

## **Historical Institutionalism and Comparative Federalism: Lesbian and Gay Rights Policies in Canada and the U.S.**

Abstract: This paper draws on historical institutionalist theory to explore the impact of federalism on the evolution of human rights policies in Canada and the U.S. The aim of the research is to explain the divergence in public policies on lesbian and gay rights between Canada and the U.S. The paper uses public opinion and other evidence to show that political culture is an insufficient explanation of policy divergence; rather the paper argues that political institutional differences between Canada and the U.S. are the main drivers of policy divergence. Building on qualitative research, the paper argues that the specific institutional configurations of federalism in the two cases play a key role in structuring public policy and political mobilization on human rights policy. Although Canadian federalism is usually considered to be more decentralized than U.S. federalism, this paper shows that generalizations about ‘centralization’ or ‘decentralization’ do not assist in understanding the impact of federalism on the evolution of public policy in a particular sector. In this case, U.S. federalism is highly decentralized while Canada’s more centralized jurisdictional structure has facilitated greater access and influence for the lesbian and gay rights movement.

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Lesbian and gay rights policies have undergone dramatic shifts over the last twenty-five years. From a position of stigma, invisibility and marginalization in the 1960s, lesbian and gay citizens today enjoy a much broader array of rights and obligations and a much greater ability to live their lives openly. As developed capitalist democracies, Canada and the U.S. are similar systems when compared to other countries and cultures across the world. Yet, these two similar systems differ greatly in the extent of human rights protections offered to lesbian and gay citizens. In Canada, such human rights protections have been exponentially expanded over the last twenty years while in the U.S., even basic human rights protections in areas such as employment discrimination are not available in most states.

This project asks why such similar societies have produced different policy outcomes. In the first part of the paper, I describe some of the key cross-national policy differences, showing how Canada and the U.S. have increasingly diverged in this policy area. In the second section of the paper, I assess the most common explanation of these differences - political culture – and outline some of the main problems with this explanation. In the third section of the paper, I outline my own approach to explaining cross-national divergence in the lesbian and gay human rights. Drawing on historical institutionalist theory, I show how the legacies of previous policies as well as political institutional differences play a structuring role in this policy area, creating obstacles to policy change for the U.S. lesbian and gay movement while providing institutional opportunity for the gay and lesbian movement in Canada. Political institutions do not create societal demands or social movements. However, institutions provide the strategic context for political actors, structuring the play of social forces in the policy process. Differences in core political institutions combined with differences in constitutional rules and practices between the two countries have played a major role in facilitating very rapid policy change in Canada over

the last decade while blocking policy change in the U.S. (see also Smith, 2005; 2007). The paper focuses specifically on the impact of federalism in structuring political opportunity for social movement actors in Canada and the U.S. In contrast to the conventional view of American federalism as more centralized than Canadian federalism, the paper demonstrates that it is hazardous to generalize about the extent of 'centralization' or 'decentralization' and that the policy effects of jurisdictional differences must be considered sector by sector. Canadian federalism is highly centralized in the area of lesbian and gay rights, In contrast to analyses which emphasize the role of the Charter of Rights as the key factor in centralizing rights policies in Canada, this paper shows that, in the case of lesbian and gay rights, the jurisdictional divisions of federalism also play an important role in facilitating the Charter's impact and in giving the federal government a very strong hand in this policy area.

### **Policy Variance between Canada and the U.S.**

The issue of same-sex marriage offers a stark contrast between the two countries. Courts in both countries have ruled in favour of same-sex marriage. In the U.S., courts in Hawaii (1993), Vermont (1999) and Massachusetts (2003) supported same-sex marriage, while, in Canada, court rulings in the three most populous provinces in 2002-04 (Ontario, B.C. and Quebec) favoured same-sex marriage. Following these victories, especially the Ontario victory in the pivotal *Halpern* case, in which the Ontario Court of Appeal ordered Toronto city hall to immediately issue marriage licenses to same-sex couples, the federal government crafted legislation to recognize same-sex marriage and referred the legislation to the Supreme Court of Canada for a ruling on its constitutionality. In 2004, the Supreme Court ruled that the legislation was constitutional and the legislation eventually passed during the minority Liberal government of Paul Martin in June, 2005. The passage of the federal legislation means that same-sex

marriage is legal throughout Canada. Given the court rulings, ultimately, the only way to roll back the legislation would be for the government to invoke the notwithstanding clause. The Harper government has so far declined to take such a radical step and the government's motion to reopen the issue was soundly defeated in the House in December 2006.

