

GAY MARRIAGE AND AMERICAN STATE LEGISLATURES

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Abstract:

In recent years, gay marriage has become an increasingly salient topic in American politics. Despite this, political scientists have paid surprisingly little attention to the question of when and how states come to provide the right to gay marriage. The limited existing literature on pro-LGBT legislation would indicate that this question should be answered by focusing on the presence of openly gay legislators or public support for LGBT issues as catalysts for the passage of gay marriage laws. In this paper, we argue that a more effective explanation relies on incorporating the important role political parties play in the legislative process. We find evidence that the success of gay marriage bills lies largely in the presence of Democratic control of the legislature and governorship. Additionally, we argue that this finding explains the recent shift from legislative to judicial attempts at introducing gay marriage: of the states that have not yet passed gay marriage legislation, the large majority has Republican control of both the legislature and governorship, indicating a very low probability of success for the legislative path.

Introduction

In recent years the fight over gay marriage rights has evolved from an issue many members of the lesbian, gay, bisexual and transgender (LGBT¹) community viewed as of minor importance, to one of the focus points of the gay rights movement. Indeed, the recent proliferation of gay marriage rights has been nothing short of dramatic: in a little more than one decade, the number of states that have begun providing marriage certificates to gay and lesbian couples has grown from zero to nineteen, with many additional states awaiting the outcome of judicial challenges to existing bans on same-sex marriage.² While it is possible that a future Supreme Court ruling (which may come as early as the spring of 2015) could settle the debate on gay marriage, up until now the issue has almost exclusively been decided on a state-by-state basis. However, despite the fact that gay marriage has become one of the most salient issues in American politics today, political scientists have paid relatively little attention to the question of when and how states come to provide the right of marriage to their gay and lesbian citizens.

[FIGURE 1]

In practical terms, there are three pathways states can follow to come to same-sex marriage rights: voters can approve the right to gay marriage through a referendum, courts within a state can rule that the failure to provide marriage certificates to gay and lesbian couples is unconstitutional, or a law creating marriage equality can be passed through a state's legislative process. As can be seen in Figure 1 and Table 1, most states have legalized gay marriage through either a judicial ruling or the state legislative process. Since the Supreme Court's 2013 ruling in

United States v. Windsor (which struck down the Defense of Marriage Act (DOMA)) there has been something of a switch in the paths taken: while the number of court cases challenging state bans on gay marriage has increased dramatically, the number of attempts at passing gay marriage bills through state legislatures has seemingly decreased. However, up until now the majority of states that have come to recognize the right to same-sex marriage have done so through their state's legislative process. As can be seen in Table 1, of the nineteen states that currently have gay marriage rights, ten achieved it through action by its state legislatures.³

[TABLE 1]

But why do some states end up following the judicial and others the legislative path? And why has the focus of the marriage equality movement in recent months shifted more towards the judicial approach and away from the legislative one? To answer this question we present an attempt at identifying the circumstances under which gay marriage bills are likely to pass in state legislatures. By answering this question we not only expand our understanding of the circumstances under which pro-LGBT legislation passes in American legislatures, but also provide information that can explain why the legislative path to gay marriage may be more or less easily accessible at different times.

The existing literature on minority groups and legislative representation has argued that the key to producing substantive representation relies on the presence of descriptive representation. In other words, minority groups are more likely to receive benefits when they are represented in a legislature by one of their own. From this perspective, the presence of openly-LGBT legislators would be the core explanatory variable indicating why states would follow the

legislative path.⁴ Other studies have argued instead that successful enactment of LGBT legislation relies on the presence of public support for LGBT issues.⁵ In this article we will argue that while we find that these approaches provide valuable insight into the legislative process that has led to states passing laws legalizing same-sex marriage, they largely ignore a crucial variable. We argue that the role of political parties and party leaders in the legislative process is as important as the presence of openly-LGBT legislators or public support to achieving successful implementation of gay marriage bills. Specifically, we argue that the combination of Democratic majorities in both chambers of the legislature and control of the governorship produces the most favorable circumstances for gay marriage legislation to be passed.

In this paper we present a qualitative assessment of each case in which a state legislature has brought a bill legalizing gay marriage to a vote, regardless of whether the bill passed or failed. For each of these cases we collected data on the presence of openly-LGBT legislators, the partisan control of the legislature's assembly, senate, and governorship, and details on how the legislative process played out. We find that the presence of openly-LGBT legislators appears not to be a predictor of success or failure of a gay marriage bill once introduced, but that Democratic control of legislatures and governorships does increase the probability of success. This conclusion not only indicates the circumstances under which gay marriage bills are more or less likely to pass but also provides an effective explanation for why states have chosen different paths towards legalizing gay marriage, and provides insight as to how the future of the battle for and against gay marriage will evolve from here.

Gay Rights, Same-Sex Marriage, and American Politics

As an issue in American politics, gay marriage is a relatively recent addition, with neither politicians nor gay rights organizations devoting much attention to the concept of same-sex marriage until the middle of the 1990s. This is hardly surprising considering that a gay rights movement did not appear in the United States until the late 1960s. Indeed, as Michael J. Klarman has stated, in the first decades after World War II, any “movement for gay equality,” let alone one focused on same-sex marriage rights, “faced daunting hurdles”⁶ in that homosexuality was all but unanimously considered immoral and illegal: all states had criminalized private, consensual sex between same-sex partners. Anti-sodomy laws were frequently used as sufficient cause by police to raid gay bars and establishments. Additionally, gay and lesbian citizens faced prosecution in the form of intense employment discrimination if their sexuality was ever uncovered, with one notorious example of this type of exclusion being the federal government’s response to the ‘Lavender Scare’ of the late 1940s. This ‘scare’ occurred in response to accusations that the Roosevelt and Truman administrations were harboring homosexual men in high positions and resulted in a witch hunt on gay and lesbian employees of federal government agencies. As a result, historian David K. Johnson has argued, between 1947 and the end of the 1960s at least 5,000 employees of different departments and agencies were fired based on their (perceived) sexual identity.⁷ In addition to running the risk of random police raids and loss of job status, LGBT Americans throughout the 1940s, ‘50s and ‘60s faced an additional risk in the form of the medical community: with homosexuality categorized as a medical disease, in many states judges were authorized to involuntarily admit homosexuals to asylums where they could face brutal ‘treatments’ such as lobotomy, electroshock therapy, and castration.⁸

