

What Drives Policy on Morality: Consensus of the Governed or Governing Consent?

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The ideal of our republic involves laws being passed through our elected representatives, with these officials generally adhering to their respected constituents, with a majority of the representatives passing laws that are reflective of the majority of each of their constituents. This, however, is not readily assumed of our current electoral system. Regardless of the reasons for this, the matter that lies at the heart of this paper is whether the people, through representatives, are able to produce what they want of their government, or if the government decides what the public will accept.

In early 2010, when dealing with Israel and Palestine, a newly elected Barack Obama thought upon how a President John McCain or Hillary Clinton might have differed with the situation, given the impact that various leaders can have, and or make, based upon the personal makeup of past experiences alone. He goes further, questioning “whether those of us who rise to power are mere conduits for the deep, relentless currents of the times or whether we're at least partly the authors of what's to come” (Obama, 2020). This sentiment is a microcosm of the larger role that the people attempt to have expressed at large versus enacted policy, through a government body, shaping the principles of a society. This dynamic is formed through various outlets; for the public, the main way this is achieved is through political participation versus the different branches of government (Executive, Legislative, or Judicial) prescribing acceptable norms themselves. While there is a direct link between the two, people electing representatives, there is only so much that even a congressional majority can do, and a more observable disparity would be what the public favors and what is ultimately implemented by their representatives.

Public Opinion or Policy's Role in America

In this context, *public opinion* “represents the various attitudes or views large communities of people hold about politics and the actions of government. It thus inherently establishes the range of views, most likely expressed when a population is polled or surveyed” (Shaw et al, 2019). The best representation of this relationship would be issues at the national level, specifically examining gay marriage and

abortion. Both of these issues spanned decades, with participation from all of the aforementioned groups—the public, state and national legislatures, presidents, and the courts—all of these with various, sometimes opposing, policies enacted that may or may not have been reflective of the society at the time, or whether the policies were attempted bellwethers for what was and is acceptable. For this paper, *public morality* is synonymous with *majority support*. The metric to determine this will be polls. Obviously, polls are not indicative of immediate change or necessary implementation, but they do serve as good indicators of the general trend of the public, one way or the other.

Why Would Law Influence Morality

The law is often interchangeable with morality, due to moral teachings of everyday life. Shavell (2002) compares this to a child growing through various institutions of school, family, church, and friends. The child learns which acts he should or should not do, based on his own internal emotional response and external societal response to his decisions. Morality in this sense would elicit a sense of honor, with concurring approval of his different groups, while immorality would elicit a sense of guilt, with simultaneous disapproval from those groups (Shavell, 2002). For this context, *laws* are rules that we must perform or else receive punishment along with it. Civil offenses and lesser misdemeanors, such as speeding and loitering, can result in monetary loss, but violent and criminal acts, such as theft and murder, typically lead to harsher sentences, typically jail or prison. The idea behind this is based on proportional punishment (Shavell 2002). These can vary state to state but generally resemble one another in sentencing. While my definition of *morality* is comparable to *majority approval*, the underlying basis for this is compatible with Shavell's (2002) definition. When broadened to functioning adults, both the factors of other people's responses to our actions and conditioned rationale for what is and is not acceptable can determine public morality (approval) for certain issues. This could indicate why the public thinks the way it does when it comes to issues such as abortion and gay marriage. This approach favors the government's ability to enact morality. If there are more

institutions that are highly regarded, such as the courts, legislatures, presidents, or other prominent outlets with a near consensus one way or the other, then the public may be more receptive to its interpretation.

Why Public Opinion Would Influence Morality

While there will almost never be a consensus on a single issue, a collective body of people can be a powerful correlation with what is deemed right. Most obvious is the fact that America operates within a constitutional republic. In America, citizens elect mayors, congressmen, and senators all directly to represent them at the state or national level, and fundamentally the representatives would listen to the majority of their constituents in order to try and get them to vote for them again. This is *electoral accountability*, where elected officials in an attempt to be re-elected stay within the confines of the voters' opinions (Shapiro, 2011). Then from there, those representatives would enact policies that the majority of their people would want, and failure to do so would lead to another candidate replacing them. This is further bolstered by regions, either sections of the country or even by state. This idea strengthens the democratic theory, where politicians would be foolish to listen to a small few special interest groups for the sake of their much larger constituency. According to Burstein, broadly, *democratic theory* is the extent to which citizens can control their governments, the extent of public opinion effectively leading to intended policies, and the responsiveness of the government to that. He further observes that the areas where this is best seen include the economy, civil rights, and war. Politicians attempt to best help their constituents economically in order to improve their chances of re-election. With respect to the latter two, the public sphere was able to aid these movements with a potential change in policy, with more equitable employment opportunities, and with decreasing military budgets during the 1960's and 1970's (Burstein, 1998).