In the U.S., reaction to court rulings has led to a widespread movement to reassert the heterosexual nature of marriage. In 1996, the Clinton Administration passed the Defense of Marriage Act, which defines marriage as heterosexual for the purposes of federal law and policy and which asserts the right of states to deny the legality of marriages or civil unions between same-sex couples from other states. Forty states have passed laws, which deny recognition to same-sex unions, while, in the 2004 elections, 11 states banned same-sex marriage in their states. Only one state – Massachusetts – permits same-sex marriage. Three other states – Vermont, Connecticut and New Jersey – recognize civil union while other jurisdictions (Hawaii, California, Maine and Washington, D.C.) offer domestic partnership arrangements in which some rights are provided to same-sex couples (Lambda Legal, 2006). However, legal challenges on same-sex marriage continue in New Jersey, California, New York, Iowa and Washington, D.C. (Lambda Legal, 2006).

Cross-national differences in human rights policies between Canada and the U.S. do not end on the same-sex marriage issue. In Canada, same-sex marriage is the culmination of a decade of legal and legislative change in the status of lesbian and gay citizens in Canadian society, changes that include broad measures recognizing same-sex relationships and parenting rights as well as systematic and constitutionally protected bans on public and private discrimination. While anti-discrimination measures have been solidly in place for ten years in most Canadian jurisdictions, such measures are non-existent in many U.S. jurisdictions. Only 17

U.S. states prohibit employment discrimination against lesbians and gay men at the state level and anti-gay ordinances are often used to forestall discrimination protection in cities and states across the U.S. (Lambda Legal 2006). Local and city level bans on sexual orientation discrimination are usually restricted to the public sector and lack mechanisms for enforcement (Button, Rienzo, and Wald 2001). On the issue of relationship recognition for same-sex couples living in common law relationships, the Liberal government in Canada passed comprehensive federal legislation in 2000 to extend benefits and recognition to these couples, and this has been followed by many provinces and territories (Smith 2002). In contrast, in the U.S., relationship recognition has developed piecemeal across public and private sector employers. In Canada, same-sex marriage is a final and to some extent symbolic step in a successful legal and political campaign for the recognition of same-sex partners in Canadian law and policy. In the U.S., same-sex marriage is seen as the means to the achievement of many of the parenting and relationship rights that are already available to lesbians and gay men in Canada (Moats 2004).

When state courts in the U.S. have ruled in favor of same-sex marriage or in favor of requiring recognition of same-sex relationships, they have often been trumped by legislatures that have supported or proposed constitutional amendments to ban same-sex marriage and, often, at the same time, to ban any recognition of same-sex partners in state law. Recently, for example, universities in Michigan were told recently by the Michigan Court of Appeals that they may no longer offer such benefits as health insurance to same-sex partners because of the state's recently passed constitutional amendment banning same-sex marriage (Strout 2007).

The U.S. and Canada also differ greatly with regard to the history of the criminalization of homosexual behavior. Until the Supreme Court's 2003 decision in *Lawrence*, sodomy was illegal in some U.S. states. Sodomy laws in the U.S. had important effects on the overall shape of

public policies toward lesbian and gay citizens. By stigmatizing lesbian and gay people as criminals, these laws are widely deemed to have impeded the passage and implementation of anti-discrimination laws and these laws have been repeatedly cited in court rulings (e.g. against lesbian mothers in custody disputes) (Leslie 2000; Cain 2000).

In contrast, in Canada, homosexuality was “decriminalized” by the passage of an amendment of the Criminal Code in 1969. As part of a package of measures that loosened the divorce laws, homosexual sexual conduct between consenting adults 21 years of age or older was removed from the Criminal Code. The decriminalization measures followed British thinking about the regulation of homosexuality, stemming from the findings of the Wolfendon report of the 1950s, which mandated that homosexuality was a question belonging to the private realm and that, therefore, it should not be relegated or criminalized by the state. As Prime Minister Pierre Trudeau famously said, “the state has no place in the bedrooms of the nation.” This policy change cleared the policy agenda for later steps such as anti-discrimination measures and, eventually, relationship and parenting rights and same-sex marriage.

