

Explaining Human Rights Protections: Institutional Analysis in the Lesbian and Gay Rights Case

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In English-speaking Canada's political debates over the last five years, lesbian and gay rights and/or "gay marriage" has become increasingly important in defining the difference between Canadians and Americans. Just as medicare has long been used to symbolize Canadian values and the more generous Canadian welfare state, the rapid progress toward the recognition of lesbian and gay rights in Canada in recent years has come to symbolize Canadian tolerance. Even the Department of Canadian Heritage has now become interested in sponsoring events organized by Egale, Canada's main lesbian and gay advocacy organization and in claiming the tolerance of sexual diversity as an example of Canada's cultural heritage and as an aspect of human rights education (Heritage Canada, 2005). Canada's new status as top destination for queer tourists who want to get married at Toronto City Hall has become part of its brand image of northern cool, validated by the *Economist*. The organizers of this panel have tapped into this branding of Canada as tolerant, multicultural, postmodern and diverse in suggesting that we might have a distinctive scholarly approach to comparative politics.

While Canadian political science may have some distinctive theoretical or analytical contributions to make to comparative analysis (as I argue in Smith, forthcoming 2005b), that is not the focus of this paper. Rather, I will explore the role of Canada as a case in comparative analysis, specifically, Canada as a comparator to the United States. Canada-U.S. comparison has a long tradition in political science and has been used to examine questions such as the weakness of socialist politics in the U.S. and the relative underdevelopment of the American

welfare state (Lipset, 1990). This paper suggests that Canada and the U.S. also differ substantially in their recognition of human rights and uses the example of lesbian and gay rights to show how and why differences in human rights have developed. In the current era of American hyperpower, it is more urgent than ever to critically assess the distinctive trajectory of American politics. Canada-U.S. comparison can play a useful role in clarifying the distinctive aspects of the American system and suggesting the sources of American exceptionalism. In certain respects, Canadian political development demonstrates another side of North American politics and illustrates roads not taken in American politics. These two countries share a common history, language, culture, legal roots, and religious heritage and have undergone substantial social change since the 1960s. With the rise of the women's movement and the increased participation of women in the labor force, both countries have witnessed important changes in family forms and gender relations. In both cases, the gay liberation and women's movements of the late sixties and early seventies gave rise to the modern lesbian and gay rights movement, focused on securing liberal citizenship rights for lesbian and gay (and, more recently, bisexual and transgender) people (Adam, 1995; Rayside, 1998).

Yet, despite these similarities, there are profound differences in public policy outcomes in the lesbian and gay rights area in these two countries. 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 11 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. (Solokar 2002). 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, the Liberal government in Canada passed comprehensive federal legislation in 2000, and this has been followed by many provinces and territories (Smith forthcoming 2005a). 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).

In the first section of the paper, I assess some of the most common explanations of Canadian/American differences, arguing that political culture and public opinion are not sufficient to explain policy outcomes in the lesbian and gay rights area. In the second section of the paper, I provide an overview of the historical institutionalist approach and argue for its advantages in explaining policy divergence in this areas. Subsequent sections of the paper explore specific effects of institutional differences and policy legacies for lesbian and gay rights debates in the two cases. In these sections, I draw out the key institutional and policy differences between the two cases, focusing specifically on the ways

in which policy legacies constituted in law have shaped political discourse and debate on lesbian and gay issues. In the final section of the paper, I focus briefly on the current politics of the same sex marriage debate in the two countries to illustrate the arguments about the effects of institutional differences.

Explaining Human Rights Policies

Same-sex marriage has been defined as the quintessential “values” issue in American politics and increasingly used as the marker of red state/blue state differences in American politics as well as of Canadian-American differences. In the 2004 U.S. elections, ballot questions on gay marriage were credited with increasing voting turnout in some states. Despite the fact that courts have issued rulings in favor of same-sex marriage in Hawaii, Vermont, and Massachusetts, political mobilization in support of lesbian and gay rights faces well-organized and well-entrenched opposition and seems unlikely to succeed in the foreseeable future. In contrast, in Canada, court rulings in the three most populous provinces as well as the Supreme Court of Canada, have led to proposed federal legislation legalizing same-sex marriage. 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. In the United States, same-sex marriage is a potent issue for the lesbian and gay communities in part because, in many

jurisdictions, it is legal to discriminate against lesbians and gays in areas such as employment and housing and because the recognition of same-sex relationships is not nearly as widespread as it is in Canada.