History of Opinion and Policy

At the core of this theory, there is a paradoxical truth. While gauging public opinion to assess morality (approval), one cannot expect, nor does this country operate on, direct democracy. This system would be the purest form of public political participation, the people having all the power; yet this would be extremely unstable and precarious, depending on the particular issue. Statistics aside, the logistics of such a system would probably be less well-received by the public than our own electoral representative system right now. Rather, this measurement would be an indicator of what the public would want implemented and the outcome of that or if the government would be able to influence morality with policies that the public would not favor right away. Examples of this can be as recent as 2010, regarding healthcare and money in politics. In 2010, the Supreme Court ruled in *Citizens United v. FEC* that the 1st Amendment applied to

money and removed previous caps on money used in politics. While expanding the electorate is a well-intended idea, the Court's expansion to include money was not well received by the public at large (Ott, 2012). This is an example of how enacted policy was implemented but failed to sway the public. This relationship between the public and implemented policy goes back hundreds of years, with more notable examples coming from just this last century, such as the Civil Rights movement, women's movement, and gay rights.

Historically, while outside this topic's purview, this can be better exemplified with other major rulings of the Supreme Court. In response to the Civil Rights movement of the 1950's and 1960's, the Supreme Court established *Brown v. Board of Education* in 1954, outlawing public segregation, and then further expanded that in *Loving v. Virginia* in 1967, legalizing interracial marriages, both with unanimous rulings (Willig 2018). Both of these decisions came after highly public movements resulting in codified legislation in the Civil Rights Act of 1964 and then the Voting Rights Act of 1965. These rulings were implemented despite states implementing these barriers during times when they probably had either a majority or a plurality of support. This can be somewhat similarly observed with gay marriage, but less so with abortion.

Expressing Public Opinion

There are many channels by which the public may try to bring about change. More civic forms of this are voting and interacting with public officials, to a more social route of protesting, to a more violent route of rioting, all of which are various forums that the public has and can take. Regarding the first option of voting, that is wholly shaped by political participation. There are numerous reasons why people might not vote, though the more historical reason was due to exclusion. Obvious examples of this are the Civil Rights movement and the women's rights movement. Going back to a notion led by our Founding Fathers of "No Taxation without Representation," the inclusion and expansion of our republic is not new, with the most civic way of determining one's own life through voting. This is what our Founding Fathers and those after them wanted: to try and repeal what they deemed immoral through political participation. While the reasoning is not comparable, the conclusion is still the same; the Founding Fathers were not demanding to have the tax repealed, but rather to have the right to decide themselves; similarly, the inclusion of women didn't relinquish political control to them, just as the re-emergence of African Americans in voting didn't give them final say in politics. All of these were led by social movements, a quite literal mass of peoples who believed certain established norms immoral, both through their application and reasoning, who were able to achieve the change they sought to choose participation in the civic way of voting, which was previously being denied to them. Of course, these movements did not necessarily house a

majority of the public during their respective decades, with a good segment of the population either indifferent or actively hostile to them. Over time, however, these movements grew more palatable to more segments of the public, resulting in codified protections and legislation that they sought.