Therefore, in terms of same-sex marriage, relationship recognition, parenting rights and the criminalization of homosexual sexual behavior, Canada and the U.S. present a very different picture of human rights for lesbian and gay citizens. While some analyses of the U.S./Canada differences might emphasize the extent to which policies swing back and forth over time, the picture in this area is one of steady progress towards lesbian and gay rights in Canada. No matter what point we choose in the timeline of policy change since 1969 - the year in which homosexuality was decriminalized in Canada – Canada provides more extensive recognition of lesbian and gay rights claims than the United States. Given the many historical, social, economic

and political similarities between Canada and the U.S, especially by international standards, how can this difference are explained?

### **Political-Cultural Explanations**

A longstanding tradition in political science attributes Canada-U.S. differences to political culture (Horowitz 1966; Lipset 1990). Applied to the human rights policy area, this might imply that Americans are simply more conservative, more religious and less post-materialist than Canadians, factors that have fatally undermined support for lesbian and gay rights in the U.S. and that provide the essential contextual backdrop for the differences described above (Adams 2003). Michael Adams' public opinion analysis of Canadian/American differences in *Fire and Ice* (2003), for example, suggests that Canadian tolerance of sexual diversity is a key difference between Canadians and Americans.

This discussion of similarities and differences in U.S. and Canadian political culture points up some of the problems in the use of the concept of political culture in cross-national comparison of public policy outcomes. First, the concept of political culture is often defined as including the beliefs of citizens as evidenced in polling data, the success or failure of political parties, and the nature and extent of policy variance (e.g. in Horowitz 1966). Political culture becomes such a large concept that it contains everything and, hence, explains nothing. From a conceptual standpoint, political culture is often defined as containing the very features it seeks to explain (Forbes 1987). When political culture is defined in terms of policy variance, it cannot be used to explain policy variance (e.g. Canadians are more politically tolerant than Americans, as evidenced by the fact that Canada permits same-sex marriage). Alternatively, political culture is sometimes reduced to the assertion that public opinion causes public policy, an assertion that is demonstrably refutable in a broad range of policy areas (including lesbian and gay rights),

especially in the U.S. where, in recent years, the Republicans have sought the far right end of the spectrum rather than hewing to the middle, which is where U.S. public opinion lies. According to public opinion polls, Americans on the whole are far more politically moderate than would appear from the policies pursued in by the Republican political leadership in the George W. Bush presidency (Hacker and Pierson 2005). The correlation of polling data with the expected direction of public policy change does not constitute causality. We must still provide the links and rationale for the correlations between polling data and policy outcomes.

While public opinion may play a role at certain policy junctures, differences in policy and in social movement politics are simply too vast to be explained in terms of public opinion or political culture alone. On some policy issues, there is virtually no difference between Canadian and American public opinion, let alone a gulf that would suffice to explain such a gaping divergence in human rights protections. For example, public opinion in the U.S. overwhelmingly favors anti-discrimination measures in employment for lesbian and gay citizens and scholarly analysis of the recent evolution of public opinion shows dramatic change in favor of lesbian and gay rights in the U.S. over the course of the 1990s (Lewis and Rogers 1999; Brewer 2003). But, despite public support, even simple anti-discrimination measures are not in force in most U.S. states. While Canada is legalizing same-sex marriage, the U.S. has debated and passed state and federal constitutional amendments to ban same-sex marriage. Yet, public opinion polls have reported a wide range of results on this issue in the two countries, ranging from a low of 28% support for same-sex marriage in Canada outside Quebec (putting English-speaking Canada behind the U.S. in support for same-sex marriage) to a national high of support in Canada of 54%. (Fournier et. al. 2004; Ipsos Reid 2003). U.S. opinion has ranged as high as 50% in support of same-sex marriage, depending on the wording of the question (Grossman 2003).