With LGBT Americans almost entirely hidden from public view and from one another, in the period between the 1940s and the late 1960s only a limited public gay rights movement existed. A commonly identified turning point in the history of LGBT rights in the United States occurred with the 1969 Stonewall riots in New York. In the wake of a police raid on the Stonewall Inn in New York – a bar that *The New York Times* reported “was well known for its homosexual clientele”⁹ – in the early hours of 28 June of that year, patrons began a riot against the police. While this was not the first time patrons of gay bars had resisted police raids in an American city, the Stonewall case resonated strongly and inspired a more radical and community oriented gay rights movement in the form of organizations such as the Gay Liberation Front and countless similarly oriented organizations in major cities and on college campuses that became focused on openly demanding gay rights.¹⁰

Despite this shift in organizational activity, during the 1970s and ‘80s, the gay rights movement would focus only to a small extent on the possibility of gay marriage. Although there were instances in the 1970s during which same-sex couples attempted to gain marriage certificates, the issue of same-sex marriage was by no means a focal point of the gay rights movement at the time. Instead, the gay rights movement predominantly focused on employment discrimination (inspired in part by attempts by conservative action groups to pass new legislation that would ban homosexuals from adopting or teaching in public schools) and building organizations such as LGBT community centers and gay student unions.¹¹

As HIV-AIDS began to appear in gay communities in the early 1980s, the gay rights movement again switched focus, this time to issues related to providing healthcare to the many gay men who became victims of this new plague. While in the post-Stonewall era some organizations had already focused on providing social services to members of the LGBT

community (including services focused on sexual health),¹² the AIDS epidemic made the provision of healthcare to homosexual men the crucial focus point of the gay rights movement at the time. Organizations like ACT UP (the AIDS Coalition to Unleash Power, founded in 1987 in response to a call to action by the playwright Larry Kramer) combined protest activities against the Reagan administration's response to the AIDS crisis with intense cooperation with medical researchers in an attempt to find (some combination of) drugs to combat the AIDS epidemic.

While devastating in the sheer number of lives lost to the disease, the AIDS epidemic would end up strengthening the gay rights movement as a whole in the long run: the disease dramatically increased the visibility of members of the LGBT community who previously had remained closeted towards family and friends but were now forced to come out. As a result, during the 1980s gay rights issues (most notably those related to the AIDS crisis, but also those concerning other forms of discrimination) became increasingly more salient to a growing subsection of heterosexual America.¹³

Still, few if any of the organizations that made up the gay rights movement showed an interest in same-sex marriage as an issue worthy of attention. Indeed, Lambda Legal executive director Tom Stoddard stated in 1989 that “no gay organization of any size, local or national, has yet declared the right to marry as one of its goals.”¹⁴ But while gay rights organizations dismissed same-sex marriage, the issue was soon to be thrust into the national spotlight. In December 1990, three same-sex couples in Hawaii attempted to apply for marriage licenses but were rejected. Subsequently, the couples filed a lawsuit against the state of Hawaii in May 1991, which (to the surprise of most leaders of the gay rights movement) resulted in a 1993 ruling by the Hawaii supreme court that a ban on same sex marriage did indeed constitute discrimination based on sex. At first glance, the Hawaii case appeared to do more damage than good to the

cause of gay marriage: Hawaii's state legislature quickly introduced legislation specifically defining marriage as being between one man and one woman (a move a variety of states followed quickly thereafter) ensuring that gay marriage would not be implemented despite a series of appeals. Additionally, Republicans and Democrats in Congress responded to the Hawaii case by passing the Defense of Marriage Act (DOMA) in 1996 (which defined marriage as a strictly heterosexual institution in the eye of the federal government) – a bill which President Clinton signed into law and even campaigned on during his re-election campaign.¹⁵

But while the backlash to the Hawaii case set back the movement for gay marriage rights in the short term, it also introduced the concept of same-sex marriage into American political discourse. What followed was a now nearly two decade long process focused largely on judicial challenges against bans on same-sex marriage which, as Keck has argued, produced a series of victories that were followed (but not eclipsed) by a backlash against those successes in the form of referenda and legislative action.¹⁶ The late 1990s and early 2000s in particular saw a series of judicial victories for gay marriage supporters: in 1999, Vermont's supreme court ruled that denying same-sex couples the right to marriage was unconstitutional, leading Governor Howard Dean (D-VT) to propose the creation of domestic partnerships.¹⁷ In 2003, the Supreme Court in *Lawrence v. Texas* ruled that a Texas law banning private, adult, consensual, same-sex sodomy was unconstitutional.¹⁸ That same year, the Massachusetts supreme court in *Goodridge v. Department of Health* ruled that barring same-sex couples from marriage was in opposition to the state's constitution, making Massachusetts the first state in the country to allow same-sex marriage.¹⁹