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 postmaterialist 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 2004). Michael Adams' public opinion analysis of Canadian/American differences in *Fire and Ice*, for example, suggests that Canadian tolerance of sexual diversity is a key difference between Canadians and Americans.

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. 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). At a general level, public opinion is too blunt an instrument to explain specific policy differences.

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. In turn, these openings influence public opinion on lesbian and gay rights issues. Local initiatives and referenda are particularly important in this regard. These campaigns have important effects on public opinion. After all, public opinion is not a naturally given societal variable; rather it is molded in the political process through elite cues, media framing, and political campaigns (e.g., initiative or referendum campaigns) (Donovan, Wenzel, and Bowler 2001, 182-4; Soule and Earle, 2001; Soule, 2004). For example, Donovan, Wenzel and Bowler found that Republican voters became more intolerant of lesbians and gays as the Republican leadership cued its base to an

antigay message, an effect that was particularly pronounced following antigay initiatives (Donovan, Wenzel, and Bowler 1998). Similarly, Sam Reimer's (2003) comparative study of evangelical subcultures in Canada and the U.S. found that the Canadians and Americans share a common evangelical subculture, but that the two groups of evangelicals are concerned about very different political issues. 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).

Institutionalist 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. The historical institutionalist literature provides the most sophisticated perspective on the nature and effects of policy legacies and political institutional changes on policy outcomes (Pierson and Skocpol, 2003). There is a natural fit between historical institutionalism and social movement theory, especially, the political opportunity approach. Political opportunity theory explores the origins and consequences of social movement mobilizing and demonstrates the ways in which social movement actors face different structures of political opportunity, including the

configuration of political institutions (Tarrow, 1998). The structure of political opportunity may influence the strategic direction of movements, the types of claims they make and even their mobilizing or organizing structure. The social movement sector describes the network of formal and informal organizations that dominate a specific “sector” such as lesbian and gay organizing or women’s organizing (Jenkins, 1983).

While there has not been much cross-fertilization between historical institutionalism and social movement theory, historical institutionalism specifically focuses on the impact of previous policies and the impact of state structures on political outcomes in ways that are quite consistent with political opportunity theory. However, political opportunity theory, in keeping with its sociological origins, casts a much wider net in terms of defining opportunity and includes such factors as the impact of counter movements, the behavior and coherence of elites, and the presence or absence of allies (Tarrow, 1998; Meyer and Staggenborg, 1996). The state-focused analysis presented here forms a subset of the discussion of political opportunities and policy legacies and their impacts on social movements. A range of political institutions and constitutional rules shapes the politics of social movements. In turn, the organizational, strategic and ideological shaping of the social movement sector feeds back into the policy process, as emphasized in the institutionalist literature on the feedback loop (Pierson, 2004).

According to historical institutionalism, the ways in which social movements and interest groups become attached to particularly strategies and

discursive claims is a key aspect of the quality of “stickiness” which is so central to the functioning of the feedback loop in institutional analysis. Changes that occur in one period, feed back into the policy process, shaping choices in subsequent historical periods. In Pierson’s recent discussion of the feedback loop and path dependency, one of the key features of these dynamics is the fact that the costs of reversing a particular course become greater over time (Pierson, 2004: 11-12). While this discussion is cast from the policymakers’ perspective – policymakers will not wish to pay the high cost of changing course – this is also true from the perspective of political and social claimants, including social movement claimants.

Pierson (1993) has commented that, in discussions of the effects of policy change on interest group politics, “analysts have not always been careful to specify precisely that the relationships between the two variables might be (599).” Political institutions and policy legacies may have a range of impacts on the ways in which groups and movements make claims and pursue political strategies. The most important types of effects that political-institutions and policy legacies may have on group and movement politics are: a) their impact on the creation of political identity and the emergence of social movements; b) their impact on the preferences and ideological frames of movements and groups; c) their impact on the organizational structure of groups and social movement sectors; d) their impact on the political strategies of movement and group actors and e) their impact on the policy resources of movements. In explaining Canada/U.S. differences in the lesbian and gay rights area, political institutions

and policy legacies did not spark the creation of the movement, although state repression played a role in the politicization of sexual identity in both countries. However, the other effects of institutions and legacies on the evolution of social movements and on policy outcomes have played an important role in explaining Canadian/American differences. Each of these will be examined in turn.