Similarly, the politicized evangelical movement plays an important partisan and political role in both countries. This movement cannot be read simply as a political cultural phenomenon, but must be understood as a social movement, actively seeking and exploiting political opportunities (Staggenborg and Mayer 1998; Herman 1997). In the U.S., political institutions provide many openings for the Christian evangelical movement and initiative and referendum campaigns have important effects on public opinion (Donovan, Wenzel, and Bowler 2001, 182-4; Soule, 2004). Sam Reimer's (2003) comparative study of evangelical subcultures in Canada and the U.S. found that Canadians and Americans share a common evangelical subculture, but that American evangelicals are more concerned about so-called "moral" issues while Canadian evangelicals are more concerned about economic issues. This suggests that there are other important contextual factors that shape evangelical political mobilization, despite the similarities in religious, moral and political beliefs between Canadian and American evangelicals and despite the strong cross-border links between Canadian and American evangelical communities (Reimer 2003: 159-163).

On the other side of the coin, the strength of the lesbian and gay rights movement itself in the two countries or of its associated "support structure" (Epp 1998) cannot convincingly explain the recent evolution of lesbian and gay human rights policies in these two cases. While the support structure for litigation is undoubtedly of critical importance in explaining the evolution of judicial behavior and in the ensuring that the decisions of courts are made meaningful and implemented fully (Epp 1998), this approach is less convincing in explaining differences in policy outcomes between two societies – such as Canada and the U.S – in which the support structure for lesbian and gay litigation is very well developed. Comparing the budgets of lesbian and gay organizations in Canada and the U.S. provides a quick measure of the support structure

for lesbian and gay litigation. The 2003 budgets of the main lesbian and gay organizations in the U.S. ranged from \$5 million to \$17 million (Cahill 2004). In Canada, the budget of Egale, the main gay and lesbian group favouring same-sex marriage in Canada, was less than \$350,000 in 2004 at the height of the same-sex marriage campaign (Hickey 2006). On a per capital bases, this would translate into about C\$3.5 million, much less even the least affluent of the U.S. lesbian and gay groups at US\$5 million. While there were other groups working for same-sex marriage in trade unions, churches and in spin-off organizations like Canadians for Equal Marriage, Canadian lesbian and gay organizations or their allies did not have access to the money and organization of the large U.S. lesbian and gay groups such as the Task Force or the Human Rights Campaign. Hence, it is not for lack of resources or support structure that the lesbian and gay movement fails in the U.S. has failed to produce policy protection against discrimination for lesbians and gay men in such basic areas as the workplace in the 35 years of the modern lesbian and gay movement in the U.S. Similarly, it is not for lack of resources that the lesbian and gay movement failed to eliminate state sodomy laws over the period from 1969 to 2003, a period in which Canadian lesbians and gay men did not have to fear criminalization of private and consenting sexual behavior among adults.

Therefore, factors such as the extent of social and political cultural support for lesbian and gay rights whether measured in public opinion polls, (particular) religious beliefs or in social movement resources are important in providing context in this policy area. However, on their own, they cannot account for the rapid and substantial pace of policy change on lesbian and gay rights in Canada, compared to the U.S.

### **Historical Institutional Explanations**

In contrast to political cultural and public opinion approaches, historical institutionalism suggests that the organization of social forces is shaped by institutional factors and by the legacies of previous policies (Pierson and Skocpol, 2002). In thinking about policy divergence in this area, historical institutionalists would start with state structures, with the field of political institutions and the legacies of previous policies, to explain divergent policy outcomes, whether between countries or between jurisdictions. That is, rather than starting with public opinion, political culture or even class struggle or political economy as a neo-Marxist might do, historical institutionalists treat the state in the Weberian tradition as an independent player and not simply as the passive reflection of the play of social forces, however conceived (Skocpol 1982; see also Graefe 2007).

Despite recent debates on the decline of the state in the era of globalization, the rise of Foucauldian approaches to understanding power beyond formal political institutions and in using governmentality as a method of policy analysis (Murray 2007) and the turn to constructivist, discursive and cultural approaches to policy analysis (Fischer 2003), the analysis of the exercise of power through the formal institutions of the state is still central to the policy project of human rights. Even if shaped by international law and practice and by the pressures of a global civil society, in countries such as Canada and the U.S., the state still holds a monopoly on the deployment of legitimate force and, hence, is the authoritative arena and fulcrum of human rights practices. Furthermore, historical institutionalism has distinct advantages in providing explanatory leverage for this type of cross-national policy divergence in a specific policy sector.