Conservatives pushed back at the *Goodridge* and *Lawrence* decisions by calling for a federal constitutional amendment specifically defining marriage as between one man and one

woman. During the 2004 presidential campaign in particular, incumbent President George W. Bush supported such a constitutional amendment while his challenger, Senator John F. Kerry (D-MA) opposed it but stopped short of endorsing gay marriage itself. While no amendment ever made it through Congress, the 2004 election proved a bitter setback for gay marriage supporters: Bush won a (narrow) reelection victory against Kerry, and eleven states that held referenda on the question of gay marriage all rejected it.²⁰ Additionally, a series of states passed constitutional amendments explicitly banning gay marriage through referenda.²¹ Towards the 2008 election, a similar process occurred when California's supreme court ruled in favor of gay marriage in May 2008. This success was short-lived as California voters passed Proposition 8 (which restated that marriage was only between a man and a woman) during the November 2008 election.²²

Despite these setbacks, in-the-middle-to-late 2000s, courts have – over time – become increasingly supportive of challenges against laws banning same-sex marriage. Most crucially (thus far), the Supreme Court's 2013 decision in *United States v. Windsor* (which found DOMA to be unconstitutional) has been interpreted by lower courts as a tacit indication that the Court views states' bans on same-sex marriage as unconstitutional, resulting in a string of successful challenges to bans on gay marriage in 2013 and 2014.

Given the wave of judicial victories that gay marriage proponents have achieved since *Windsor* (with courts in 14 states ruling in favor of plaintiffs challenging existing bans on same-sex marriage thus far), it is tempting to view the fight for gay marriage as an exclusively judicial one. However, from the mid-2000s on, the issue of gay marriage has not solely been constrained to the judicial system. As gay rights became more salient to a broader group of voters, legislatures in the United States have taken up a variety of pro-LGBT issues including same-sex marriage. As a result, an increasing number of attempts at passing bills legalizing gay marriage

have been made in state legislatures: between 2005 and 2013 a sizable number of states actively chose to bring bills introducing the right to same-sex marriage to a vote, and a substantial number of those states succeeded in passing marriage equality. What can explain why some states followed the legislative route towards gay marriage and others the judicial path? And when would we expect attempts at producing marriage equality through the legislative path to succeed or fail?

Achieving Substantive Representation: Descriptive Representation and Political Parties

The existing literature that has assessed the likelihood of legislatures passing pro-LGBT legislation has largely done so by focusing on the importance of descriptive representation. From this perspective the presence of members of a minority group in a legislature represents a crucial variable in the legislative process that leads to the passage of laws that benefit members of this minority.²³ This phenomenon is not unique to the LGBT community. For example, studies have found that legislators who represent an ethnic or racial minority, or who are female, are more likely to introduce and support legislation consistent with their constituents' racial, ethnic or gender-based preferences.²⁴ Additionally, representation from members of a racial minority has been found to increase the likelihood of legislative assistance being offered to minorities' requests for constituency service.²⁵

Similar conclusions have been reached by scholars who have tested the effects of descriptive representation of the LGBT community: using almost exclusively large N statistical analyses, these scholars have found that the presence of LGBT legislators (frequently coded as both dichotomous and continuous variables) is positively correlated with a higher probability of

successful passage of pro-LGBT legislation by state and national legislatures. Most notably, Donald Haider-Markel, in a series of collaborative publications, has shown that there is a strong positive correlation between descriptive and substantive representation for the LGBT community in American legislatures. Haider-Markel, Hoslyn and Kniss find that openly gay representatives increase the probability of domestic partnership registration and other pro-LGBT benefits being implemented in cities and localities in the United States.²⁶ Haider-Markel finds evidence that the presence of LGBT lawmakers increases both the probability of LGBT laws being introduced and adopted, although he also finds that descriptive representation of the LGBT community causes an increase in the probability of the introduction and adoption of *anti*-LGBT legislation.²⁷ Finally, in a broader study of the role out-LGBT politicians play in American politics, Haider-Markel finds that an increase in the number of openly gay state legislators results in a higher probability of pro-LGBT laws being introduced and passed.²⁸ Reynolds, who follows Haider-Markel's basic model and assumptions, comes to similar conclusions in a comparative study of national legislatures, showing that the lagged presence of openly gay lawmakers in legislative bodies shows a significant positive correlation with the probability of pro-LGBT laws having been passed by this legislature.²⁹

While the literature presents a convincing argument as to the importance of the role individual openly-LGBT lawmakers play in the legislative process, we believe that the focus on descriptive representation alone ignores other crucial variables that can help explain why some state legislatures do and others do not succeed in passing gay marriage bills. It is certainly true that openly-LGBT lawmakers are at the forefront of the battles for pro-LGBT legislation – writing and introducing bills and lobbying other lawmakers in an attempt to change hearts and minds – but American state legislatures predominantly function through partisan control of the

legislative agenda and individual lawmakers generally do not produce majority support for their bills through personal lobbying alone. As such, openly-LGBT lawmakers may increase the probability of pro-LGBT bills being introduced but their presence alone is unlikely to be sufficient to produce a positive outcome of the legislative process beyond that point.

An additional explanation for the success or failure of gay marriage bills lies in the level of public support that exists for same-sex marriage. Lax and Phillips have shown convincingly that in states in which there is a higher level of support among voters for issues such as gay rights, there is also a higher level of probability of legislation on those issues being enacted.³⁰ But while the connection between public support and political responsiveness represents a crucial electoral connection between voter and elected official, strong public support alone does not *automatically* produce the outcome a majority of voters desire: bills which a majority of the public strongly favors frequently fail, while bills which the majority appears to not care strongly about or even oppose frequently pass in American legislatures. For example, while opinion polls in the run-up to a 2012 vote on gay marriage in New Jersey indicated that 54 percent of voters supported gay marriage, a bill legalizing same-sex marriage still failed to be enacted.³¹ While it would be foolish to dismiss either descriptive representation or public support for LGBT issues as influencing the outcome of these legislative processes, it is also clear that some other variable has an important impact on the probability of success and failure of same-sex marriage bills.