Shaping Preferences and Frames: The Example of Sodomy Laws

As historical institutionalism has emphasized, the adoption of a particular policy preference by organized interests is an outcome that must be explained (Thelen and Steinmo, 1992; Thelen, 1999). Political-institutional change and policy legacies may also influence the overall ideology of group and movement organizations, or, in other words, the broader frame in which specific policy demands are situated. Hattam's (1993) study of the emergence of business unionism in the United States shows how the collective identity and political strategies of American workers were channeled into bread and butter unionism, in part as a consequence of the power of the courts to block progressive labour laws. Obviously, the U.S. labour movement existed prior to the period explored by Hattam; hence, the institutional effect was not in creating a movement with a common sense of interests and identities or even in generating specific policy demands but, rather, in framing the overall ideology of the American labour movement in the sense of bread and butter unionism. This type of effect may be discerned empirically by exploring the evolution of group and movement claims over time.

In the case of lesbian and gay rights in Canada and the U.S., institutional changes and policy legacies did not create lesbian and gay identity or directly spark the creation of the lesbian and gay movement but they did shape the overall discursive frames in which the movements' demands were situated. An excellent example of this process at work is in the critical juncture formed by the legalization of homosexuality in Canada in 1969 and the lack of such a policy change in the U.S. during the same period. This set the stage for a vastly different set of legal and political circumstances for the lesbian and gay movements in the two countries, differences that were reinforced and accentuated over time, resulting in substantial policy differences between the two cases.

In 1969, Canada legalized sodomy between consenting adults, twenty-one years of age or over, in private. This legal reform formed a critical juncture in comparison with the failure of U.S. states to decriminalize sodomy. The legalization of sodomy has been the most important public policy issue in the lesbian and gay rights area in the U.S. over the last 20 years. In Canada, sodomy laws are a non-issue (Kinsman 1996). This difference between the policies of the two countries attracted little attention at the time; the change to Canadian law was made as part of a package of family law reforms designed on the British model of family law reform. The intent of the changes was to modernize family law; at the time the legalization of homosexual behavior (sodomy) attracted less public attention than other features of the reform package such as the easing of access to divorce.

Several features of the institutional environment facilitated this critically important change in Canadian policy. First, unlike in the U.S., the federal division of powers in Canada allocates criminal law powers to the federal government. Second, the parliamentary system makes it much easier for a determined executive to pass its legislative agenda unopposed. In the U.S., the division of powers system provides more points of access for determined opponents and the criminal law regulation of sodomy is a power belonging to the states, not to the federal government. These differences have greatly exacerbated the difficulty of legalizing sodomy in the U.S.

This critical juncture in the evolution of public policies toward lesbians and gays has had important repercussions through policy debates on lesbian and gay rights. First, the lesbian and gay movement in the U.S. must counter the categorization of homosexuals as putative or potential criminals (Cain 2000, 282-3; Rimmerman 2002, 57-64). This puts the movement in a much more defensive posture than the Canadian movement, which has not had to counter the stigma of criminalization. In public opinion terms, the question of criminalizing homosexual behavior is still a live issue in American politics, while questions about the legality of homosexual behavior are no longer mentioned in public opinion studies in Canada. Although many states have dismantled their sodomy statutes, state sodomy laws have been on the books in the U.S. over the entire post-Stonewall era of social movement organizing in the U.S. up until the 2003 *Lawrence* decision (which struck down such statutes as unconstitutional), has had important shaping effects on the political debate on lesbian and gay rights in

the U.S. In the U.S., the “legality” opens the door to the wholesale condemnation of homosexuality in public discourse and frames the definition reinforces the legitimacy of religious values that define homosexuality as evil or sinful. The discursive field of public policy and political debate defines the “gay marriage” debate as a question of moral values while, in the Canadian debate, by contrast, same-sex marriage is treated as a question of human rights. Canadian evangelicals have had to fight an uphill battle against the definition of same-sex marriage as a human rights question.

Second, the criminalization of homosexuality in the U.S. has had important effects on the construction of legal issues surrounding lesbian and gay rights claims. As Christopher R. Leslie argues,

[p]ublic agencies, private actors, and courts all rely on the criminality of sodomy to justify discrimination against gay and lesbian Americans. Sodomy laws are used to facilitate employment discrimination, bias against gay and lesbian parents in custody disputes, discrimination against gay organizations, discriminatory enforcement of solicitation statutes, and immigration discrimination (Leslie, 2000, 104).