In explaining Canada-U.S. policy divergence in the lesbian and gay rights area, institutionalists would focus on the configuration of the executive, the legislature, the courts and

the bureaucracy along with the meta-institutional rules or the constitutional rules that govern the interaction of these elements in shaping the terrain of political struggle. Policy legacies also exert important effects and recent historical institutionalist analyses emphasize the extent to which past policy choices in themselves constitute “institutions” (Pierson 2006). The legacies of previous policies exert influence on contemporary political battles by closing off certain policy choices or making them more difficult, less feasible, more expensive or difficult to envisage. Policy discussion never occurs on a blank slate; the terrain of policy discourse is shaped by the weight of current policies and by the political, bureaucratic, administrative and legal apparatuses that have been created by them (Skocpol and Pierson 2002).

There are a number of institutional factors that differentiate Canada and the U.S. and that contribute to an explanation of policy divergence between the two countries. Institutional differences contribute to policy divergence by creating obstacles and openings for policy change. As institutionalists emphasize, the creation of obstacles to policy change can influence policy debate by defining what is considered to be a feasible solution to a policy problem and by shaping the perceptions of political actors about what is realistic and possible and what will reflect the political interests. Institutional design can make certain policy options more or less politically visible and politically costly. While there are a number of institutional differences between Canada and the U.S. that play a role in this policy area, one of the most important is the impact of federal political arrangements.

### **The Impact of Federalism**

Federalism is structured differently in Canada and the U.S. in ways that have a profound impact on human rights policies on lesbian and gay rights. Most commonly, Canada/U.S. differences in this area are discussed in terms of the centralization and decentralization of

political power. Despite the fact that residual power is reserved to the federal level in Canada and to the states in the U.S. system, most observers emphasize that Canada is a more decentralized federation than the U.S. In particular, provinces in Canada have freedom to deliver social policies such as education, health care (through the single payer Medicare system) and social assistance while education and social assistance policies in the U.S. are more strongly controlled through federal policies and purse strings. Further, regional, provincial and sub-national political identities are stronger in Canada than in the U.S. Quebec nationalism has long been a decentralizing force in the Canadian federation (Russell 2004).

In the U.S., on the other hand, although regional political culture is important, there is a strong sense of U.S. nationalism that overrides the centrifugal dynamic of regionalism and states' rights. Further, with the exception of Native Americans, minority groups within the U.S. have not constituted themselves as nations to challenge the federal government as have Quebec nationalists. For these reasons, the two federal systems are often seen as differing on the continuum of centralization/decentralization with the U.S. as a more centralized federal system than Canada.

However, in the area of lesbian and gay rights, the opposite holds true. The federal government in Canada, for various reasons, has more power to effect change in the lesbian and gay rights policy area than does the federal government in the U.S. With respect to the division of powers, in the U.S. system, the states have jurisdiction over policy areas that have a substantial impact on lesbian and gay citizens, such as the criminal law and the right to marry. Criminal law is one of the most important areas for lesbian and gay rights, especially because the criminal law regulates sexual behavior in a number of areas that affect homosexuality. This ranges from the question of the legality of the practice of sodomy between consenting adults,

whether in same-sex or opposite sex couples, the regulation of the age of consent for sexual activity, the regulation of sex in public spaces such as parks or public houses (e.g. Canada's "bawdy house" law), and the regulation of the sex trade. Because of federal jurisdiction in this area, in Canada, a determined federal government has the jurisdiction to change the criminal law in 1969. Similarly, on the issue of same-sex marriage, the federal government has jurisdiction over who can get married. In the U.S., the lesbian and gay movement requires vast resources of organization and coordination to compete on a state-by-state playing field in order to change policies that are within the jurisdiction. This has meant that U.S. lesbian and gay organizations have required formidable financial and organizational resources in order to press legal and lobbying campaigns across the U.S., state by state.

