Title
Gay Rights and Legislative Wrongs: Representation of Gays and Lesbians

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Introduction

On September 21, 1996, Democratic President Bill Clinton signed into law The Defense of Marriage Act (DOMA) which allows states to avoid recognizing same-sex marriages performed in other states and prohibits the federal government from recognizing these marriages at all. In so doing, Clinton joined with a majority of the Democrats (118/198) in the House, and Senate (32/47) to deny a basic civil right to one of their party’s staunchest allies, the LGBT community.¹

In the years that have followed, every major Democratic presidential party candidate has supported DOMA (e.g., Al Gore, John Kerry, Hillary Clinton, Barack Obama) and opposed same sex marriage rights. While many high profile Democrats now claim to support a “separate but equal” extension of benefits through civil unions, and some former standard bearers like Bill Clinton and Al Gore have “evolved” in their thinking and now support marriage equality, the LGBT community has yet to receive the support of the Democratic Party.²

In a sense, the passage of these bills during an era of Republican ascendancy is unsurprising. In 1996, Republicans had solid majorities in both the House and Senate and were checked by a Democratic president who had won with only 43% of the vote. Since the realignments of the 1950’s, Republicans have regularly and repeatedly opposed extending civil rights to disadvantaged groups at least partly because, as Hillygus and Shields (2008) note, much of the GOP’s southern strategy was predicated on making race-based appeals to recruit Democratic white southern voters to the GOP. Specifically, Republicans stonewalled advances in civil rights by propounding “states rights” arguments that asserted these decisions should be left to the individual states. This approach served to delay the extension of federal law to state and local communities and thereby resisted the will of large national majorities that favored extending civil rights to African Americans.

More surprising is the consistent opposition of Democrats to gay marriage. DOMA was passed with the support of a Democratic president and a majority of Democrats in each chamber. Democrats had, since the civil rights battles of the 1960’s, been the party of and for extension of civil rights to virtually all disenfranchised groups whether based on race, ethnicity, gender, or age. On issues of gay rights, however, many Democrats embraced the states rights arguments most frequently advanced by Republicans seeking to retard the extension of civil rights and liberties. Democrats’ rejection of extending a basic right to the LGBT community raises
important questions about the representation process in the United States. Specifically, why is it that on an issue so important to such a loyal group, Democrats reject their philosophical principles of strong federal control and expansive civil rights to routinely support legislation that is contrary to their supporters’ preferences and overtly harms their supporters?

If a central concern of political science is the study of who gets what, when, and how, then in a republican democracy few questions would seem more important than those that address the degree to which elected officials act as their constituents’ prefer. For decades, scholars’ concern with identifying whether and under what conditions elected officials are most likely to represent their constituents’ majority preferred views has been central to the study of representation. More recently, however, scholars have begun to scrutinize the degree to which elected officials appeal to intense groups of citizens called subconstituencies. Whether traditionally disadvantaged groups have been able to obtain representation—even from those politicians who have made promises to represent them is one focus of the emerging literature about sub-constituency politics.

To date, these competing views of representation, that is, majoritarian or sub-constituency based, have largely been studied by examining issues on which either these fundamental democratic values do not conflict, or issues like civil rights for racial and ethnic minorities where because large majorities of Americans strongly support extension of the right, elected officials do not face choices about which values (among popular sovereignty, liberty, and equality) to embrace when casting their roll call vote.

For some fifty plus years, scholars have primarily evaluated American democracy through the prism of popular sovereignty. Democratic theorists, including most prominently, James Madison, have long since established that popular sovereignty is only one of three values central to democratic governance. Equally important, both liberty and equality ensure that citizens are treated as political equals in the eyes of their government, and that people are allowed to live their lives as they see fit, without unwarranted government interference. Consequently, we might expect elected officials to abandon their allegiance to popular sovereignty on precisely those issues where majorities seek to impede the liberty and equality extended to minority groups. Legislators might act to prevent a tyranny of the majority which Dahl (1956) describes as a severe deprivation of natural rights.

This paper seeks to bridge this lacunae by simultaneously evaluating these competing theories of representation on the issue of gay marriage. This is an ideal proving ground for assessing the theories. First, marriage is an issue that courts have long recognized as a fundamental right central to basic civil liberties. Secondly, gay Americans are a traditionally disadvantaged group and marriage equality is opposed by a majority of Americans. Specifically, by simultaneously evaluating majoritarian and subconstituency politics based theories of representation, along with the theory of electoral capture, we hope to shed light on the extent to which elected officials act as their constituents prefer on a highly contentious and salient issue.

This paper proceeds as follows. We begin with a review of the central theories that explain when, why, and how legislators represent constituents. Then we introduce the issue of gay rights and explain why gay marriage allows for an important test of these competing theories. Next, we develop a series of expectations for legislator behavior on the issue of gay marriage that allows us to evaluate these competing theoretical frameworks. We test these theories using an original data set that examines the legislative behavior of the California and Iowa legislatures, the US House and Senate, and data from the 2006 Pew Religious Landscape Survey and the US Census. Our results provide substantial evidence for the subconstituency
politics theory of representation but less evidence for the theory of electoral capture, while legislators opposition to gay marriage does not seem to be rooted in the desire to fulfill the majority’s will.

Theories of Representation

The standard conception of representation summarizing the link between the citizen and their elected officials rests on the notion of popular sovereignty, the idea that in a democracy, the majority should and do rule. This majoritarian model holds that elected officials hew to citizens’ majority-preferred policy positions which are often summarized by reference to the position held by the median voter. This perspective, often referred to as the “Demand Input Model,” holds that the public demands policy from its elected representatives and the representatives respond to those demands (Wahlke 1971). Representatives embrace the majority’s preferences because they are motivated by a desire for reelection (e.g., Fenno 1978; Key 1963; Mayhew 1974). The electorate intermittently has the chance to pass judgment on the efficacy of this responsiveness through elections.

While scholars emphasize the role of the majority, they also recognize that the link between electors and elected is often complex. Douglas Arnold notes that the process of representation is complex, partly because legislators are often forced to make decisions on issues their constituents know little about at the time the roll call vote must be cast. Consequently, elected officials often must anticipate what their constituents’ preferences on the issue are likely to be at the time of the next election (Arnold 1990; Mansbridge 2003).

At first blush, the majoritarian model seems compelling. Elected officials strive to satisfy their constituents in a variety of ways (e.g., Fenno 1978; Mayhew 1974; Eulau and Karps 1977). Indeed, dozens of studies examining representation, find that legislators’ votes and policy choices seem to correspond with constituents’ majority preferred positions across a wide range of issues (e.g., Stimson et al. 1995). Once the democratic process is more closely examined, however, the responsiveness of elected officials to citizens’ policy preferences is less clear.

Scholars have identified numerous cases in which elected officials spurned the will of the majority and instead adopted some other position. A robust literature explicates the effects and mechanisms of, for example, parties as the explanatory vehicle for the behavior of elected officials. Party identification explains much of the voting that occurs in Congress (e.g., Truman 1951; Poole and Rosenthal 1997). The parties control the legislative agenda, the institutional rewards conferred upon members of the legislature, and sanction members who fail to support the party’s policies (Cox and McCubbins 1993, 2004; Lebo et al. 2006; Rohde 1981, 1991). This stream of literature essentially speaks past the role of the voter and is most concerned with the legislative decision-making that is independent from constituent influence.