Gay Marriage and Public Perception

The catalyst to this political issue belonged in the Supreme Court. In 1986 in *Bowers v. Hardwick*, a conservative Supreme Court upheld Georgia's sodomy law outlawing private homosexual relationships. However, for the first time in American history, an ideologically identical Supreme Court then struck down the State of Colorado's attempt to bar protections to LGBTQ relationships with *Romer v. Evans* in 1996 (Weiss, 2015). This sudden shift in the Supreme Court stance is peculiar, as 10 years in the lifespan of the United States of America is not a considerable amount of time, yet an ideologically identical Supreme Court would come to a different conclusion than the *Hardwick* case. There was by no means a plurality, let alone majority consensus, about gay marriage when the Supreme Court ruled this way. The reasoning of this, while unknown, is perhaps an example of the Court attempting to shift the public's acceptance of gay marriage. Later that year, the House and Senate overwhelmingly passed DOMA (Defense of Marriage Act), with 342 to 67 and 85 to 14 votes, respectively, in the House and Senate, which federally recognized only heterosexual marriage and did not recognize same-sex marriages across state lines. Both of these realities happened at the same time. Public opinion on gay marriage during this time was not naturally supportive, both with gay marriage being illegal in a majority of American states and housing a rather small public minority. Why then was this occurring?

Abortion and Public Opinion

Abortion traveled along quite a bit different path than gay marriage. Prior to *Roe v. Wade*, there was a social push to ensure the safety of abortions in the more liberal era of the 1960's. However, despite this push, there wasn't really a guarantee, as it was being struck down in the courts. Going back to this time period, polling on this particular issue could vary widely, although it probably didn't have majority support, more so had a high to mid plurality support. Then, in 1973, the Supreme Court ruled in *Roe v. Wade* that women had a constitutional right to an abortion (Vincent, 2014). Perhaps the reasoning behind this was that the Supreme Court was acknowledging the second wave of feminism that was present at the time. Proponents of abortion considered this an ending point, but there was also a good segment of the population who saw it as a starting point. Unlike gay marriage, the Supreme Court first supported this practice and has backtracked ever since. This was a result, as other cases had triggered, of backlash. The aforementioned *Bowers v. Hardwick* case energized gay rights activists, and likewise

this ruling energized pro-life advocates. In 1976, the United States Congress overrode a veto, by then President Gerald Ford, to block federal funding of abortions, with rare exceptions known as the Hyde Amendment. The Supreme Court then held up the constitutionality of the Hyde Amendment 4 years later in *Harris v. McRae* (1980), concluding that Medicaid could not cover abortions. To this day, the Hyde Amendment persists, potentially giving insight to the way Congressional representatives still feel on the issue of federal funding for abortions. Furthermore, in 1992 the Supreme Court ruled that states had the right to implement certain restrictions that did not produce "undue burdens" for women seeking abortions (*Facts on File* 2021). While perhaps well-intentioned, the practicality of this has led to states implementing wide-ranging restrictions for women. Another example was in *Stenberg v. Carhart* (2000), where the Supreme Court allowed partial-birth/late-term abortions, an extremely controversial practice at the time. Support for partial-birth abortions then, and even now, is solidly opposed to the practice. Was public support for partial-birth abortions the reason for the Supreme Court's ruling for it, or did the Supreme Court's ruling in *Stenberg* create more opposition to this? Overall, this case had a minimal effect on abortion, as partial-birth abortions, numerically, were already in the extreme minority. However, abortion has continuously lost support in the Supreme Court. While *Roe v. Wade's* (1973) majority compromised seven Justices, *Stenberg's* majority comprised the barest majority possible of 5 Justices. This waning support has dire implications for abortion in America if the trend continues that abortion holds generally stagnant. Abortion has always led to mixed reactions from the public. While there might not have been (or yet be) a majority of the public in favor of abolishing it, a good segment of the population is uncomfortable with it, which has led to these opposing rulings and laws.

Impact of Public Opinion on Policy

There is ranging data on the effect of public opinion, with the summation of it concluding that it generally plays a role, the extent of which dependent on the issue(s) (Shapiro, 2011; Burstein, 2003). This effect of public opinion can work both ways, though, limiting or expanding elected officials' options. This is readily observed with either the referendum usage or state legislatures in the US. Regarding gay marriage, at similar times, states across America were either legalizing or outlawing gay rights. In 1992, Colorado added an amendment to their state constitution prohibiting protections for lesbians, gays, and bisexuals by a margin of 53% to 47% (Weiss, 2015). In 2008, California banned gay marriages with Prop 8, with 52% support. In 2009, the legislatures of Vermont, New Hampshire, and D.C. legalized gay marriage, with Maryland doing the same through referendum, with 52% support (Weiss, 2015). All of these initiatives occurred before

gay marriage reached majority support among the public, with a majority of America more opposed to it.