We therefore argue that for gay marriage bills to successfully pass a state legislature it is important that there is also strong support from a majority party for that bill. The importance of parties, and particularly party leadership, in facilitating the legislative process has been established in studies of Congress in the form of the competing legislative cartel³² and conditional party government³³ theories and, although state legislatures frequently have different

institutional rules and cultures, studies of state legislatures have come to similar conclusions regarding the importance of party leadership in the legislative process in state legislatures.³⁴ While individual legislators play important roles in writing, introducing, and lobbying for the passage of new pieces of legislation, the party-centered literature has provided us with an understanding that these actions alone generally do not produce successful attempts at passing laws. Instead, a bill is likely to pass under two specific conditions: first, a majority of a party must come to support an issue (which allows for a bill to be brought to a vote), and, second, that party must subsequently control the relevant veto positions in the legislative process, or have the ability to incorporate members of the minority party into a winning coalition so that the bill will actually pass.

In practical terms, for gay rights in the United States this means that successful implementation of pro-LGBT bills largely relies on support from a *Democratic* majority: as Smith has argued, LGBT voters face electoral capture (a term introduced by Paul Frymer³⁵), “a political dilemma faced by a group that regularly votes overwhelmingly for one party while the other major party has no interest in competing for the group’s votes.”³⁶ With the Republican Party consistently in opposition to pro-LGBT legislation, success or failure of legislative processes aimed at producing substantive representation lies entirely with the willingness of Democratic legislators and party leaders to support issues that still remain controversial with many of their voters outside of the LGBT community.³⁷ As a result, LGBT bills face a steep hill to climb in American legislatures, and the role party leaders play in forcing their caucus to support these bills is crucial.

This role can be illustrated by the successful attempt at passing same-sex marriage legislation in Vermont in 2009. While the bill legalizing gay marriage easily passed both the

assembly and senate (respectively by 94-52 and 26-4 votes), Governor Jim Douglas (R-VT) vetoed the bill. In response, the Democratic majorities in both houses succeeded in overturning the veto, making Vermont the first state to legalize gay marriage through a legislative process. While both the assembly and senate included openly-LGBT members who campaigned actively for gay marriage legislation, the crucial variable that resulted in the successful overturning of the governor's veto was the role played by Democratic party leaders.

[TABLE 2]

As can be seen in Table 2, Democrats provided by far most of the support for gay marriage in both the first vote – held in March 2009 – and the subsequent vote to override the veto – held in April 2009. It is, of course, too simplistic to assume that partisan identity of those members (rather than their individual ideology and policy preferences) must have caused this correlation between party and support for gay marriage. Indeed, Keith Krehbiel's famous critique of the party-centered literature is that parties rarely seem successful in forcing their members to vote against their personal preferences, leading Krehbiel to conclude that parties are merely a collection of likeminded legislators that hold no particular power over the legislative process itself.³⁸ Yet, in the case of Vermont this conclusion does not appear to be correct. As can be seen in Table 2, there is a minor but important change in the level of Democratic support in the assembly between the first and second vote. This increase in Democratic support is what provided the supporters of gay marriage the two-thirds majority in the assembly required to overturn Douglas' veto.³⁹ These switches did not occur accidentally and appear to have been caused by specific attempts by Democratic Party leaders to force Democrats who had voted

against the bill during the first vote to change their position. For example, state representative Jeff Young (D-VT) changed his vote from opposition to support for gay marriage after Douglas' veto and explained his change of heart by stating that "I think if I wanted to continue my career here and have any chance of being effective, I had to vote with my caucus. [...] I want to get a railroading bill through. I wouldn't even have had a chance to testify, let alone get it through. Now, people will listen to me. It's the way the political game is played."⁴⁰

While Young may have been unusually honest about the factors that caused him to change positions, his assessment of this aspect of the legislative process is not surprising to those who study the role of parties in the legislative process. While party leaders do not have the ability to outright *force* members to vote a certain way, they do actively attempt to influence members to vote the 'right' way for the party. They do so by offering rewards for good (or punishments for bad) behavior in the form of committee assignments, pork, or increased (or decreased) likelihood of success of members' own preferred bills. Party leaders do not use these tactics all the time and frequently allow their members to vote against the party: in the Vermont case, lawmakers such as Young were 'allowed' to vote against gay marriage when it first came up for a vote because their support was not necessary for the bill to pass the assembly. However, once the bill was vetoed and the Democratic leadership needed a higher number of votes to override the veto, Young's opposition became a threat to the party's ability to deliver on salient policy issues and he was pushed to change his vote.

However, the power parties have over their members is not absolute. Since members run for reelection on individual tickets, they may be willing to go against their party's preferences on bills that have high salience to voters and for which they fear reprisal at the ballot box if they go with their party. This means that, while the party can sometimes successfully push its members

to vote differently from how they otherwise would have, it cannot always do so. Specifically on highly salient issues such as gay rights, then, a party may face considerable barriers to convincing its members to vote with the majority of the other members if these members sense that there is reason to believe that the opposite vote is a ‘safer’ vote for their own future reelection. This consideration works both ways: conservative Democrats, for example, may very well ignore pressure from their party’s leadership and vote against a gay marriage bill while more liberal Republicans may ignore *their* party’s leaders and vote in favor. On average, however, votes on gay marriage bills should be expected to largely fall across partisan lines.