Scholars concerned with questions of social justice often reach similar conclusions. Whether examining congressional roll call voting behavior on the question of the minimum wage (e.g., Bartels 2008), or addressing health care reform, Congress frequently chooses to do nothing rather than make changes supported by substantial majorities of citizens. Studies generally find that Congress is highly responsive only to the wealthy while the poor and middle class get little to no policy representation (e.g., Gilens 2005; Bartels 2008). The upper class accent of Schattschneider’s heavenly chorus has gotten thicker and more pronounced with time (1960). Elected officials’ willingness to neglect the citizens’ majority held preferences are not limited
only to issues of interest to the underclass. Even issues strongly held by broad swaths of the public, like extending the ban on assault weapons, or legalizing the importation of prescription drugs from Canada, are frequently ignored.

Further complicating matters, much of the evidence supporting the findings in favor of majoritarianism has recently been called into question. While elected officials often produce policies that seem to move in the same direction as citizens’ preferences, it is not clear whether these policies actually reflect the outcomes that constituents’ prefer (e.g., Bishin and Park 2008). From the 2010 health care bill to the 2003 Medicare Prescription Drug Improvement, and Modernization Act, legislators often seem perfectly willing to support proposals that are unpopular, while neglecting to implement specific policies that are very popular (Oberlander 2007).

The failure of the majoritarian model suggests several reasons why the behavior of the legislators may not readily map to voter preferences (Bishin 2000; Fiorina 1974; Krehbiel 1991; Shannon 1968; Uslaner 1999). First, the results of research that assesses the extent to which legislators represent their constituents are mixed (e.g., Miller and Stokes 1963). Although some attempts to bridge this explanatory gap have used an “issue visibility thesis” which argues legislators are more responsive as an issue becomes more visible, the fact is that most issues of concern to the legislature hold little interest for most of the public (e.g., Kuklinski and Elling 1977; McCrone and Kuklinski 1979).

The majoritarian model also suggests that candidates seeking to follow majority opinion should converge on the preferences of the median voter in their districts in order to be most responsive to the largest number of citizens. An expansive literature has evolved, however, that shows candidates tend to diverge from the median (Adams et al. 2004; Burden 2004; Groseclose 2001; Lewis and King 2000; Merrill and Grofman 1999; Rabinowitz and MacDonald 1989). Also problematic for the median voter concept central to the majoritarian model is the fact that candidates frequently adopt non-centrist positions (Adams et al. 2004).

Finally, although the demand theory rests on an understanding of the voter as engaged in policy and aware of legislator behavior, the literature demonstrates that voters are often apathetic and uninformed (Converse 1964; Delli Carpini and Keeter 1996). As Bernstein (1989) notes, citizens are seldom capable of holding their elected officials accountable. Moreover, even if legislators act as if the electorate will hold them accountable, as Doug Arnold suggests (1993), a quality challenger must run to effectively advertise the legislator’s misdeed with the hope that citizens might become mobilized at some point in the future. Given the paucity of competitive races—only about 1/10 of House and 1/3 of Senate races are competitive in a typical year—elected officials would seem to have very little to fear from the average constituent (e.g., Jacobson 2005).

The determination that elected officials frequently spurn the majority preferred policy choice, combined with the shortcomings of the majoritarian model described above, have led scholars to seek alternative explanations that are more consistent with citizens’ and legislators’ behavior. Increasingly, scholars have come to recognize that in different circumstances and under different conditions, politicians seem to appeal to the preferences of various groups rather than the public as a whole (Dexter 1963; Clausen 1973; Fenno 1978; Goff and Grier 1989; Bishin 2001; Griffin and Newman 2005; Bartels 2008).

The “subconstituency politics theory of representation” develops a typology that explains why and when politicians appeal to particular groups (Bishin 2009; Bishin 2000). It holds that politicians appeal to groups because, unlike members of the general public, group members are
much better informed about, and likely to be active on, issues they see as relevant to their group identity. By appealing to groups, elected officials overcome the apathy that characterizes citizens who do not see their group identity as relevant to the issues being addressed. Moreover, because group associations tend to emanate from individuals’ own self-identification, members’ positions on issues relevant to the group tend to be well informed and intensely held.

In contrast to the majoritarian model, the central implication of subconstituency politics theory is that representation is driven, not by citizens’ majority preferred preferences, but rather by the preferences of intense groups. In legislative districts with only one intense group, politicians from both parties tend to advocate that group’s preferred position. In districts with two intense groups, however, candidates will offer differing positions that represent the positions most closely associated with the positions taken by their party historically. The politicians elected from these districts continue to propound those positions once elected to office.

Where the majoritarian model is unable to explain outcomes in which elected officials act contrary to the will of the majority, subconstituency politics explains this behavior as a function of issue intensity as elected officials ignore the preferences of a more apathetic majority in favor of the preferences of an intense minority. In short, shifting away from a primary focus on the electorate as a whole, subconstituency politics theory holds that groups of intense and active citizens can constrain and direct legislative behavior (Bishin 2009: 10).

While subconstituency politics suggests that politicians seek out intense groups to exploit their resources, scholars have increasingly sought to explain the observation that some disadvantaged groups seem to be courted by a candidate or political party, only to have their interests ignored once they have provided their support. This theory of electoral capture was first developed to describe the paradox faced by the African American community (Frymer 1999). Because of the GOP’s history of racist appeals through the 1960s and 1970s, African American voters were essentially stuck supporting the Democratic Party. In short, despite the failure of Democrats to make good on issues of importance to the community, Republicans were not a viable option (Frymer 1999). More recently, this theory has been offered to explain the Democratic Party’s failure to deliver policy to the LGBT community in the face of Republican attacks (Smith 2005).

Electoral capture holds that in the absence of party competition over a constituent group, the party to whom the group gives its votes has substantial latitude in whether and when it delivers policy. Electoral capture is most likely to occur when one party decides that appealing to that group is not only inconsistent with the ideological or policy position advocated by the party, but that attempts to reach out to it are likely to undermine support within some other subconstituency in the party’s main coalition of support (Frymer 1999). Consequently, politicians from electorally competitive districts may shirk in support for LGBT concerns in the absence of party competition over those voters in an attempt to appeal to more conservative swing voters.

The absence of two-party competition over LGBT voters combined with the unwillingness of many Democrats to deliver LGBT-friendly policy suggests the electoral capture of the gay and lesbian community (Smith 2007, Frymer 1999). That is, in part because the Republican Party overtly demonizes members of the LGBT community and has no interest in competing for those votes or voters, the Democratic Party reliably receives an outsized share of the LGBT vote (Smith 2007). The Democratic Party is not compelled to deliver pro-LGBT policies, however, because the LGBT voter does not have a viable alternative at least in regards to pro-LGBT policies. Accordingly, many Democrats offer little more than cheap talk to their
LGBT constituents. Electoral capture may be a more narrow explanation of representation generally, as there are very few constituencies that are not the object of at least nominal party competition.

Perhaps the central distinguishing feature of the GOP since the election of Ronald Reagan is the rising importance of the religious right to the Republican vote (Green and Guth 1988; Green et al 1993; Green 1995; Layman 2001; Leege 2002). The post-Reagan Republican Party engaged social conservatism as an equal to fiscal conservatism and by 2004, the bloc of voters called the religious right had fully embraced the Republican Party as their avenue to power (Lindsay 2007). A central concern for the religious right, and especially Evangelical Christians, is what they describe as the moral decay in the United States and the rejection of the “gay lifestyle” (e.g., Haider-Markel and Meir 2003). Because this group represents such a large part of the core GOP voters, and their policy preferences are directly antithetical to recognizing basic civil rights for the LGBT community, the GOP has no interest in courting gay voters and instead actively seeks to demonize this constituency in order to excite their core voters (e.g., Sherrill 1996; Burack 2008). Consequently, much like African American voters during the Clinton era, the GOP does not compete for gay voters and utilizes hostility towards gay voters to activate other dimensions of its coalition.