The *Lawrence* case, decided by the U.S. Supreme Court in 2003, concerned the constitutionality of a Texas law that outlawed homosexual sodomy. At the time of the *Lawrence* in 2003, four states retained sodomy laws that applied solely to same-sex couples while nine states had laws on the books that applied to both same-sex and opposite sex couples (Lambda 2003: Map and Sodomy Laws). In some cases, these laws had been strengthened in the early 1970s to ensure the criminalization of homosexual sodomy (earlier statutes had broadly banned oral sex and sodomy, whether opposite sex or same sex). In the *Bowers* decision of 1986, the U.S. Supreme Court ruled against a challenge to the constitutionality of these state criminal laws and, in the period following *Bowers*, political struggles had taken place in several different states to overturn sodomy laws. Courts in states such as Tennessee and Kentucky struck down state sodomy laws in the 1990s, rejecting the logic of *Bowers* while states, such as Texas, did not. Attempts to change the sodomy laws through the legislature alone without litigation were not successful (Pierceson 2005: 62-98). In 2003, a second sodomy case reached the Supreme Court

of the U.S. This case, brought on behalf of John Geddes Lawrence and Tyron Garner, explicitly asked the court to rule on the issue of equal protection, by asking if a statute such as Texas's that permitted sodomy for heterosexual couples but not for homosexual couples, violated the 14<sup>th</sup> Amendment, whether the statute violated the right to liberty and privacy under due process and whether the Supreme Court's previous ruling in *Bowers* should be overturned (Harlow 2002: Brief in *Lawrence*). The Supreme Court ruling in favour of Lawrence and struck down the Texas laws in its landmark 2003 decision. However, state control of sodomy laws had a very negative impact on lesbian and gay organizing over the entire historical period prior to this landmark ruling, a struggle that did not occur in the Canadian case because of the early change to the law, a change facilitated by the federal government's control of the issue. The criminalization of sodomy in the U.S. states was very widely credited with holding back progress on other lesbian and gay rights issues such as the provision of enforceable protections against discrimination (Leslie 2000).

With regard to marriage, jurisdiction over who can marry in Canada clearly belongs to the federal government, a fact that has frustrated gay marriage opponents, especially in Alberta. The province made it clear in *Marriage Act 2000* that it would only recognize a marriage between partners of the opposite sex and, in doing so, it invoked the notwithstanding clause of the Canadian Charter, as well as the Alberta Bill of Rights. This legislation was likely unconstitutional at the time it was passed, although it was never challenged in court. The Klein government continued to state that it would attempt to oppose same sex marriage and that it would implement a scheme of civil partnerships. In fact, the Klein government did pass the *Adult Interdependent Act, 2002*, which recognized any relationships of emotional and financial attachment between two adults living together outside of a legal civil marriage (which, in 2002,

excluded same sex couples). Unlike domestic partner or civil union provisions in other jurisdictions such as Vermont, which recognize the spousal nature of same sex relationships, the Alberta legislation deliberately broadens the application of the act to any two people living together and specifies that a conjugal relationship is only one of the grounds that might enter into the definition of such as relationship. Notably, the Alberta act forces the recognition of such relationships after three years of cohabitation for those who meet the standard set by the act. This was yet another attempt to circumvent same sex marriage on the part of the Klein government. However, the use of the notwithstanding clause in the marriage Act 2000 expired in 2005 and, at that time, the Klein government accepted the redefinition of marriage by the federal government in the same sex marriage legislation, recognizing that there was little point in continuing to fight a continued legal battle against the jurisdiction of the federal government (CTV 2005).

In December 2004, the Supreme Court of Canada ruled in the federal government's constitutional reference case on same sex marriage (*Reference re: Same Sex Marriage*). The government posed four questions to the court regarding the constitutionality of its proposed redefinition of civil marriage to include same sex couples and the assurance, contained in the bill, that those responsible for the solemnization of marriage would be able to refuse to perform such marriages on the grounds of religious freedom. The court ruled that it was entirely within the federal government's jurisdiction to change the definition of marriage to include same sex couples but that the assurances offered in the bill with regard to the religious freedom of those performing marriages fell under provincial jurisdiction. With this decision, the Supreme Court clarified the federal government's jurisdiction over the question of who can marry, therefore, permitting the federal government to change the law to permit same sex marriage. The question of allowing marriage commissioners to refuse to perform same sex marriages is currently under



litigation as three provinces have stated that marriage commissioners must perform such marriages as a condition of employment and a human rights complaint on this issue is pending in Manitoba and Saskatchewan (Graham 2007). These questions, however, only affect those employed by the provinces to perform civil marriage; they do not apply to religious officials, who retain the Charter right to freedom of religion in denying access to same sex marriage within a religious denomination (Justice, 2004).

