



Why U.S. States Vary in the Rights and Protections They Offer to Lesbian, Gay and Bisexual Residents

Rebekah L. Herrick, Oklahoma State University-Main Campus

Location, location, location is the mantra we often hear about the value of real estate – and the same principle applies to the rights and protections enjoyed by gays, lesbians, and bisexuals across the United States. Those who live in New England, along the West coast and in the Great Lakes states can marry whom they wish and are legally protected against hate crimes and discrimination in public accommodations and employment. In the rest of the country, however, such legal rights and protections are rarely found. Drawing on my own research and that of other scholars, this brief explores why this variation exists. Regional imitation, the presence of gay and lesbian legislators, public opinion, and institutional rules all turn out to matter.

Neighboring States Acting Together

Regional differences in public policies supporting gays and lesbians suggest that the importance of what scholars call “policy diffusion,” where policies adopted in one state spread to its neighbors as their citizens and officials see positive effects and move to imitate. In New England, for example, the process started when Massachusetts legislated against employment discrimination in 1988 and recognized same-sex marriages in 2004, and Vermont became the first state to formally recognize same-sex relationships by instituting civil unions in 2000. Similarly, California and Minnesota were early adopters, setting the stage for diffusion along the West coast and among Great Lakes states. California legislated against employment discrimination in 1992 and against hate crimes in 1999, and Minnesota took action in 1993.

Leading and Lagging States

But simple diffusion does not explain why some pioneering states moved early, or account for why some neighbors followed and others did not. The presence of gay and lesbian state legislators may offer a partial explanation. As long ago as the mid-1970s, both Minnesota and Massachusetts had gay or lesbian state legislators, Allan Spear and Elaine Noble respectively, both Democrats; and growing numbers of gay and lesbian legislators have been present since the 1990s in other states leading the way toward more rights and protections, including California, Oregon, Vermont, Maine, Rhode Island, Connecticut, and Washington. Although gay and lesbian legislators, like state representatives generally, pursue many goals, they are significantly more likely to prioritize and introduce legislation supporting lesbian and gay interests. The presence in the room of gay or lesbian legislators may also affect others as they come to work with and know gay and lesbian colleagues and their families.

Research has nailed down some interesting dynamics. The larger the number of gay and lesbian legislators in a state legislative chamber, the more legislation supporting gays, lesbians, and bisexuals is introduced and passed. There is also a backlash effect, where the presence of larger numbers of gay and lesbian legislators is associated with more anti-gay legislation being introduced and passed. On balance, the effect is positive, however.

Yet variations in state enactments to protect gays, lesbians, and bisexuals are not fully explained by the presence of gay and lesbian legislators. Some states like Montana, Utah, and Missouri have had numerous gay and lesbian legislators, but have done little to enact protections.

Public Opinion and Interest Groups

Public opinion may constrain or spur state action. This has been difficult to pin down, because most national attitude surveys do not ask questions of enough people in each state to make valid estimates. Recently, however, political scientists Jeffrey R. Lax and Justin H. Phillips combined data from numerous national surveys to create credible estimates of public views in the states.

- Public opinion varies with legislation, with the people of New England, the West coast, and the Great Lakes area tending to be more sympathetic toward lesbian, gay, and bisexual people.
- On issues that get a lot of media attention, variations in public opinion are greater.
- Overall, policies tend to be much more conservative than public opinion – in part because of the disproportionate strength of interest groups mobilized to oppose gay and lesbian rights.

Researchers are working to measure the strength of groups supporting and opposing gay rights across the states. Because organizational indicators are lacking, many simply record the percentage of gays and lesbians in each state versus the percentage of fundamentalist Christians, assuming that pro- and anti-rights groups will have commensurate resources. Studies using such measures have found that, indeed, the balance significantly affects the likelihood that state legislatures will debate and pass protective legislation, as well as the content of policies.

Political Institutions Also Matter

Government rules and institutions have also contributed to variations in protective legislation. Direct democracy procedures allow a state's voters to vote up or down on a proposed policy or a legislative enactment, and states with such procedures seem less open to gay rights. Some years ago, voters in 33 states approved constitutional amendments that outlawed same-sex marriages; and in some instances state legislators passed similar measures to head off anti-gay referendums. States that have direct election of judges or mandate short terms for judges have also tended to be more restrictive towards gays, lesbians, and bisexuals. And various other specific rules help to explain policy variations – including rules of access to the courts, term limits for governors and legislators, and the size of the constituencies that vote on state legislators.

Rights and protections for gays, lesbians, and bisexual people are advancing across the United States, as public opinion moves steadily in favor of such measures. But major state and regional variations remain, attributable to various factors, not just one overriding cause.

Research and data for this brief were drawn from Jeffrey R. Lax and Justin H. Phillips, "Gay Rights in the States: Public Opinion and Policy Responsiveness." *American Political Science Review* 103, no. 3 (2009): 367-386; Rebekah Herrick, "Legislators' Positions on Gay and Lesbian Rights: The Personal and Political." *Journal of Homosexuality* 57, no. 7 (2010): 928-943; Rebekah Herrick, Christine Pappas, and Jeanette Mendez, "Negative Effects of Populism on Gay and Lesbian Rights." *Social Science Quarterly* 90, no. 1 (2009): 150-163; and Donald P. Haider-Markel, *Out and Running: Gay and Lesbian Candidates, Elections, and Policy Representation* (Georgetown University Press, 2010).