The absence of party competition over a group is not enough for capture to occur. Instead, capture occurs when the party that is open to appealing to the group chooses to refrain from delivering policy to it. This constituent neglect occurs both because there is no competition for their vote, and because any delivery of pro-group policy may reduce the likelihood that other moderate swing voters unaffiliated with the party may turn out to vote for Democrats (Frymer 1999). In particular, Democrats marginalize the concerns of the gay community at virtually no cost, because the community cannot defect to the GOP (Smith 2007). Doing so allows Democrats to tailor policy messages to facilitate appeals to less progressive and conservative voters and thus (potentially) broaden their electoral coalition.

The LGBT Community as a Discrete Group

The issue of civil rights for gays and lesbians has been a major dimension of political discourse since the early 1970s (Haider-Markel and Meier 2003). While much of the heterosexual population holds broadly negative attitudes towards gays and lesbians, the debate over LGBT rights has occurred against a backdrop of steadily improving (if still net negative) attitudes towards the LGBT community (e.g., Hillygus and Shields 2005; Lax and Phillips 2009a; Lax and Phillips 2009b; Lewis and Gossett 2008; Sherrill 1996). Still, despite the somewhat improved status in general, because the group is comprised of such a small numerical minority, the path through which full civil rights could be achieved is not readily obvious. The literature on the LGBT community treats it as a group that has cohesive policy preferences (e.g., Haider-Markel and Meier 2003; Haider-Markel et al 2000; D’Emilio 2006; Smith 2007; Smith 2008). Accordingly, at the outset we adopt a simple rational model that assumes most members of the LGBT community desire full rights of citizenship including the right to marry. While no doubt there are members of the community that are opposed to marriage conceptually, the same is likely true for the heterosexual community.

Like any other group, the LGBT community could achieve progress in the rights field through either litigation or legislation. Efforts to expand gay rights have had mixed success in the
courts. Recent legal gains by those supporting equal rights for the LGBT community frequently have been met with a push-back by those opposed to full civil rights. In California, voters passed Proposition 8 to amend the state constitution to eliminate marriage equality as defined by the state Supreme Court. In Maine, Proposition 1 repealed the first legislative grant of full marriage rights. Despite this, a conventional wisdom has taken shape that rights-based litigation strategies are either ineffective or counterproductive (Klarman 2004: 465; Klarman 2005:482; Rosenberg 2008). In short, the argument is that LGBT rights litigation has actually caused a backlash against and an erosion of the policy stands of the LGBT community (D’Emilio 2006). Indeed, much of the recent scholarship has focused on the wisdom, success, and outlook for future rights litigation (Hirsch 2005; Mezey 2007; Posner 1977; Robinson 2001; Smith 2008; Zackin 2008). Explaining the scholarly focus on litigation, Keck demonstrates that the “backlash” argument has perhaps been overstated and the litigation strategy often has been the best of the bad strategic options available (Keck 2009).

Another stream of scholarship that has evolved alongside the litigation strategy literature assesses the measurement of, changes in, and the impact of public opinion on and about LGBT rights issues (Egan and Sherrill 2005a, 2005b; Fiorina, Abrams and Pope 2006; Haider-Markel and Meier 1996; Haider-Markel, Joslyn, and Kniss 2000; Hillygus and Shields 2005; Lax and Phillips 2009a; Lax and Phillips 2009b; Lewis and Gossett 2008). Similarly, the rise of state constitutional ballot initiatives about same sex marriage, along with other gay-oriented policy issues, led to a great deal of research about gay issues, turn-out, and voting behavior (Campbell & Monson 2008; Haider-Markel and Meier 2003; Smith, DeSantis, & Kassel 2006; Gamble 1997; Zackin 2008).

While public opinion toward gay marriage has become more positive with time, attitudes tend to still be negative such that it has been defeated in every place that gay marriage has appeared on the ballot. Consequently, legal and legislative strategies appear most promising. In fact, a simple survey of the five states and the District of Columbia in which gay marriage is legal shows that in half gay marriage has come about through court rulings (Massachusetts, Iowa, Connecticut) and half through the legislative process (Vermont, New Hampshire, and DC). In practice, these institutions are intertwined and respond to one another, so it may not be simply a question of whether legislative or judicial processes prevailed. None the less, we can learn a great deal about the democracy by considering the legislative and judicial processes separately.

We assess the legislative route for achieving civil rights through an explication of the responsiveness of elected officials to gay constituents. This will shed light not only on the plight of the LGBT community but on representation in general. We test three competing theories of representation, the “majoritarian model,” “subconstituency politics,” and “electoral capture” in order to assess the responsiveness of elected officials to their constituent gay and lesbian communities. As gay rights are characterized by competing groups with highly intense and mutually exclusive views, the subconstituency politics theory predicts that elected officials will appeal to these specific groups. It is also an issue on which the parties do not compete for the votes of the disadvantaged group since the GOP actively demonizes the LGBT community and in no way seeks their votes. These are the conditions under which electoral capture should be seen.

Expectations of the Theories
These three theories produce competing explanations for elected officials’ behavior. Based most directly on the notion of popular sovereignty, the majoritarian model simply holds that elected officials act in a manner consistent with the opinion preferences of the majority in their states and districts. To the extent that the majority supports or opposes gay marriage, then elected officials should reflect that position when casting roll call votes.

Subconstituency politics theory rejects the majoritarian argument and instead holds that politicians appeal to the preferences of the intense groups of constituents in the elected official’s district. In districts with two active and opposing groups, legislators advocate the position of the group that is closest to their party’s traditionally held position. In districts with only one intense group, politicians advocate that group’s preferred position. On issues of gay rights, legislators take their cues from two intense groups: Evangelicals, who are ardent opponents of gay rights, and the LGBT community who are its staunchest supporters. Consequently, subconstituency politics theory predicts that legislators from “one-group districts” with very few members of the LGBT community but many Evangelicals should oppose same sex marriage, while legislators from “one-group districts” with few Evangelicals and many gays should support it. In districts with relatively large numbers of both groups, we expect Republican legislators to oppose gay marriage, while Democrats should support it.

Fundamentally, the theory of electoral capture holds that the absence of competition in the two party system works to undermine the representation of those groups whose votes are not valued by both parties. Democrats are best able to take the LGBT vote for granted in districts that are electorally competitive because it is in these districts that they have the greatest incentive to do so. In safe districts, Democrats do not especially benefit from ignoring the LGBT voters because there is no need to reach out to swing voters, who might object to support for gay friendly policies, in order to build winning coalitions. Of course, a safe district would also suggest minor consequences for the elected official regardless of the support or lack thereof for the gay community. In contrast, in competitive districts, Democrats’ incentives for reaching out to swing voters who might be turned off by explicit appeals to the gay community are highest. Consequently, we expect the degree to which gays are “captured” to depend on the degree to which districts are competitive. In more competitive districts, Democrats should be more likely to shirk the concerns of the gay community and vote against their interests.

**Data and Methods**

A central debate in the extension of civil rights is whether policy should be made at the federal or state level. At least since the Civil Rights Movement of the 1960’s, opponents of civil rights have argued that such questions should be left for the states to decide. Advocates for extending civil rights tend to argue for strong federal action so that particular states and local governments cannot prevent the extension of these rights to disadvantaged groups. While Republicans have been the strongest proponents of states’ rights arguments over the last half-Century, on questions of gay rights, prominent Democrats ranging from Bill Clinton to John Edwards have espoused the states’ rights view.