The existing literature on the role parties play in the legislative process makes a strong case for incorporating their role in our attempts at understanding circumstances under which gay marriage bills can successfully pass. Based on the assumptions underlying the literature on the role of political parties in Congress and the descriptive representation literature, we can identify a set of expected circumstances under which gay marriage bills are more likely to succeed. The descriptive representation literature would predict that the introduction and subsequent passage of gay marriage bills are more likely to occur when openly-LGBT legislators are part of a legislature. The party literature produces a more extensive set of hypotheses: first, Democratic control of both chambers of the legislature should make it more likely for a gay marriage bill to be brought to a vote. Second, the combination of a Democratic majority in the legislature and a Democratic governor should make it more likely that a gay marriage bill that is brought to a vote will become law. Third, under the optimal combination of Democratic control of the legislature and governorship, *failure* to pass a gay marriage bill is likely to be caused by a subset of Democratic legislators who identify voting against the bill as a ‘safer’ choice. And fourth, support from Republican legislators can help in successfully passing gay marriage legislation but

this support should be expected to come from legislators representing more moderate districts than the average Republican legislator in that state.

Methodology and Data

To test these hypotheses we collected data on each case in which a bill legalizing same-sex marriage was brought to a vote in a state legislature in the United States, regardless of whether the bill subsequently passed or failed.⁴¹ As can be seen in Table 3, there have been 18 cases in which a bill legalizing gay marriage was brought to a vote in at least one chamber of an American state legislature. For each of these cases, we collected information regarding partisan control of both chambers of the legislature and the party identification of the state's governor.⁴² For each case, we collected information regarding the vote and legislative process of the proposed gay marriage bills.⁴³ To assess whether Republican supporters of gay marriage bills are liberal outliers within their party, we use Shor and McCarty's NPAT common space data on ideology in American state legislatures, which places individual legislators on a liberal to conservative scale based on roll call votes and survey responses.⁴⁴

[TABLE 3]

Finally, we collected information regarding the number of openly-LGBT legislators in the legislature (no openly-LGBT governors served at times when gay marriage bills were brought to a vote): for each case we searched through newspaper archives for members of legislatures who, at the time the bill was brought to a vote, had identified as openly gay.⁴⁵ To

ensure we did not miss out on relevant legislators we conducted a second sweep consisting of a general internet search using a collection of keywords aimed at identifying legislators who, at the time a vote took place, were publicly out as gay or lesbian. For obvious reasons, this approach misses out on members of a legislature who are open about their sexual identity to their colleagues but not to voters, however the theory of descriptive representation gives us no reason to believe that those legislators would play an important role in pushing for the passage of a gay marriage bill.

In the section that follows we will present a qualitative assessment of each of the hypotheses based on the data collected in Table 3. While we acknowledge the limitations inherent to our methodological choice and the scope of our case selection, we believe the approach chosen here will provide us with the ability to more effectively assess the role political parties played in each of these cases than we would have been able to in a large N study. This is particularly true considering the common critique that studies of the effect of party identity on legislative votes manage to show correlation but not causation. By focusing on a relatively small set of cases, we believe we can provide context that will help to identify not only that party and successful passage of same-sex marriage bills are correlated but also the circumstances under which bills we would expect to succeed or fail met those expectations, and when and why they did not.

Findings

The data collected in Table 3 present some basic indications as to why there is reason to doubt that the presence of openly-LGBT legislators alone explains success or failure of gay

marriage legislation. For example, while there were six openly-LGBT legislators in New York's assembly and senate in 2009, the attempt at passing gay marriage failed. Meanwhile, while New Hampshire's senate did not have a single openly-LGBT member (and there was only one openly-LGBT member in the assembly), gay marriage supporters did succeed in passing same-sex marriage. Indeed, as can be seen in Table 4, there is seemingly little reason to assume openly-LGBT legislators are the crucial predictor for success or failure of gay marriage legislation. Using a dichotomous variable to indicate the presence (or lack thereof) of LGBT legislators, we would expect Table 4 to have a cluster of outcomes in the upper left and lower right cells if descriptive representation was the most important predictor of success or failure. However, while it is indeed true that in each of the states that passed gay marriage at least one openly-LGBT legislator was present in either the senate or the assembly, the same is true for each state legislature that *failed* to pass gay marriage. In fact, states that passed gay marriage had, on average, 3.5 openly-LGBT legislators while the states in which gay marriage bills failed had a higher average of 4.7 openly-LGBT legislators. Additionally, out of the six individual chambers of legislatures that did not have a single openly-LGBT legislator, five still passed a gay marriage bill. Based on these results, it is clear that while openly-LGBT legislators can play crucial roles in the *introduction* of gay marriage bills and may play important roles in lobbying their fellow legislators, their presence alone does not appear to be crucial to the success or failure of these bills once they are introduced.

[TABLE 4]

We do find support for the hypothesis that the combination of a Democratic controlled legislature and governorship increases the likelihood of successfully bringing gay marriage bills to a vote. Of the 18 cases in which gay marriage has been brought to a vote in at least one of the two chambers of a state's legislature, 16 had Democratic majorities in both houses. Of the remaining two cases, New York in 2007 saw a Democratic majority in the assembly pass a gay marriage bill which was subsequently ignored by the Republican majority in the senate. In only one case, New York in 2011, did a Republican controlled chamber of a state legislature allow a gay marriage bill to come to a vote: senate Republicans caved under pressure from Governor Andrew Cuomo (D-NY) and gay marriage was passed by a coalition of Democrats and moderate Republicans.⁴⁶

The partisan affiliation of governors also appears to be important: of the 11 states that passed gay marriage bills, 9 had Democratic governors who all signed the gay marriage bills into law. The two exceptions to this rule concern Governor Lincoln Chafee (I-RI), who was elected as an independent in 2010 but changed his party identification to Democrat the same month he signed the gay marriage bill into law,⁴⁷ and Governor Jim Douglas (R-VT) who vetoed the gay marriage bill but whose veto was overturned by the Vermont legislature. Of the seven cases in which gay marriage failed to pass, three failed due to a veto of the governor, each of which was a Republican (Governor Chris Christie (R-NJ) in 2012, and Governor Arnold Schwarzenegger (R-CA) in 2005 and 2007). No Democratic governor has vetoed a gay marriage bill, and no Republican governor has signed a gay marriage bill into law unless forced by a court ruling declaring an existing gay marriage ban unconstitutional. While the presence of a Democratic governor alone is not sufficient for a gay marriage bill to pass and the Vermont and Rhode Island

cases show that it is, in itself, also not strictly necessary for a successful outcome to occur, it is nonetheless clear that it does greatly increase the probability of success.