Historically, the issue of gay marriage has not been a popular one. While there has been a slow increase over several decades, why is that the case? Part of this reasoning was due to the optics of the issue. In the late 20th century, the general attitude towards homosexuals was similar to that of perverts and pedophiles, as a danger to children and traditional marriages, explaining the majority of actions taken to restrict their rights. According to the Brennan Center for Justice (Weiss-Wolf and Plant-Chirlin 2015), over the years, due to simple affiliation and teaching, the support for gay marriage grew. More and more people knew same-sex couples and were less likely to want to strip them of their rights, and continued exposure of same-sex couples in the media and on television helped shift the narrative of gay couples reasoning to marry. In his interview with *Meet the Press* in 2012, then-Vice President Joe Biden somewhat accurately pointed out that the TV show *Will & Grace* was just as effective at moving public opinion as a Supreme Court ruling or a national law. The public perception of gay marriage moved to center around love, similar to straight couples, compared to the traditional thought of wanting to obtain only certain economic or civil rights (Weiss, 2015).

Abortion, on the other hand, has always been a more politically precarious issue. The Supreme Court, while more immediately “favoring” abortion compared to gay marriage, has since been much more proactive towards gay marriage than towards abortion. In general, the Supreme Court has left the issue up to the states, allowing varying restrictions to be imposed, yet it has intervened numerous times on behalf of the LGBTQ community. Katha Pollitt (2015), a contributor at *The Nation*, argues this through multiple lenses, with the first being sex. Gay marriage is usually portrayed to the public by men, with same-sex women being underrepresented in this issue. Meanwhile, abortion is focused solely on women, where men aren’t at play, according to her article. Furthermore, LGBTQ people exist in every class and can be more readily “seen” compared to the women who end up getting abortions, who are typically depicted as lower class. Also, marriage is easier to rally behind compared to a practice that some consider immoral and some consider stemming from promiscuity (sex). Pollitt argues further that economics might be at play as well. To rule definitively for abortion, as with gay marriage, would mean to federally fund them (Pollitt, 2015).

Theoretical Rationale

The basis of this theory is to determine which “body” (public or government) within the United States acts more as the instrument either to establish new or to alter old policies. If the former, then one must gauge the responsiveness of the government to adhere to them. If the latter, then one must see which particular entity plays the strongest role. The relevance

of this is mainly to measure the authenticity of our democracy. In any democracy, there is an expectation that the public would have, at least, some involvement in the process of government policy. This is both an expected norm and premise of the *democratic theory*. The core of the democratic theory revolves around the public, specifically, “this is the factor of interest and participation; the electorate is required to possess a certain degree of involvement in the process of political decision, to take an appropriate share of responsibility” (Berelson, 1952). The two main theories stemming from this would be either that public opinion leads to a change in public policy or that public policy leads to a change in public opinion. A derivative hypothesis of the first theory would be that the public opinion on either gay marriage or abortion would lead to an intended policy change. The other hypothesis would be that public policy on either gay marriage or abortion would shape the public opinion around it. My own view is that the public opinion on gay marriage and abortion would forge favorably expected policies. In an examination of the public shaping morality (policy), the relationship would be an amended or new policy to reflect the public’s view on a stance. For the other theory, policy determining morality, the relationship would be a government agent implementing policy that either has low support or goes against public sentiment.

According to Monroe, a *theory* is “a set of empirical generalizations about a topic,” with the *hypothesis* of any theory being an “empirical statement derived from a theory.” Moreover, essentially, the independent variable can generally be considered the cause, while the dependent variable is roughly the effect (Monroe, 2000). The first theory’s independent variable would be either no change or an increase in public opinion. The dependent variable would be whether or not that corresponded either with no new policies or with new policies. This could operate in either way, really, though I will adhere to the setup established above. A positive relationship for the first hypothesis would be that the public had a majority opinion (50% or more) on the issue, and then

TABLE 1: Analytical Method	
Theory 1: Public opinion influences public policy	
Independent Variable:	Dependent Variable:
Public Opinion Change (Y or N)	Policy Change (Y or N)
Hypothesis: Public opinion in surveys on an issue leads to changes in court rulings on an issue	
Independent Variable:	Dependent Variable:
Public Opinion Change on Surveys (Y or N)	Change in Court Rulings (Y or N)
Theory 2: Public Policy influences	
Independent Variable:	Dependent Variable:
Policy Change (Y or N)	Public Opinion Change (Y or N)
Independent Variable:	Dependent Variable:
Change in Court Rulings (Y or N)	Public Opinion Change on Surveys (Y or N)
Issue 1: Gay Marriage	
Issue 2: Abortion	

there was a change in, or new, policy. The second positive relationship could be that the government’s policy effectively established principled norms that a majority of society would later adhere to.