In order to test whether different theories of representation might better explain elected officials’ behavior at the state or federal levels, we examine lawmakers’ behavior on state and federal marriage legislation. We begin by examining legislator behavior in the US Congress on the 1996 Defense of Marriage Act. In order to examine representation at the state level, our next
two cases examine lawmaking in California, a state known for its lack of electoral competition, and in Iowa, a state known for having relatively large numbers of competitive elections owing to their ‘independent’ redistricting commission. These states provide an excellent laboratory for examining the representation process because the theory of electoral capture suggests that capture is most likely to occur in places where high levels of political competition occurs. Consequently, Iowa and California provide most and least likely cases, respectively, where electoral capture should be most evident.

Congress: The Defense of Marriage Act

Because of the breadth of its scope and because it deals with a fundamental right, the Defense of Marriage Act (“DOMA”) is the most important legislation affecting gay rights that has been considered by the US Congress. By restricting the term “marriage” to include only the union between man and woman, it limited the benefits and liberties of members of the LGBT community with respect to policies under the purview of the federal government. This condition penalizes members of the LGBT community both financially and in other ways, as they are prevented from receiving basic benefits and privileges extended to heterosexual couples that range, for example, from the qualification for Social Security survivorship benefits, to immigration policy and the right to bring one’s partner into the US. In addition, DOMA was designed to allow states to avoid recognizing marriages between gay couples conducted by other states which the Constitution would otherwise require under the full faith and credit clause. Under this provision, a married gay couple would not take the benefits of marriage with them to a state that outlawed it.

While we have yet to see large majorities come to support gay rights on the issue of marriage, we have seen increased acceptance of marriage over time, and large increases in the acceptance of other pro-civil rights policy, such as allowing gays and lesbians to serve in the armed forces (Lax and Phillips 2009b). Thus, examination of the influences on policies pertaining to gay rights on the federal level may provide some insight for understanding whether, if trends in opinion continue, the US Congress is likely to enhance or inhibit the extension of civil rights to the LGBT community over time.

The politics surrounding DOMA offers an opportunity to examine the extent to which competing explanations of legislator behavior explain elected officials’ behavior on questions of gay rights. While direct measures of public opinion on gay marriage are unavailable for the level of analysis considered here (i.e., the congressional district) during the time period around the vote, other proxies that tap support for gay rights, specifically, support for allowing gays and lesbians to serve in the Armed Forces, are available using the 2000 National Annenberg Election Study (NAES).

Data necessary for testing the subconstituency politics theory are also available through the 2000 NAES and the US Census. In order to estimate the proportion of each district that self identifies as either born again or as white Evangelical Protestant, we use self identification data from the 2000 NAES tabulated by congressional district and state to estimate the size of this important subconstituency for the House and Senate.

While data assessing the size of the LGBT community is not directly available, we build on the measure employed by Haider-Markel, Joslyn, and Kniss (2000) to estimate the size of the LGBT community using Census data that measures the proportion of same sex partners sharing a
household in each district. To the extent that people in the LGBT community are less likely to either admit such relationships, due to issues of social desirability, or share a household with their partner owing to the potential for discrimination, this measure will understated the size of the LGBT community, but should provide us with a fairly reliable proxy for the size of the community across districts.

Finally, the data needed to test the theory of electoral capture are widely available and require only information on elected officials’ party affiliation, roll call vote, and district competitiveness. We begin by developing a series of measures that reflect the competing theories.

We begin to assess the competing theories by employing a regression type analysis where the variables that the theories suggest should influence legislators’ roll call voting behavior are examined for their influence on legislators’ DOMA vote. More specifically, we begin by assessing the specific components held to drive each of the theories of representation. While we are unable to assess the majoritarian model directly, we examine whether attitudes toward gays more broadly affect legislators voting behavior. The variable Gay Opinion is the proportion of respondents in each district who support allowing gays to serve openly in the military as obtained using the 2000 NAES. To assess the subconstituency politics theory, we include measures of the LGBT Population by including the variable described above that assesses the size of the same sex household percentage. The size of the Evangelical population is measured using the Percent Evangelical variable estimated from the NAES.

The final theory is electoral capture, which is reflected by the variable, Electoral Capture. Recall that the lack of party competition – where one party does not seek votes from the group is at the heart of electoral capture. All Republicans, as well as Democrats in competitive districts—those where Democrats won by less than 10 points in 2004—are coded ‘0’ while Democrats in safe districts are coded ‘1’. This reflects both Republicans’ rejection of gay rights as well as the expectation that Democrats in competitive races ignore the will of LGBT voters to appeal to anti-gay swing voters in order to expand the size of their electoral coalition.

With Republicans united in their support, and only a minority of Democrats in each chamber opposed, the 1996 Defense of Marriage Act easily passed both the House of Representatives (342-67), and the Senate (85-14). President Clinton signed the bill on September 21, 1996. The dependent variable in this analysis is each legislator’s vote on DOMA and is scored ‘1’ if the legislator voted for DOMA and ‘0’ if they voted against. Because the roll call vote is dichotomous, we employ logistic regression. The results of this estimation for the House and Senate are seen in Table 1, below.

The results of Table 1 are largely consistent with the expectation of the theories, though the confidence we have in the results vary dramatically across chambers. In the House, seen in column 1, we observe much smaller standard errors around the estimates. Here, each of the variables is correctly signed and either statistically significant, or almost so, suggesting that all of these factors influence legislators’ voting behavior on gay marriage. In contrast, in the Senate all variables except for Percent Evangelical are correctly signed, although none of them approach conventional significance levels. While it is hard to be sure, the uncertainty around these results seems likely to be due at least partly to the smaller size of the Senate, and the reduced statistical power that results from having fewer observations.
Table 1. Logit of influences on 1996 Defense of Marriage Act Votes in the US Congress.

<table>
<thead>
<tr>
<th></th>
<th>House</th>
<th>Senate</th>
</tr>
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<tbody>
<tr>
<td>Constant</td>
<td>4.17**</td>
<td>12.09</td>
</tr>
<tr>
<td></td>
<td>(1.93)</td>
<td>(9.22)</td>
</tr>
<tr>
<td>Percent Evangelical</td>
<td>2.60#</td>
<td>-1.96</td>
</tr>
<tr>
<td></td>
<td>(1.58)</td>
<td>(6.52)</td>
</tr>
<tr>
<td>LGBT Population</td>
<td>-144.30***</td>
<td>-176.45</td>
</tr>
<tr>
<td></td>
<td>(35.47)</td>
<td>(176.78)</td>
</tr>
<tr>
<td>Gay Opinion</td>
<td>-4.02#</td>
<td>-13.10</td>
</tr>
<tr>
<td></td>
<td>(2.49)</td>
<td>(11.62)</td>
</tr>
<tr>
<td>Electoral Capture</td>
<td>3.71***</td>
<td>.89</td>
</tr>
<tr>
<td></td>
<td>(.75)</td>
<td>(.71)</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-95.78</td>
<td>-28.48</td>
</tr>
<tr>
<td>N</td>
<td>406</td>
<td>95</td>
</tr>
</tbody>
</table>

Standard errors in parentheses. ***p<.01, **p<.05, #p<.11

While the results presented in Table 1 give us a sense of which factors influence legislator behavior, they tell us little about the magnitude of the influence of the competing factors. To examine this question, we focus on the House owing to the larger number of members. In order to assess the magnitude of the influence of the variables examined in Table 1, we conduct simulations using Clarify which allow us to examine how the probability of voting for DOMA changes with shifts in particular variables, while holding all other variables constant at their medians (King, Tomz, and Wittenberg 1999). Table 2 summarizes these results.