[TABLE 5]

To more effectively assess whether political parties actually affected the probability of success of gay marriage bills or whether the correlation is merely spurious we present basic information on each of the successful and failed attempts at passing bills that would legalize gay marriage. Table 5 shows each of the eleven cases in which gay marriage bills were enacted successfully. Of these 11 cases, eight had Democratic control of both chambers of the legislature and a Democratic governor. Of the three exceptions, two concerned the previously discussed cases of Rhode Island and Vermont. New York's legalization of gay marriage in 2011 concerns the only case in which Republicans controlled one chamber of the state legislature (in this case, the senate). While Republicans had the opportunity to block the gay marriage bill to come to a vote, New York's Democratic Governor Andrew Cuomo – assisted by the fact that a majority of senators (including four Republicans) had identified themselves as supporting gay marriage -- managed to push the Republican Senate leadership to allow a vote to take place.⁴⁸

Of the seven cases in which a gay marriage bill was brought to a vote in at least one chamber of a state legislature but failed to become law, four concerned situations in which either a Republican majority in at least one of the legislature's chambers or the presence of a Republican governor prevented the bill from becoming law (see Table 6). However, in three cases the presence of a Democratic majority in the state legislature and a Democratic governor would have lead us to expect success but the bill failed nonetheless. In all three of these cases,

this failure to pass the bill appears to have been caused by general unease among a minority of Democratic legislators that a yes vote for gay marriage was not the ‘safe’ vote – a clear downside to the situation of electoral capture LGBT voters find themselves in with regard to the Democratic Party.

[TABLE 6]

In New York in 2009, Democrats faced a rocky year in the senate with several conservative Democrats switching partisan identification in the late spring. While these same senators returned to the Democratic caucus later that summer, the switch temporarily provided Republicans with majority control of the state senate and the ability to block a scheduled vote on the gay marriage bill that had previously been passed by the assembly.⁴⁹ Additionally, efforts at lobbying conservative Democrats were complicated by the unpopularity of Governor David Patterson and his strategic choice of pushing for a vote to be held regardless of a clear lack of majority support in the senate.⁵⁰ Indeed, the major difference between the 2009 and 2011 attempts at passing a gay marriage bill through New York’s state senate, was the approach by Governors Patterson and Cuomo to ensuring legislators who were not automatically in the pro-gay marriage camp would vote in favor of the bill: while Patterson insisted on a vote being scheduled regardless of whether a majority had declared itself in favor, Cuomo focused on building a majority coalition and providing electoral safety for conservative Democrats and moderate Republicans before scheduling a vote.⁵¹ By the time the bill was brought to a vote in the senate in 2009, conservative Democrats had been provided with little incentive to support

gay marriage and with no reason to believe a vote in favor of the bill would not result in voter backlash at the polls.

In the other two cases, a similar scenario played out. In New Jersey, Democrats attempted to pass gay marriage during the lame duck session before the inauguration of newly elected governor Chris Christie (R-NJ). While at this point Democrats did control both chambers of the legislature, Governor Corzine (D-NJ) indicated he would sign the bill if passed, and opinion polls showed a majority of New Jersey voters approved of gay marriage, news reports indicate that several Democratic legislators who previously had supported the bill became “squeamish” after Christie’s victory. Additionally, several Democratic senators did not vote, resulting in a 20-14 defeat.⁵² Meanwhile, in Maryland in 2011, Democrats in the Assembly faced strong opposition within their ranks from religious conservatives. Facing likely defeat, Democrats chose to withdraw the bill rather than have it come to a vote.⁵³ Maryland legislators reintroduced the bill in 2012 when it passed in both chambers and was signed into law.

Finally, we have looked at the voting behavior of individual legislators. Here too we find strong evidence that party identification plays a crucial role in gay marriage votes: over all gay marriage votes included in our data, only 7.2 percent of Republican assembly members and 8.8 percent of Republican senate members voted in favor of gay marriage. In contrast, 81.5 percent of Democratic assembly members and 81.9 percent of Democratic senators voted in support of gay marriage. Nonetheless, in certain cases support from moderate Republicans was necessary for a gay marriage bill to pass. In three cases (Vermont during the second vote after Douglas’ veto, New York and New Hampshire) support from Republicans was necessary.

For each of these cases we can assess the political ideology of these specific Republican legislators by comparing their individual NPAT common space scores in Shor and McCarty’s

data set to the average score of the Republican caucus in the year in which the gay marriage bill came to vote. The NPAT common space data places individual legislators on a liberal to conservative scale (ranging from -2 to 2, in which larger – positive – numbers are more conservative and smaller – negative – numbers more liberal) based on roll call votes and survey responses.⁵⁴ In New Hampshire, Republican support in the state assembly was necessary for passage with 13 Republican legislators voting in support of the bill. As predicted, the NPAT scores for these members identified them as moderate Republicans more generally: while the average score for the Republican caucus as a whole was 0.44 during the session, the Republicans that voted in favor of gay marriage had an average score of 0.05. A similar effect can be seen in New York’s senate: while the Republican Senate caucus already had a liberal slant with an NPAT score of -0.08, the four Republican state senators that voted in favor of gay marriage had an even lower average NPAT score of -0.29. Finally, in Vermont’s assembly (where Republican support was necessary to overturn the Republican governor’s veto during the second vote), Republican members voting in support of gay marriage had an average NPAT score of 0.28 while the Republican caucus in the assembly had a more conservative score of 0.51.