An obvious juxtaposition that continues to arise is that generally, the national, state, and local governments (legislative branch) continue to strip away certain rights from certain groups, with the Supreme Court (judicial branch) combatting most of those efforts. The legislative body that more directly represents the American people passed sweeping barriers for LGBTQ people, while the more indirect body of the Supreme Court aided in their equality. Whether at the state or national levels, it was the judiciary that could mobilize the public in one way or the other. For instance, DOMA (Defense of Marriage Act) was passed in response to Hawaii’s Supreme Court and Federal Circuit Court ruling that a ban on gay marriages was unconstitutional. That led the Congress of the United States to enact legislation to counter that potential mobilization. Then in 2003, Massachusetts’s Supreme Court ruled that gay couples had the right to a marriage, not just a civil union. This saw ripple effects on both sides. Cities and states would begin to follow in Massachusetts’s steps, starting off precariously slow, while Conservatives came out in droves the following year (an election year), as part of a campaign advocating for a constitutional amendment to ban same-sex marriage (Weiss, 2015).

While there is this oscillation between the legislature and judicial branches of government, the more important aspect—whether or not either one of these is actually influencing the other—gets lost. I will be testing the case of *Windsor v. United States*, a Supreme Court case that outlawed DOMA, citing a 5th Amendment violation, to see which influences the other. I am choosing this case over the more famous case of *Obergefell v. Hodges*, as it predates *Windsor* by only two years, and any change in public or policy would be predicated on *Windsor’s* ruling. While *Obergefell’s* ruling shouldn’t be downplayed, there was little expectation that the exact same justices would come to a different conclusion for a more rigorous question in *Obergefell*, as in both cases Justice Kennedy was the deciding vote.

The polls that I used were from the Pew Research Center, and I selected polls both 4 years prior to and after *Windsor v. United States*, ranging from 2009 to 2017, with Group A being before *Windsor* (in the picture above), and Group B being after *Windsor* (in picture above). These polls asked the exact same question in both set of polls; the first set ranged from 2008 to 2013, and the second set were from 2012 to 2019. The question that the polls were asking was “Do you strongly favor, favor, oppose, or strongly oppose allowing gays and lesbians to marry legally?” (Pollingreport.com). These polls had 1,503 adults participate nationwide.

Table 2. Participants in favor of gay marriage

Data Summary	Before <i>Windsor</i>	After <i>Windsor</i>	Total	
Cases	11	06	17	
Mean	45	55.1667	48.5882	
Mean a – Mean b	t-ratio	df	p one-tailed	p two-tailed
-10.1667	-4.23	15	0.0004	0.0007

Results

Table 2 reports the findings of a difference of means test, or a t-test. Going over the data, starting off with the mean both before and after *Windsor*, quite a change occurred. The mean before *Windsor* was 45, meaning that public support for gay marriage was at an average of 45% nationally. The mean after *Windsor* was at 55.17, meaning that public support for gay marriage was at an average of 55.17% nationally. This is a stark change in public support before and after, favoring gay marriage. Nationally, there was a 10-percentage point increase, meaning that a somewhat comfortable majority of the public approved. The significance of this is that it was this policy, a Supreme Court case (*Windsor v. United States*), that produced this change in public opinion. The confidence in the t-ratio of -4.23 is represented by the “p” (probability) value 1 tailed test. The number in question is .0003635, and to find its confidence, you would simply subtract that from 1 (numerical value). From this, it can be determined that there is a 99.97% confidence in rejecting the null hypothesis, making it more likely that this policy ruling led to the shift in public opinion towards gay marriage. This t-ratio is strongly significant that this policy led to a change in the public’s acceptance of gay marriage. With this, we can reject the null hypothesis, as it is above 95%, to determine the strength, but not the uniformity, of the policy (from the court ruling) shifting public opinion.