Table 2. Change in the probability of voting for DOMA as variables shift across the middle 90% of their distributions.

<table>
<thead>
<tr>
<th></th>
<th>Difference</th>
<th>From</th>
<th>To</th>
</tr>
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<tbody>
<tr>
<td>Opinion</td>
<td>-1%</td>
<td>99.8</td>
<td>98.8</td>
</tr>
<tr>
<td>Evangelical Population</td>
<td>.5</td>
<td>99.7</td>
<td>99.2</td>
</tr>
<tr>
<td>LGBT Population</td>
<td>-5.2</td>
<td>99.7</td>
<td>94.5</td>
</tr>
<tr>
<td>Party (from Democrat to Republican)</td>
<td>20</td>
<td>79.5</td>
<td>99.5</td>
</tr>
</tbody>
</table>

First differences obtained using Clarify (King Tomz and Wittenberg 1999) on the model estimated in Table 1 (with party substituted for Capture). All other variables held at their means.

The results presented in Table 2 depict the substantive impact of each of the individual elements on which the competing theories of legislative representation are based. Most striking is the relatively small impact that each of the variables, save perhaps Republican party identification, has on the typical legislator’s propensity to vote for the Defense of Marriage Act. At best, the influence of any of these factors by themselves can be considered no greater than marginal. Even in the case of political party, where we see a 20 point increase in the probability of voting for the bill, the substantive impact is relatively small because a change in a legislator’s political party (from Democrat to Republican) only increases their probability of voting for the
bill from very to overwhelmingly likely (i.e., 79.5% to 99.5%). Shifts in the other variables never lead to a legislator’s probability of voting for DOMA to drop below 94.5%.

While these substantive effects are surprisingly small, the statistical results are largely in-line with expectations underlying each of the theories, as they focus solely on the individual components of the theories. As they focus on the components of the theories rather than the theories themselves, they do little to tell us how well each of the competing theories explain legislator behavior on gay marriage. In order to assess this question, we examine the extent to which each of the theories effectively predicts legislators’ votes. Obviously, theories that explain a higher proportion of legislators’ votes are more powerful than those that explain less. In order to perform this test we compare the *Electoral Capture* variable included in Table 1 to a new variable that predicts based on subconstituency politics theory.

The subconstituency politics theory is assessed by developing a variable that accounts for the conditions under which legislators should vote for the Civil Marriage Protection Act. Specifically, *Subconstituency Politics* is coded ‘1’ for legislators that hail either from a ‘one-group’ district with only members of the LGBT community or, from ‘two-group’ districts with both Evangelicals and LGBT identifiers that are represented by a Democrat. *Subconstituency Politics* is coded ‘0’ if a legislator comes from a ‘one-group’ district with only Evangelicals or if a Republican legislator represents a ‘two-group’ district with both Evangelicals and LGBT community.11

Unfortunately, because we lack a district level measure of public opinion on gay marriage, we are unable to directly test the predictions of the majortarian model. However, we are able to create a naive baseline in order to assess how the models perform in an absolute sense by calculating the number of votes correctly predicted by a model that relies exclusively on legislators’ party affiliation. Specifically, if these complex theories enhance our understanding of legislator behavior they should outperform a naive model of straight party line voting. The results of the proportion of votes correctly predicted for House and Senate are seen below, in Table 3.

<table>
<thead>
<tr>
<th>Party</th>
<th>House</th>
<th>Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Subconstituency Politics</strong></td>
<td>86.1</td>
<td>82.8</td>
</tr>
<tr>
<td><strong>Electoral Capture</strong></td>
<td>70.9</td>
<td>70.7</td>
</tr>
<tr>
<td><strong>Votes Cast</strong></td>
<td>409</td>
<td>99</td>
</tr>
</tbody>
</table>

The results of Table 3 suggest that for both the House and Senate, subconstituency politics theory best explains legislator behavior on DOMA as in both chambers it predicts about 15% more votes correctly. Moreover, these differences are not attributable to chance as the difference between the predictions of the subconstituency politics theory and the party and capture models are always statistically significant (p<.05 for the Senate; p<.01 for the House).

It is also worth noting that the Electoral Capture model performs scarcely better than does the naive party model (p=.71 for the Senate; p=.94 for the House). To some degree this is unsurprising because races for the US House, in particular, are notable in part because so few
incumbents face serious challengers and as a result reside in districts that are not competitive. In such cases, the predictions of the capture model converge to those of a party based model. However, the performance of the capture model should not be absolved entirely for its poor performance as this particular Congress saw high levels of competition (and turnover) in the election preceding the vote as 20% of House seats (87) were competitive in 1994 and of sitting senators, 29% had faced a competitive race in their previous campaign. T
Taken together, these results suggest that subconstituency politics better explains legislator behavior on gay marriage than does electoral capture or the naive party model. Unfortunately, the available data do not allow for evaluation of the extent to which public opinion explains legislators’ roll call vote on DOMA. While the results of the regression analysis presented in Table 1 suggest that there is some relationship, absent improved measures, we are unable to assess its substantive impact on federal policy. Fortunately, we are able to assess the impact of public opinion at the state level by examining the influences on legislator behavior in California and Iowa.

The Case of California

The case of California’s 2005 Religious Freedom and Civil Marriage Protection Act (CRFCMPA) provides an excellent opportunity to evaluate these competing theories at the state level. This bill was introduced to amend state law by ending discrimination against same-sex couples by defining marriage as a contract between two people rather than between one man and one woman. If enacted, this bill would have extended all of the rights of marriage to those with domestic partnerships. Although it passed in the Senate (21-15) and then five days later in the House (41-35) the bill was vetoed by Governor Schwarzenegger who argued that it would be improper for the legislature to overrule the will of the people as expressed by Proposition 22, the referendum that banned same sex marriage in 2000.

Measures of public opinion on gay marriage are available for Assembly and state Senate districts by proxy through the election returns on Proposition 8, which banned same sex marriage in the State of California in 2008, thus meeting the central requirement necessary for testing the majoritarian model. Moreover, by examining the outcome of a bill passed in the California Assembly, we examine districts that are sufficiently small such that districts will exist that lack a large population of both key subconstituency groups. This allows for a test of the theory across the entire range of group constellations. More specifically, while examination of the distribution of Evangelicals across U.S. congressional districts finds very few with less than even ten percent of the population, by examining Assembly districts we have several districts that have almost no Evangelicals.

The major difficulty in examining legislative behavior at the state level is that we have relatively few legislators to study. The California Assembly and Senate have only 80 and 40 members, respectively. The smaller number of observations introduces a host of statistical limitations. First, statistical models, which rely on maximum likelihood estimation techniques, such as those dichotomous dependent variables that we examine in this paper, may be less reliable with the small samples we see at the state level. Moreover, even absent estimation problems, the smaller number of observations decreases the power of our statistical tests which results in the inability to differentiate the independent results of competing theories. This second problem is especially pertinent as the competing explanations lead to similar predictions, as a
condition called multicollinearity occurs when variables are closely related as in the case with the effects of party influence, capture based arguments, and even subconstituency politics. For the California Assembly and Senate, for instance, the predictions of the theories of electoral capture and subconstituency politics correlate with party at .9 and .8, respectively. Most important, colinearity is overcome only through the collection of additional data, which allows analysts to more clearly parse the different effects. Unfortunately, with relatively few observations, and several highly related variables, conditions are ripe for colinearity to occur and additional data (observations) for overcoming this problem do not exist. As a consequence, in order to compare the relative influence of the competing theories we evaluate the theories based on the extent to which they accurately predict legislators’ votes on gay marriage.