Conclusion

In recent years the United States has seen a drastic shift in attitudes from political actors and institutions when it comes to gay rights. While in the 1990s and early 2000s the LGBT community predominantly faced defeat in the form of legislation passed specifically to ban gay and lesbian citizens from being part of such institutions as marriage or the military, the late 2000s and early 2010s have produced a dramatic set of victories – not the least of which being

the growing number of states that provide gay and lesbian citizens the right to get married. These victories have come from a variety of sources and include roles for all branches of government at both the federal and state levels. Nonetheless, as our analysis here shows, passing pro-LGBT legislation remains a process that faces considerable hurdles and one of the roles political scientists can play is identifying what those hurdles look like and under what circumstances it is more or less likely that they can be overcome.

The results presented here indicate that partisan affiliation of legislators and governors is not only correlated with a higher likelihood of successful passage of gay marriage bills, but that there is also a causal link between Democratic control of veto positions and the legalization of same-sex marriage through the legislative path. While the presence of openly-LGBT legislators may indicate a higher probability of gay marriage legislation being introduced, there is little reason to assume that these individual legislators subsequently play a crucial role in the success or failure of those bills. Instead, the extent to which Democrats control the relevant veto positions within the legislative process is a more effective explanation as to why some gay marriage bills succeed and others fail.

If our conclusions are correct, future attempts at passing gay marriage bills in American legislatures face two simultaneous developments that both increase and decrease the probability of success. On the one hand, opinion polls show that the number of Americans that support gay marriage continues to rise.⁵⁵ From this perspective, the legislative process of passing gay marriage bills should become less salient to most voters and legislators should become increasingly more comfortable to vote in favor of gay marriage. On the other hand, in states in which Democrats are unlikely to control the legislature and the governorship at the same time, the probability of legislative success remains slim regardless of recent developments in public

opinion: until Republican voters will be fully incorporated in the shift in public opinion (and, as of now, they have not), Republican majorities and governors remain unlikely to support gay marriage bills.

This conclusion also explains why the future of the fight for gay marriage should largely be expected to be waged through courts rather than state legislatures. As can be seen in Table 7, which represents the partisan control of legislatures and governorships of the 31 states in which gay marriage is not yet legal, only two (Colorado and West Virginia) have conditions that we identify as most favorable (with Democratic control of the legislature and governorship) for gay marriage to pass through the legislative path. Indeed, 23 of these states currently have Republican control of both chambers of the legislature and the governorship, which makes the probability of successful passage of gay marriage bills very low. While it is possible that future elections will change this dynamic for some states, our theory would indicate that the number of states that have conditions favorable to achieving marriage equality through the legislative path is (at least for now) largely tapped out.

Additionally, while it is possible a dramatic change in public opinion will lift the electoral capture linking gay rights to the Democratic Party, there is currently little reason to believe that this shift will occur in the states that currently do not yet recognize same-sex marriage: of the 20 states in the U.S. that had the lowest average opinion on gay marriage in 2012, 15 do not recognize same-sex marriage *and* have Republican control of the legislature and governorship, resulting in a highly hostile political context for legislative attempts at introducing same-sex marriage. Nonetheless, even in states where support for gay marriage is relatively high (such as Wisconsin at 47 percent, Alaska at 46 percent and Arizona at 46 percent of voters supporting the right to same-sex marriage) unified Republican control of the state's government

makes it highly unlikely that gay marriage can be achieved there through the legislative process.⁵⁶ It is therefore unsurprising that in the last year the focus of the marriage equality campaign has shifted to the judicial path: not only has the Supreme Court's ruling in *United States v. Windsor* provided lower courts with a decision that thus far has been interpreted as supporting the right to same-sex marriage, those states that do not yet provide the right to gay marriage lack the political context in which the legislative approach is likely to be successful, leaving open only the judicial path.

[TABLE 7]

NOTES

¹ For more on the use of the terms gay, lesbian, LGBT and same-sex in political science see: Charles Anthony Smith, "Gay, Straight, or Questioning? Sexuality and Political Science," *PS: Political Science and Politics* 44, 1 (2011) 35-38.

² For an up to date overview of the status of gay marriage legislation and judicial challenges for each state see: Freedom to Marry, "States," accessed at <http://www.freedomtomarry.org/states/>, January 12 2014.

³ Of these states, ME is a somewhat complicated case: ME passed legislation legalizing gay marriage in 2009. Voters subsequently repealed this law during a referendum that same year. In 2012, voters approved a referendum legalizing gay marriage. Additionally, in MD the bill legalizing gay marriage was also challenged in a referendum but approved by voters. See: Abby Goodnough, "Maine Governor Signs Same-Sex Marriage Bill," *New York Times*, May 6 2009; Abby Goodnough, "A Setback in Maine for Gay Marriage," *New York Times*, November 4 2009; Erik Eckholm, "In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage," *New York Times*, November 7 2012.

⁴ See: Donald P. Haider-Markel, *Out and Running. Gay and Lesbian Candidates, Elections, and Policy Representation* (Washington DC.: Georgetown University Press, 2010); Donald P. Haider-Markel, "Representation and Backlash: The Positive and Negative Influence of Descriptive Representation." *Legislative Studies Quarterly* 32, 1 (2007) 107-133; Donald P. Haider-Markel, Mark R. Joslyn, and Chad J. Kniss. "Minority Group Interests and Political Representation: Gay Elected Officials in the Policy Process." *The Journal of Politics* 62, 2 (2000) 568-577; Donald P. Haider-Markel and Kenneth J. Meier. "Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles over Lesbian and Gay Civil Rights." *Review of Policy Research* 20, 4 (2003) 671-690; Andrew Reynolds, "Representation and Rights: The Impact of LGBT Legislators in Comparative Perspective." *American Political Science Review* (2013) 1-16.

