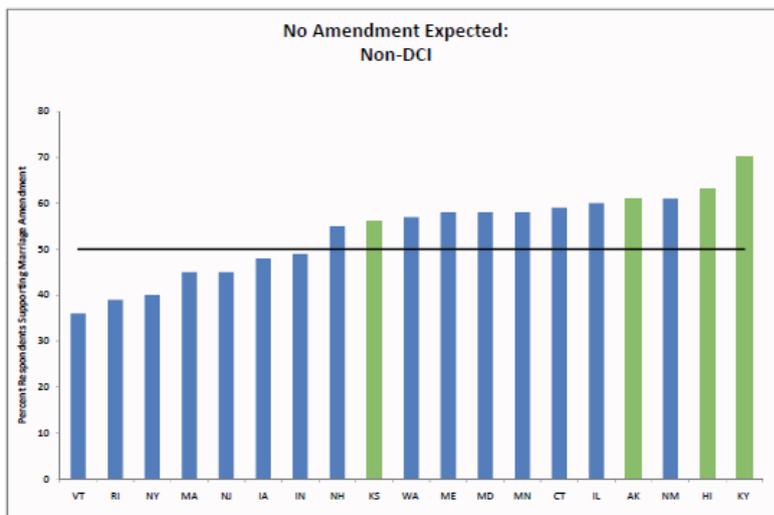
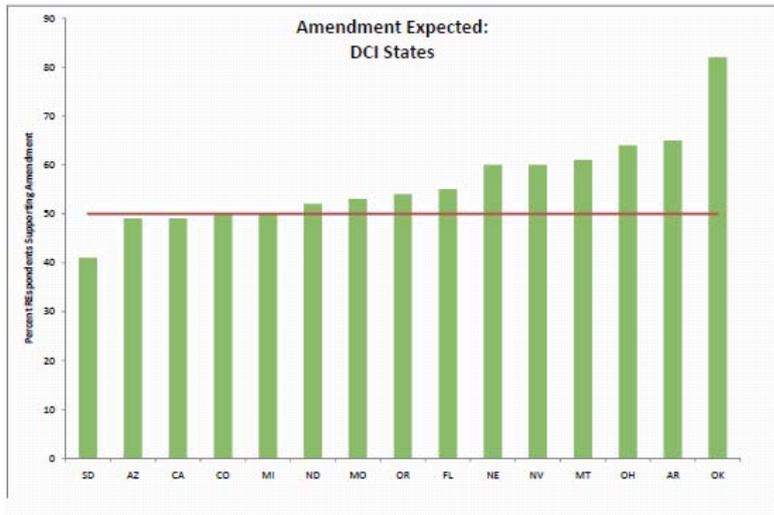
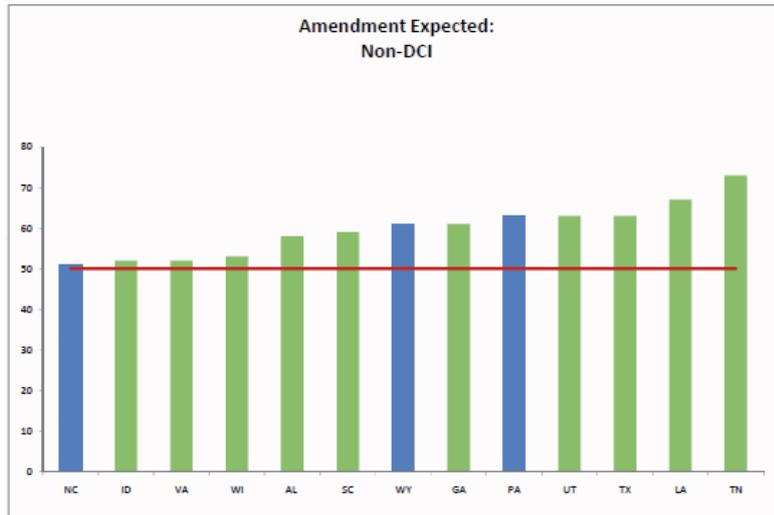


Table 1: Institutional Requirements for Passing Constitutional Amendments

DCI	Simple	Complex	
		Mult. Sessions	Voter Supermajority
AZ	AL	DE	HI
AR	AK	IA	ID
CA	CT	IN	IL
CO	GA	MA	MN
FL	KS	NY	NH
MI	KY	PA	TN*
MO	LA	TN*	VA*
MT	ME	VA*	WY
NE	MD	VT	
NV	MS	WI	
ND	NJ		
OH	NM		
OK	NC		
OR	RI		
SD	SC		
	TX		
	UT		
	WA		
	WV		
Percent Passed			
100%	53%	31%	50%

Bold indicates states that have passed amendments restricting marriage

** indicates states with both supermajority and multiple session requirements*

Table 2: Legislative and Voter Requirements in Non-DCI States

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

VA	majority	majority	majority of all voters
VT	2/3	majority	majority
WA	2/3	2/3	majority
WI	majority	majority	majority
WV	2/3	2/3	majority
WY	2/3	2/3	majority of all voters

Table 3: Expectations for non-DCI states. ✓ = correct

No Amendment Expected Procedural requirement or election day requirement not satisfied since 1998	Amendment Expected Procedural and election day requirement simultaneously satisfied since 1998
Alaska Connecticut ✓ Delaware ✓ Hawaii Iowa ✓ Illinois ✓ Indiana ✓ Kansas Kentucky Massachusetts ✓ Maryland ✓ Maine ✓ Minnesota ✓ New Hampshire ✓ New Jersey ✓ New Mexico ✓ New York ✓ Rhode Island ✓ Vermont ✓ Washington ✓ West Virginia ✓	Alabama ✓ Georgia ✓ Idaho ✓ Louisiana ✓ North Carolina Pennsylvania South Carolina ✓ Tennessee ✓ Texas ✓ Utah ✓ Virginia ✓ Wisconsin ✓ Wyoming