To assess the subconstituency politics theory, data are needed that estimate the size of the LGBT and Evangelical communities across districts. While such data are not readily available, we estimate the size of the Evangelical community across Assembly districts by employing the 2006 Pew Religious Landscape Survey which polled a representative sample of 35,556 Americans nationally.12 Of these, 3,574 were polled in the state of California which, once assigned to assembly districts, allows us to create estimates of the religious population based on a sample that averages of about 45 respondents per Assembly district and about 90 per Senate district.13

We examine the subconstituency and capture models in the same way as described in the preceding section. The majoritarian model is tested by developing a variable called Majority, which is constructed by reclassifying the proportion of voters supporting gay marriage, such that those districts in which greater than 50% of citizens voted ‘no’ on Proposition 8 are scored ‘1’ while those districts in which less than 50% voted ‘no’ on Proposition 8 are scored ‘0’.

In order to assess how well each theory predicts legislator behavior, we begin with a simple comparison of the proportion of votes each theory correctly predicts. To provide a baseline for comparison with competing theories, we create a naive model of roll call voting which assesses how well an uninformed analyst would predict votes if the prediction was simply based on an assumption that all Democrats would support gay marriage and all Republicans would oppose it. The results of the competing theories’ predictions are seen in Table 4.

<table>
<thead>
<tr>
<th>Theory</th>
<th>Assembly</th>
<th>Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party</td>
<td>94.7%</td>
<td>97.2%</td>
</tr>
<tr>
<td>Majoritarian</td>
<td>78.9</td>
<td>69.4</td>
</tr>
<tr>
<td>Subconstituency Politics</td>
<td>93.4</td>
<td>91.7</td>
</tr>
<tr>
<td>Electoral Capture</td>
<td>96.1</td>
<td>94.4</td>
</tr>
</tbody>
</table>

Note: All estimates are significantly different than the majority rule model, but not significantly different from the remaining models.

The results of Table 4 are somewhat startling. Most prominently, we see that the naive model of behavior on the Civil Marriage Protection Act does astonishingly well, correctly predicting almost 95% of Assembly votes and over 97% of Senate roll calls because in both chambers the bill faced an almost perfect party line vote. Importantly, the differences between
the party, the subconstituency politics, and electoral capture models are tiny and, unsurprisingly, not statistically significant.

The similarity between the capture, subconstituency, and the naive party models also makes sense because, in each theory, party acts as a cue. In the case of electoral capture, the degree to which the Democrats defect from the party line depends entirely on the level of competition in a legislator’s district. As there are only 4 competitive seats in the Assembly (only one of which, District 30, is held by the Democrat) and two competitive seats in the Senate (districts 4 and 34, both of which were held by Democrats) the capture model comes very close to being a strict party-line model because of California’s lack of electoral competition.14

Similarly, in the Assembly, 51 of 80 districts are “two group districts,” where the subconstituency model predicts that legislators will take the position closest to their party. The subconstituency model predicts 23 of the remaining 25 correctly. Similar results are achieved in the Senate such that the subconstituency model reverts to a party line vote in the 23 ‘two-group’ districts (of which it predicts 22 votes correctly).15 Consequently, both electoral capture and subconstituency politics make predictions identical to the party model in a majority of districts.

Perhaps most striking, however, are the results for the majoritarian model. Regardless of chamber, the majoritarian model predicts statistically significantly worse than do either the subconstituency politics or electoral capture models. Public opinion on gay marriage poorly predicts how legislators will vote on the 2005 Civil Marriage Protection Act. The implications of this finding are quite important because they suggest that on gay marriage in the case of California, legislative institutions help to mitigate the imposition of majority tyranny over minorities. Unfortunately, for supporters of gay rights, the legislature does not have the final say on the issue. The results of Table 4 suggest that party is the central cleavage on the vote on the Civil Marriage Protection Act, as each of the theories, save the majoritarian model, does a solid job predicting the vote.

The Case of Iowa

That Iowa was among the first states to pass a ban on gay marriage came as no surprise to most observers. In the late 1990’s both chambers of Iowa’s legislature were controlled by Republicans and Iowa had long been seen as a state in which religious conservatives were fairly strong. The 2000 National Annenberg Election Study finds that 34% of Iowans described themselves as either born again or Evangelical. Iowa’s 1998 Defense of Marriage Act, which defined marriage in Iowa as between only a man and a woman, passed the state House 89-10 and 40-9 in the Senate and was signed into law by Governor Terry Branstad. As in the other cases, Republicans were united in their support, as only one of the 53 Republicans in the Assembly and two of 27 in the Senate voted against the bill.

Examination of gay marriage legislation in Iowa provides a nice counterpoint to California because Iowa is known for having more competitive elections since redistricting plans are proposed by an ‘independent’ commission. Consequently, whereas the state legislature in California saw only four of 80 Assembly (5%), and two of 40 Senate seats (5%) that were competitive, in Iowa 17 of 100 Assembly seats, and 12 of 50 Senate seats (24%) were similarly competitive. How well do the competing theories of representation explain legislator behavior in Iowa?
Owing to the large number of state legislative districts relative to the size of Iowa’s population, data by legislative district is very difficult to obtain in Iowa. As a consequence, opinion polls allowing for the evaluation of the majoritarian model do not exist. Obtaining data on the size of the Evangelical population by district is similarly difficult. Because we know the state has a large Evangelical population (i.e., 34%), however, if we make the reasonable assumption that no legislative district is less than 5% Evangelical, the threshold we use in the previous sections, then we can develop predictions for the subconstituency politics model as data on the LGBT population is available through the US Census. We present the predictions of the three theories in Table 5 below.

<table>
<thead>
<tr>
<th></th>
<th>Assembly</th>
<th>Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party</td>
<td>61.6%</td>
<td>64.5%</td>
</tr>
<tr>
<td>Subconstituency Politics</td>
<td>86.9</td>
<td>85.4</td>
</tr>
<tr>
<td>Electoral Capture</td>
<td>70.7</td>
<td>70.8</td>
</tr>
<tr>
<td>Votes Cast</td>
<td>99</td>
<td>48</td>
</tr>
</tbody>
</table>

In both Senate and House, subconstituency politics is significantly different from party (p<.02 in the Senate and p<.01 in the House) and capture theories (p<.08 in the Senate and p<.01 in the House).

The results from Table 5 appear more in line with the findings from the US Congress than those seen in California. Once again, subconstituency politics seems best explain legislator voting behavior on Iowa’s DOMA as it explains almost 87% of votes in the Assembly and about 85% of votes in the Senate. Importantly, its predictions are statistically significantly better than the predictions made by electoral capture (p<.09 for the Senate; p<.01 for the House) or the party baseline (p<.02 for the Senate; p<.01 for the House). Moreover, it is worth noting, once again, that the theory of electoral capture provides a relatively modest improvement over the party baseline, and one that is never statistically significantly different from the estimate generated by the naive party model (p=.51 for the Senate; p=.18 for the House).