In different ways, legal doctrines such as suspect status under the equal protection clause, the right to privacy and First Amendment rights have all been shaped, directly or indirectly, by the criminalization of sodomy. Under the equal protection clause, sexual orientation or homosexuality could be treated as defining a category of citizens whose differential treatment requires strict or heightened scrutiny. However, the fact that, until *Lawrence*, homosexual conduct has been defined as criminal, has been cited as grounds for denying lesbian and gay citizens the protection of suspect classification on the basis of sexual orientation (Cain 2000, 185-192). Furthermore, criminalization has affected the

way in which the First Amendment has been used to create a distinction between conduct and status. While the First Amendment protected the rights of gays and lesbians in the United States to assemble freely and to circulate newsletters and other materials through the mail, it was not legal for homosexuals to engage in certain conduct (i.e., sodomy). Hence, the criminal prohibition on sodomy was a factor in the development in American law and policy of the distinction between “conduct” and “status,” a distinction that is unknown elsewhere and that has led to stigmatizing policies such as “don’t ask, don’t tell” (Halley, 1999). In this way, the criminalization of sodomy reinforces the obstacles to lesbian and gay rights recognition in other areas. For the lesbian and gay movement in the U.S. as well as for its opponents, the question of the legalization of sodomy has dominated political discourse on gay rights.

The impact of this has been to heighten the political importance of essentialist conceptions of sexual orientation in the U.S. lesbian and gay rights movement or what Stephen Epstein (1987) has called the “ethnic” model of gay politics. The distinction between conduct and status has reinforced the discourse of gay right opponents, especially the evangelical movement which claims to hate the sin (the conduct) and love the sinner (status). In response, the lesbian and gay movement in the U.S. has deployed an essentialist discourse that asserts the immutability of homosexuality for those who are ‘born that way’ and that posits an analogy between the immutability of race and ethnicity and the immutability of sexual orientation as the basis for civil rights claims. In contrast, for the Canadian movement, issues of sexual regulation have been elided and

relegated to the local/urban level around questions such as the regulation of public sex and the impact of bathhouses and other recreational venues in urban gay villages. While police repression has played a key role in the mobilization of urban queer communities in Canada, the main legal issue at the pan-Canadian level – the legalization of homosexual conduct – was a non-issue following the 1969 reform. This enabled the Canadian movement to move on to other political issues such as employment discrimination as early as the 1970s and to make these issues of discrimination into central planks of the lesbian and gay right movement by the end of the first decade of gay liberation in the 1970s. The framework of discrimination and human rights, strengthened in the Canadian case by the growth of human rights commissions and enforcement machinery at both federal and provincial levels, was then reinforced by the entrenchment of the Charter of Rights in 1982. The Charter's framing of "equality rights" in section 15 resonated with the preexisting framework of the lesbian and gay rights movement, centred on discrimination. In this way, the rights template began to dominate the framing of lesbian and gay politics in Canada as a national political issue, while, in the U.S., the American movement was still defending the legitimacy and legality of homosexual sexual behavior.

Shaping Organizations: The Role of Litigation Groups

Political institutions or policy legacies shape the particular forms of organization that are taken up by groups. Skocpol, Ganz and Munson's (2000) recent large-scale empirical exploration of the formation of associations in the U.S., demonstrates the impact of federalism in shaping patterns of association.

These conclusions are validated in Canadian studies of federalism and group organization. A substantial literature in Canadian politics points to the impact of federal political institutions on shaping associational life around provincial (substate) interests, using organizational forms that reflect the federal structure of Canadian political institutions (Kwavnick, 1975; Cairns, 1977; Schultz, 1980).

However, beyond the formal structure of associations, political institutions also structure the relationship between formal organizations and informal networks that are stakeholders in particular group or social movement 'sectors'. Social movement theories emphasize the role of mobilizing structures, defined as "those collective vehicles, informal as well as formal, through which people mobilize and engage in collective action" (McAdam, McCarthy and Zald, 1996, 3). The mobilizing structure includes the informal networks of activism as well as the formal organizations of movement politics. Further, it encompasses other kinds of organizations and networks that may provide resources for collective mobilization. A well known example is the role of black churches and colleges in the civil rights movement (McAdam, 1982). The social movement 'sector' may take different forms cross-nationally and, as social movement scholars point out, a key element of the research agenda in this area is "[the] assessment of the effect of both state structures and national 'organizational cultures' on the form that movements take in a given country" (McAdam, McCarthy and Zald, 1996, 4).