Another dimension of federalism that affects the lesbian and gay rights conflict is that, in contrast to Canadian provinces, American states possess freestanding constitutions while provinces in Canada do not. On the one hand, these state constitutions have provided scope for state courts to draw on state variations in equal protection provisions to rule in favour of lesbian and gay rights as occurred in Hawaii, Alaska, Vermont and Massachusetts same-sex marriage decisions (Andersen 2005; Pierceson 2005). That is, state courts used the equal protection provisions of state constitutions in order to legitimate gay and lesbian rights claims. However, at the same time, many state constitutions also provide mechanisms for initiative and referenda, mechanisms which are absent in Canada. State constitutions can also be amended and many of them have been amended to constitutionally preclude the recognition of same-sex marriage in law and policy. It is much easier to amend a state constitution than to amend the federal constitution and state constitutions are amended frequently (Tarr 1998).

In Canada, discussion of constitutional change - especially on the scale needed to entrench a "Defense of Marriage" Amendment - is currently unthinkable. Even opponents of same-sex marriage have not argued – at least not with any credibility – that the constitution should be amended to ban same-sex marriage. But, in the U.S., there is discussion of a Federal Marriage Amendment (FMA) to constitutionally prohibit same-sex marriage, in addition to the

state measures to this effect that have already been passed in some states. Even if it is unlikely that then FMA will pass, the proposal has been used to mobilize lesbian and gay rights opponents and to frame policy debates about the legitimacy of promoting the heterosexual family over families headed by same-sex couples (Human Rights Campaign 2007). Thus, the process of constitutional amendment (which is more politically possible in the U.S. system) and the process of state constitutional amendment (which is institutionally easier in the U.S. and nonexistent in Canada) create mechanisms through which court decisions can be directly blocked and through which the conservative movement can be mobilized against same-sex marriage and other areas of lesbian and gay rights.

In addition, many states have mechanisms for initiative, referenda, which create political opportunities for conservative opponents to mobilize their base. This has a longstanding history in the U.S. Every time a U.S. court gives a positive gay rights decision, the Christian right and other conservative forces counter-organize and mobilize using these institutional openings (Soule 2004; Kane 2003). In Canada, the conservative opposition lacks institutional levers or pressure points to counter the decisions of courts except to win a majority government. Even then, in order to counter court decision in Canada, the government of the day would have to meet the fairly high bar of (eventually) deploying the notwithstanding clause, given the jurisprudential direction of the courts. The notwithstanding clause could be used to roll back lesbian and gay rights; however, for other constitutional and political reasons, the clause has become politically costly or even impossible for the federal government to deploy. Therefore, the lesbian and gay movement has an easier pathway than the lesbian and gay movement in the U.S.

## Conclusions

The institutional barriers, policy legacies, and jurisdictional obstacles created by the specific configuration of U.S. political institutions, especially in the lesbian and gay policy area, raise barriers for the U.S. lesbian and gay movement. In contrast to the barriers faced by the movement in the U.S., policy change in Canada on lesbian and gay rights has been thoroughgoing, substantive and rapid. As Ellen Immergut (1992) argued in her comparative analysis of health policy, political institutions do not explain everything. In particular, the historical institutionalist approach does not purport to explain sociological developments, the rise of social movements or, as on the lesbian and gay rights issue, the changing norms of gender, sexuality and the family. However, once social movements enter into the political process and bring pressure to bear on the state, historical institutionalism has much to contribute to an understanding of how movements will (or will not) exercise policy influence and this approach can fruitfully complement theories of legal mobilization (e.g. Rosenberg 1991). As Immergut emphasizes and as my project demonstrates, the structure of political institutions provides “the strategic context” (1992: 83) or “outermost frame” (1992: 85) for the actions of political actors. As historical institutionalists have emphasized now for a generation, political institutions and legacies of previous policies have powerful structuring impacts in channeling political conflicts in particular directions. These channeling effects of institutions are critically important in explaining, interpreting and understanding policy outcomes. With this broader political institutional lens, we obtain a deeper, richer and more convincing account of policy development and policy outcomes.

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