The finding about the relative lack of success of the capture theory raises broader questions about its generality. While it may be possible that capture simply does not explain gay politics, or more precisely, gay marriage, very well, given the relatively high levels of competition in Iowa, these results raise questions about the extent to which capture is likely to be successful in other electoral contexts. It is worth noting that the only place in which we find significant support for the capture theory is in California, where owing to the low levels of competition, the predictions of the capture model almost replicate the party and subconstituency models.

Discussion and Conclusion

The degree to which a nation is seen as democratic depends in large part on its commitment to three democratic ideals: liberty, equality, and popular sovereignty. Since the founding,
democratic theorists have worried about the possibility that majorities might tyrannize minorities by depriving them of a basic right. The fundamental right of gays to marry appears to be such a case.

In order to limit the majority’s ability to tyrannize a minority, the Framers designed a set of institutions with shared and overlapping power, such that new policies would require gaining support for such actions across institutions. The history of civil rights demonstrates, however, that rather than simply protecting the provision of basic civil rights, this system serves to impede change altogether. It protects the status quo at the expense of the disadvantaged. This distinction is important because the federal institutions designed by the Framers appear better suited for preserving the rights of those who already have them, such as a wealthy property-holding class designing a new government, than to articulate and extend them to those whose rights are not yet established, such as gay and lesbian Americans.

We began this paper by asking how competing theories of representation explain when and where minority rights are most likely to be protected given that so many Democrats seem so willing to support restrictions on gay marriage, a position that runs contrary to the basic rights of some of their staunchest supporters. While past research, and the research presented herein, suggests that Democrats are much more likely to support gay rights than are Republicans (Lublin 2005), Democratic support on the question of gay marriage (as evidenced by the majorities of both the House and Senate Democrats, and the large number of national leaders that support DOMA) has been much more mixed than either their more liberal principles, or their opposition to state’s rights might imply.17

To test the majoritarian, subconstituency politics, and electoral capture theories, we examined legislative behavior on Federal and State DOMA legislation in the U.S. Congress and Iowa, respectively, and on the 2005 Religious Freedom and Civil Marriage Protection Act in the California legislature which extended to gays and lesbians the right to marry. These cases provide an excellent venue for testing alternative representation theories on a fundamental right across federal and state legislatures because they vary in their levels of electoral competition and because data are available that allow for testing the central components of each of the theories at units of analysis small enough to allow for a broad range of variation in the measures on which the theories are based (i.e, party affiliation, competition, public opinion, and the Evangelical and LGBT population).

Our results suggest several important findings. Perhaps most importantly, the theory of subconstituency politics seems to best explain legislator behavior on gay marriage. By a substantial and statistically significant margin, subconstituency politics theory better explained legislators roll call votes in both the U.S. Congress and in the Iowa legislature. Even in the California legislature where electoral capture correctly predicted the largest number of votes (96.1% in the Assembly, 94.4% in the Senate), the predictions made by the subconstituency politics theory were statistically indistinguishable (93.4% in the Assembly, 91.7% in the Senate) from it.

In contrast to the theory of capture, which implies that minority groups can only gain representation by fostering two-party competition or by creating fewer competitive districts, this finding is important because it suggests somewhat more attainable strategies for improving LGBT representation. More specifically, subconstituency politics suggests that civil rights supporters who seek legislative change might focus on activating LGBT constituencies both in Democratic districts where they are not currently perceived as especially large or intense, and in Republican districts with small numbers of Evangelicals, in order to make their voice heard.
While these latter districts are very rare, given the relatively small populations contained in some state level districts, some of these districts may exist and may make the marginal legislative difference.  

A second important finding in this paper is that, contrary to the expectations of the majoritarian model, legislator behavior on the issue of gay marriage is not especially well explained by public opinion. In the U.S. Congress, public opinion on gay rights had little substantive influence on legislator behavior. Moreover, in the case of gay marriage in California, where we employ a direct measure of constituency support for gay marriage, this popular sovereignty-based explanation of legislator behavior fares statistically significantly worse than do either electoral capture or subconstituency politics theory.  

At first glance, given the public’s traditional opposition to gay marriage, the fact that public opinion performs so poorly might be positively viewed by advocates of minority rights. After all, if equal rights are to prevail, the tension between popular sovereignty and equality would seem to require just such an abeyance when minority rights are diminished. Unfortunately, however, ignoring public opinion is not enough to ensure that legislatures are equality enhancing because even when they do promote equal civil rights, legislatures seldom act alone.  

The degree to which legislatures protect the rights of minorities partly depends on who holds power in them. While the election of Democrats alone is not enough to ensure gay rights, in cases like California, Vermont, and New Hampshire, where Democrats have large majorities, legislatures regularly consider and support bills advancing the rights of gays and lesbians. Consequently, the election of Democrats seems to be a necessary but insufficient prerequisite for progress. However, as Republican control of the legislature leads to the consideration and passage of anti-gay legislation, as occurred in the US Congress, when it considered DOMA (1996), and in Iowa, at the time they banned gay marriage in 1998. Of those Republican legislators who cast votes on the bills we examine in this paper, for instance, less than 1% (4/403) voted to support gay marriage. And even those who claim to support gay rights, like California’s Republican Governor Arnold Schwarzenegger, may be less likely to follow their vocal commitment with actions. After all, Schwarzenegger vetoed the 2005 Civil Marriage Protection Act.  

Legislative advances in extending civil rights to gays and lesbians have also been limited by the fact that power is shared across branches. Owing partly to unified Republican opposition in so many state legislatures, barring the existence of a veto-proof majority, legalization of gay marriage requires the support of a Governor. Similarly, the likelihood that a state will extend to gays the right to marry also seems to depend on the ease with which a state allows referenda to be placed before voters. The pro-gay rights position has been defeated in all of the 33 instances in which the legal status of same-sex couples has been placed on the ballot since 1998 (Egan 2010).  

Given this unfavorable political context for gay rights, the role of the courts is central as gay rights have only a slim chance of passage even when Democrats hold unified control of the legislature and the executive. As President Obama and congressional Democrats have shown, even this unusual circumstance of cross-institutional party control is not necessarily sufficient. In Massachusetts, gay marriage was legalized by the court, and in the cases of Iowa and California, for example, the courts overturned legislative and referendum based restrictions, respectively, that prevented gay marriage. Most recently, a federal district court judge has
overturned California’s constitutional amendment banning gay marriage holding that it violates the equal protection and due process clauses of the 14th Amendment to the US Constitution.

Our results may also provide some insight for better understanding the legislative conditions under which gay rights are likely to be supported in the future. Somewhat obviously, both theories and the empirical evidence presented here suggest that the election of Republicans provides a significant impediment to the advancement of gay rights. These theories seem to differ, however, in their predictions for the conditions under which Democrats are most likely to work for gay rights.