The entrenchment of the Charter of Rights in Canada and the strengthening of the hand of the courts in the institutional arena, encouraged the establishment of lesbian and gay advocacy organizations and informal networks

of activism. Judicial empowerment sparked the creation of certain types of advocacy organizations and certain specific patterns of movement organization, namely, a dominant advocacy organization that focuses on litigation, at the same time as it shaped lesbian and gay politics at the pan-Canadian level as a social movement 'sector,' i.e. as a complex of organizations and networks, formal and informal, in the lesbian and gay rights area. In other words, judicial empowerment has not only encouraged social movement politics, it has encouraged a certain type of social movement politics in the lesbian and gay 'sector'. Organizationally, judicial empowerment has provided incentives for litigation organizations and for the privileging of legal expertise within such organizations. It strengthened the appeal of human rights as the dominant public demand of the movement (Smith, 1999).

In the U.S. strong courts and extensive civil rights litigation in other sectors such as the African-American civil rights movement and the women's movement provided a template for gay and lesbian political activism through litigation. However, until very recently, American courts were unlikely to rule in favour of lesbian and gay rights. The judicial arena was not seen as friendly to the lesbian and gay rights movement and lesbian and gay activists were determined to use a broad range of strategies to influence policy. In the U.S., litigation funds are only one type of lesbian and gay organization and co-exist among other major lobbying and advocacy groups. The more ambiguous role of the courts, the frequency with which courts have ruled against lesbian and gay rights claims and the use of the courts by the anti-gay movement, have all encouraged a much

broader range of national level organizing, including organizations that focus on lobbying Congress, in addition to litigation activities. While the lesbian and gay social movement sector in Canada is dominated by Egale, a litigation focused group, and more, recently by the Campaign for Equal Marriage, which is solely devoted to the same sex marriage issue, the lesbian and gay social movement sector in the U.S. is characterized by associational pluralism. While there are specialized litigation funds such as Lambda Legal, there are also other organizations such as the National Gay and Lesbian Task Force and the Human Rights Campaign, which also focus on lobbying and on grass roots educational campaigns (Rimmerman, 2002).

Shaping Strategy and Providing Policy Resources

Another sense in which political institutions and policy legacies may influence collective actors is by shaping political strategies and providing policy resources. The entrenchment of the Charter in Canada has empowered the courts and, through positive rulings on lesbian and gay rights, the lesbian and gay movement has been encouraged to use litigation as a political strategy and to focus the demands of the movement in terms of judicially enforced rights. In turn, legal victories have been given political effect through sustained media attention and advocacy. The role of courts in endowing social groups with political resources has been extensively discussed in the literature on the relationship between courts and other political institutions. "Relational power" as McCann terms it, may affect the balance between Congress and the courts, in

the U.S. system, or between legislatures and courts in the Westminster-style system (McCann 1999; Hiebert 2002).

Courts in both Canada and the U.S. have ruled in favor of same-sex marriage. The Massachusetts decision (*Goodridge*) is particularly noteworthy when compared to the Ontario Court of Appeal decision in *Halpern*. Both of the decisions draw on the legal heritage of English common law in reaching a decision on the constitutionality of same-sex marriage and the *Goodridge* decision cites Canadian precedents, including *Halpern* - an unusual move for an American court. But debates over same-sex marriage in Canada and the U.S. are only superficially similar. The observation that courts in both countries have ruled in favor of same-sex marriage obscures profound differences in the meaning of these decisions in relation to preexisting policies and the large political-institutional structure of which courts are a part (Smith, forthcoming, 2005a).

With regard to the meaning of the decisions, as previously noted, same-sex marriage is largely a symbolic question in Canada. Canadian public policies, federal and provincial, have already legalized sodomy, banned public and private discrimination against lesbians and gay men, recognized same sex relationships and permitted same sex couples and lesbian and gay people to adopt children. In contrast, in the U.S., same-sex marriage would indirectly extend partnership benefits and the recognition of the legal status of children in queer families. In addition, focusing on the similarity of the same-sex marriage decisions in Canada and the U.S. obscures important differences in the relationship between courts

and other political institutions in the two political systems. In the U.S., the separation of powers, the impact of federalism, and the access points provided by state-level initiatives have provided gay rights opponents with important levers to oppose the recognition of gay and lesbian rights. In contrast, in Canada, the opposition lacks these institutional levers.