The same parameters were used in table 3 (same polls and time span), however through a different lens. The metrics here are either polls below 50% support for gay marriage or polls above 50% support for gay marriage and then the results are put into columns to see how often they happen. Ten times before *Windsor* was ruled, public support for gay marriage was below 50%, and only once after it was ruled. On the other hand, only once was public support for gay marriage above 50% before *Windsor* was decided, and 6 times after *Windsor* it was above 50%. The numbers in bold are the observed numbers reported in the polls, and the numbers below them are what you would expect those numbers to be. For below 50% and before *Windsor*, 10 times public support was below

Table 3: Chi-Square test for those who favored gay marriage

Independent Variable	Dependent Variable		Row Total
	Before Policy Change	After Policy Change	
Opinion: Below 50%	10 7.12	1 3.88	11
Opinion: Above 50%	1 3.88	5 2.12	6
Column Total	11	6	17
Pearson Chi-Square Statistic	9.37	2x2 Table Number To Beat For Significance: 3.841	
Is Chi-Square Statistic Significant?	Yes		

50%, more than what was expected before the policy change. What this means is that the public was more frequent in their lack of support for gay marriage than what was expected before the policy change. For cases above 50% and before *Windsor*, only once did the public favor it, again also less than what was expected. However, after *Windsor* was decided, only once was public support for it below 50%, and 6 times out of the 7 it was above 50%. Aiding the conclusion of this is the above 50% cases after *Windsor* was decided, as the public favored it more frequently than what was expected. At the same time, the public's lack of support occurred less often, only once, than what was expected. The chi-square value was 9.37, while the critical value was only 3.841. Simply put, if the chi-squared value is greater than the critical value, the relationship is significant, and the further away it is from the critical value, the more significant it is. This also refutes my own theory and hypothesis about public opinion pressuring public policy. This test, along with the difference of means test, on the issue of gay marriage means that policy is extremely likely to influence public opinion.

When examining abortion through the late-term abortion *Stenberg* case, the same way as *Windsor* was utilized (comparing the same number of years before and after, three in this case), though with only one set of polls, as it included more than enough data. In table 4 the "A" column is the polls before *Stenberg*, and "B" column is the polls after *Stenberg*. These polls contained 900 people and were conducted by Fox News. The question they asked was "On the issue of abortion, would you say you are more pro-life or more pro-choice?", with an option of both/mix in its reporting (PollingReport).

Using a difference of means test, the noticeable observation here is the stagnant average mean before and after *Stenberg*. The mean actually fell, although not by much, meaning that there were fewer people who were pro-life as a result of the *Stenberg* case. The t-ratio of 1.48 does not meet the 95% threshold standard required to be significant. So the null hypothesis is kept, though this does not mean the opposite of a rejected null hypothesis. Simply, it means that there is not enough here to conclude a strong correlation between the public changing policy and the shift that is seen from the public, as the *Stenberg* case did not move public opinion (specifically, changing the number of pro-life supporters). On the issue of abortion, there is no correlation between policy affecting the public's opinion on abortion. The chi-square test could not be done, as two of the columns were barely different from 0.

Table 4. Pro-life supporters				
Data Summary	Before <i>Stenberg</i>	After <i>Stenberg</i>	Total	
Cases	04	05	09	
Mean	43.5	41.2	42.222	
Mean a – Mean b	t-ratio	df	p one-tailed	p two-tailed
2.3	1.48	07	0.0912	0.1824

Future Implications

There are two potential lessons from these results. For gay marriage, policy (in the form of the higher court case *Windsor v. United States*) was able to significantly shift public opinion in its favor, whereas the pro-life policy for abortion (the Supreme Court case *Stenberg v. Carhart*) did not move public opinion at all and saw a slight decrease afterwards in pro-lifers. What this means is that while a current conservative majority may exist on the Supreme Court, they are potentially less likely to move against the issue of gay marriage; however, with stagnant opposition and support for abortion, the Supreme Court potentially may continue its practice of keeping the issue of abortion afloat, with some restrictions.

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