Our results speak to one of the most central questions of republican democracy. Overwhelmingly, empirical studies of American politics focus on the degree to which legislatures produce policies consistent with the value of popular sovereignty, and tend to overlook the values of equality and liberty. To the extent that the institutions in at least some states serve to inhibit all three of these values by diminishing the degree to which popular sovereignty, liberty, and equality, are followed, then the degree to which a state or nation might consider itself democratic must be called into question. Such conditions would seem to protect only those minorities that already have power. Moreover, these results likely have far reaching implications that extend to other small minority groups, such as Muslims, about whom the general public also exhibits low levels of tolerance.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Coding</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Marriage Protection Act</td>
<td>Scored ‘1’ is a legislator voted for gay marriage and ‘0’ if they voted against.</td>
<td>California Secretary of State. <a href="http://vote.sos.ca.gov/">http://vote.sos.ca.gov/</a></td>
</tr>
<tr>
<td>Electoral Capture</td>
<td>Scored ‘0’ for all Republicans and for Democrats in competitive districts (i.e., less than 10 point difference in vote share) and 1 for safe Democrats.</td>
<td>California Secretary of State. <a href="http://vote.sos.ca.gov/">http://vote.sos.ca.gov/</a></td>
</tr>
<tr>
<td>Gay Opinion</td>
<td>The percent who support allowing gays and lesbians to serve in the US Military.</td>
<td>2000 National Annenberg Election Study.</td>
</tr>
<tr>
<td>Majority Rule</td>
<td>Scored ‘1’ for districts in which Proposition 8 received more than 50% of the vote, and ‘0’ in districts where it received less.</td>
<td>California Secretary of State. <a href="http://vote.sos.ca.gov/">http://vote.sos.ca.gov/</a></td>
</tr>
<tr>
<td>Percent Democratic</td>
<td>The percentage of registered voters who identify as Democrats.</td>
<td>California Secretary of State. <a href="http://vote.sos.ca.gov/">http://vote.sos.ca.gov/</a></td>
</tr>
<tr>
<td>Public Opinion</td>
<td>Percent voting ‘no’ on Proposition 8 in each district.</td>
<td>California Secretary of State. <a href="http://vote.sos.ca.gov/">http://vote.sos.ca.gov/</a></td>
</tr>
<tr>
<td>LGBT Population</td>
<td>Same sex partners sharing a household by the proportion of all partners (including married) sharing a household.</td>
<td>Census 2000 State Legislative District Summary File.</td>
</tr>
<tr>
<td>Safety</td>
<td>The difference between the vote share of the Democrat and the Republican candidate in that district in the last election for that seat.</td>
<td>California Secretary of State. <a href="http://vote.sos.ca.gov/">http://vote.sos.ca.gov/</a></td>
</tr>
<tr>
<td>Subconstituency Politics</td>
<td>Scored ‘1’ in districts in which only LGBT is an active group, or in two-group districts represented by Democrats. Scored ‘0’ in districts with only Evangelicals, or two group districts represented by Republicans.</td>
<td>Compilation of: Same Sex Couples; Party Model; Evangelicals.</td>
</tr>
</tbody>
</table>
References


Egan, Patrick J. 2010. *Findings from a Decade of Polling on Ballot Measures Regarding the Legal Status of Same-Sex Couples* working paper.


Endnotes

1 We use LGBT as the standard reference to the Lesbian, Gay, Bisexual, and Transgendered community. Practically speaking, the Bisexual and Transgendered members of the community are invisible from a
general policy perspective. That is, the political discourse is almost completely limited to heterosexual or not (Smith 2011). For rhetorical ease, throughout the article we use “gay” “gay and lesbian community” and “LGBT” interchangeably to represent the Lesbian, Gay, Bisexual, and Transgendered community although we recognize these are not fungible groupings. Similarly, we use “same sex marriage” and “gay marriage” interchangeably.

2 It is worth noting that while Gore supported DOMA as a candidate, he changed his position. In contrast, while Obama originally opposed DOMA, he unequivocally opposed same sex marriage as a presidential candidate, and his Administration has written briefs supporting DOMA and other anti-gay policies in court and reiterated his opposition to marriage equality in response to the District Court ruling in Perry v. Schwarzenegger overturning Proposition 8 in California.

3 Denying gays the right to marry precludes them from receiving over 1000 federal benefits or privileges extended to opposite sex couples, including, for example, the right to social security survivor benefits.

4 Since, as more citizens support a particular position, the median moves in the direction of the majority’s policy preference.

5 Representation is similarly complicated when citizens are forced to rely on surrogate representation (Mansbridge 2003), which entails gaining representation from elected officials who are not from the district, and consequently over whom these representatives have no direct control. Members of the LGBT community, for example, may thus rely on elected officials form other districts to raise issues of importance to them if their elected official does not act as a member of this community would prefer.

6 Bill Clinton interview with Anderson Cooper on CNN (9/25/09). Edwards made the statement on 2/4/04.

7 Specifically, we employ the Census 2000 State Legislative District Summary File 1 with geography set to the 106th Congressional district which provides districts for the pre-2000 redistricting. Our measure differs from theirs in that rather than being the number per thousand, our denominator includes all couples sharing a household (both married and unmarried) in a district.

8 We include this measure rather than the central component, party affiliation, because we cannot estimate a model with party in the US Senate as all Republicans supported DOMA.

9 Safe districts are those where the difference in vote share between winner and loser was more than 10 points (e.g., 55 to 45).

10 Only one Republican, Steve Gunderson (WI-3rd), voted against the bill. Gunderson was outed as gay by Bob Dornan on the House floor during the debate over DOMA.

11 Since it is not possible to estimate the opinion of these groups owing to the small sample sizes, we assume that Evangelicals oppose gay marriage, that members of the LGBT community support it, and that in districts where these groups are active, legislators work to achieve their policy preference. Evangelicals are considered an ‘active’ group when they are greater than 5% of the population, while gays are considered active in districts in which the same sex partner household percentage is at least 1%. There are no districts in which neither LGBT nor Evangelical groups are active.

12 Just over 35,000 of these were obtained using random digit dialing. Consequently, the sample from California should approximate a random sample.

13 Future analyses will employ weights to ensure the validity of the sample. We note, however, that applying the estimates of the 2004 Bush vote generated from the 2006 Pew Religious Landscape Survey finds that our method correlates with actual Bush vote at .77, and our 5 point measure of party self-identification correlates at .74 with actual GOP registration.

14 As these cases are the purported strength of the capture model—since it is holds that competition leads Democrats to defect, it is worth noting that Capture predicts 2 of the three votes correctly.

15 While the model correctly predicts 11 of 13 Senate votes in ‘one-group’ districts, these are all districts in which Evangelicals are the only active group as there are no Senate districts in which Evangelicals are a small proportion of the population such that only active LGBT groups exist.

16 The assumption leads to the possibility that our predicted votes for Republican held seats with small Evangelical populations but large LGBT populations would mistakenly predict support for Iowa’s
DOMA when it should predict opposition. Even in a worst case scenario, there are only four of 29 Republicans in the Senate and six of 54 in the Assembly that hail from districts where this could occur. Even subtracting these votes, subconstituency politics theory out-predicts the party and capture theories by about 10% in the Senate and 15% in the Assembly.

17 Of those voting, 43.18% (157/364) of the Democrats in the U.S. Congress, and the Iowa and California Assembly and Senate, cast pro-gay marriage votes.

18 We find no such districts in the US Congress or in California during the time period we examine. We lack religion data by district in Iowa.

19 Importantly, in Iowa and Massachusetts, recent Democratic majorities in the legislature have been able to thwart the of gay marriage opponents’ attempt to place a constitutional amendment directly before voters since such an amendment first requires legislative approval.

20 None of the states that currently allow gay marriage have an initiative process that is unchecked by other branches. In Iowa and Massachusetts, the initiative occurs only for a constitutional amendment which requires support of the legislature before being out before voters. In DC, it requires approval of an appointed referendum committee which ensures compliance with, among other requirements, the District’s Human Rights Act (which the proposed gay marriage referenda was found to violate).

21 It is also worth noting that the ability to set the policy agenda is central to maintaining the right to gay marriage. In Iowa and Massachusetts, Democratic control of the legislature has prevented Republicans from offering an anti gay marriage constitutional amendment that would go before the voters. In California, the legislature’s inability to prevent such referenda ultimately led to the passage of just such a constitutional amendment.