This is illustrated by the recent frustration of same-sex marriage opponents in Canada compared to the successes of their American counterparts. A spate of same-sex marriage cases led the Liberal government to write legislation favoring same-sex marriage, legislation that would create a common legal standard for same-sex marriage across the provinces and territories of Canada. There is strong opposition to such legislation across party lines (although especially concentrated in the Conservative party) and in well-financed evangelical organizations. Conservative provincial governments, such as Alberta's, which have close ties to the evangelical movement, have argued that Parliament should vote against the legislation or that a national referendum should be held on the issue. It is expected that the vote on same-sex marriage in the House of Commons will be quite close, with less than 25 votes separating the two sides in the 308-seat House. In other words, there is substantial opposition to same-sex marriage in Canada. But, votes in the House of Commons are usually controlled by the government side; although Canada currently has a Liberal minority government, it is thought that the Liberals, in conjunction with other parties in the House of Commons, will control the vote on same-sex marriage. There are no other means for federal Conservatives to stop the measure.

In contrast, recent events in the U.S. demonstrate how political institutions provide policy resources to same-sex marriage opponents. Federalism in the U.S. means not only that both state and federal governments have some jurisdiction over the definition of marriage but, more importantly, that some state constitutions provide for initiative and referendum; both have been used many times by opponents of lesbian and gay rights, most famously in Colorado in 1995 in a measure that outlawed protection from discrimination for lesbians and gays in that state (later overturned as unconstitutional in *Romer*) (Donovan, Wenzel, and Bowler 2001). The infamous gay marriage bans of the 2004 election year were mainly placed on the ballot by legislators or by petition.

If these measures were available in Canada, they surely would have been pushed hard by the Progressive Conservative government of Ralph Klein in Alberta, which strongly opposes same-sex marriage and which has used every possible legal and constitutional argument against having to submit to the will of the federal government and the courts on the issue. While the Canadian constitution contains an override clause, permitting legislatures (federal and provincial) to override certain rights provisions, this option is not available to the provinces because of their lack of jurisdiction over marriage (Hogg 2004).

Positive rulings in favour of lesbian and gay rights in Canada have been the product of the process of judicial empowerment that has occurred since the entrenchment of the Charter. This process has reinforced the position of litigation-focused lesbian and gay groups such as Egale and shaped the policy debate around lesbian and gay rights issues. In the U.S., court rulings have been

more negative toward lesbian and gay rights claims, in part as a function of the process of anti-gay mobilization, a mobilization that has been provided with many more policy resources and institutional openings. The anti-gay movement in Canada is institutionally blocked by a political system in which jurisdiction over rights issues is allocated to the federal level, enforced through the pan-Canadian application of the Charter. The concentration of power in the Westminster system leaves few openings for determined opponents.

Conclusions

The effects of political institutional differences and policy legacies on social movement organizing play an important role in the feedback loop. The effects of institutional differences on group preferences, ideologies, and framing; on organizational and mobilizing structures; on group strategies and in providing policy resources to groups feed back into the policy process over time, reinforcing policy differences. Historical institutionalism emphasizes that path dependence locks in certain policy choices and outcomes. As Pierson puts it, initial choices in the design of institutions may “encourage the emergence of elaborate social and economic networks, greatly increasing the cost of adopting once-possible alternatives and therefore inhibiting exit. Major institutional arrangements have major social consequences (Pierson 2000, 492).” Organized interests and social movements form part of the “elaborate social and economic networks,” to which Pierson refers. As such, they are in part the vehicles for policy feedback through the four types of effects noted here. Institutional changes such as judicial empowerment may cause new interest groups and social

movements to emerge where none existed, they may lead to the creation of new networks, and they may endow organizations with new-found political resources. In the case of the institutional change explored here – judicial empowerment – groups that were privileged by the new human rights regime were endowed with extraordinary legal and political resources through a process of constitutional change that cemented the powerful liberal-democratic idea of human rights.

In sum, comparing the Canadian and American experiences in the lesbian and gay rights areas demonstrates that political institutional differences and the historical pacing of policy change can drive otherwise similar systems in different policy directions. Over time, the gap between Canada and the U.S. on lesbian and gay rights issues has widened substantially. While there may be some political cultural and public opinion differences between Canada and the U.S., these are not sufficient to have caused the huge gap that now exists with respect to lesbian and gay human rights protections. Political institutional differences and the legacies of previous policies have set up very different debates, policy dynamics, and policy outcomes in the lesbian and gay rights arena in Canada and the U.S. In turn, this suggests that Americans may not be as polarized as is sometimes suggested in red-state/blue-state analyses. Rather, differences between Americans on issues like same-sex marriage may be exacerbated and reinforced by specific features of American political institutions.

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