⁵ Jeffrey R. Lax and Justin H. Phillips, "Gay Rights in the United States: Public Opinion and Policy Responsiveness," *American Political Science Review*, 103, 3 (2009) 367-386; Jeffrey R.

Lax and Justin H. Phillips, "The Democratic Deficit in the States," *American Journal of Political Science*, 56, 1 (2012) 148-166.

⁶ Michael J. Klarman, *From the Closet to the Altar. Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford: Oxford University Press, 2014) 3.

⁷ Richard M. Valelly, "LGBT Politics and American Political Development," *Annual Review of Political Science* 15 (2012) 313-332. See also: David Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004).

⁸ Klarman, *From the Closet to the Altar*, 6.

⁹ Cited in Raymond A. Smith and Donald P. Haider-Markel, *Gay and Lesbian Americans and Political Participation* (Santa Barbara, CA: ABC-CLIO, 2002) 42.

¹⁰ Smith and Haider-Markel, *Gay and Lesbian Americans and Political Participation*, 43; Klarman, *From the Closet to the Altar*, 17. See also: Elizabeth A. Armstrong and Suzanna M. Crage, "Movements and Memory: The Making of the Stonewall Myth," *American Sociological Review* 71, 5 (2006) 724-751.

¹¹ Klarman, *From the Closet to the Altar*, 22-31.

¹² See: Michael G. Lee, "Between Stonewall and AIDS: Initial Efforts to Establish Gay and Lesbian Social Services," *Journal of Sociology & Social Welfare*, 40, 3 (2013) 163-186.

¹³ Klarman, *From the Closet to the Altar*, 39-41; Smith and Haider-Markel, *Gay and Lesbian Americans and Political Participation*, 46-49.

¹⁴ Cited in Klarman, *From the Closet to the Altar*, 48.

¹⁵ *Ibid.*, 55-63.

¹⁶ Thomas M. Keck, "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights," *Law & Society Review* 43, 1 (2009) 151-185.

¹⁷ Carey Goldberg, "Vermont's House Backs Wide Rights for Gay Couples," *New York Times*, March 17 2000.

¹⁸ Klarman, *From the Closet to the Altar*, 85-88.

¹⁹ *Ibid.*, 90.

²⁰ *Ibid.*, 113.

²¹ For more on the circumstances under which these referenda passed see: Arthur Lupia, Yanna Krupnikov, Adam Seth Levine, Spencer Piston and Alexander Von Hagen-Jamaer, "Why State Constitutions Differ in their Treatment of Same-Sex Marriage," *The Journal of Politics*, 72, 4 (2010) 1222-1235.

²² See: Bob Egelko, "State's Top Court Strikes Down Marriage Ban," *San Francisco Chronicle*, May 16 2008; Maura Dolan and Tami Abdollah, "Gay Rights Backers File 3 Lawsuits Challenging Prop. 8," *Los Angeles Times*, November 6 2008.

²³ See, among many others: Kathleen Bratton, "Effect of Legislative Diversity on Agenda Setting: Evidence from Six State Legislatures." *American Politics Research* 30, 2 (2003) 115-142; Kathleen Bratton, "Critical Mass Theory Revisited: The Behavior and Success of Token Women in State Legislatures," *Politics and Gender* 1, 1 (2005) 97-125; Kathleen Bratton and Leonard P. Ray. "Descriptive Representation, Policy Outcomes, and Municipal Day-Care Coverage in Norway." *American Journal of Political Science* 46, 2 (2002) 428-437; Jocelyn Elise Crowley, "When Tokens Matter." *Legislative Studies Quarterly* 24, 1 (2004) 109-136; Sandra Grey, "Does Size Matter? Critical Mass and New Zealand's Women MPs." *Parliamentary Affairs* 55, 1 (2002) 19-29; Mala Htun, "Is Gender like Ethnicity? The Political

Representation of Identity Groups." *Perspectives on Politics* 2 (2004) 439-458; Robert R. Preuhs, "Descriptive Representation as a Mechanism to Mitigate Policy Backlash: Latino Incorporation and Welfare Policy in the American States." *Political Research Quarterly* 60, 2 (2007) 277-292; Grace Hall Saltzstein, "Female Mayors and Women in Municipal Jobs." *American Journal of Political Science* 30, 1 (1986) 140-164; Grace Hall Saltzstein, "Black Mayors and Police Policies." *Journal of Politics* 51, 3 (1989) 525-544; Sue Thomas, *How Women Legislate* (New York: Oxford University Press, 1994).

²⁴ Kathleen Bratton and Kerry L. Haynie. "Agenda Setting and Legislative Success in State Legislatures: The Effects of Gender and Race." *The Journal of Politics* 61, 3 (1999) 658-679.

²⁵ See: Peter K. Eissinger, *Black Employment in Municipal Jobs: The Impact of Black Political Power*. (Madison: Institute for Research on Poverty, University of Wisconsin-Madison, 1982).

²⁶ Haider-Markel, Joslyn and Kniss, "Minority Group Interests and Political Representation."

²⁷ Haider-Markel, "Representation and Backlash."

²⁸ Haider-Markel, *Out and Running*.

²⁹ Reynolds, "Representation and Rights."

³⁰ Lax and Phillips, "Gay Rights in the United States"; Lax and Phillips, "The Democratic Deficit in the States."

³¹ Rutgers Eagleton Institute of Politics, "Majority of New Jersey Voters Support Gay Marriage," February 13, 2012, accessed at

<http://www.rci.rutgers.edu/~redlawsk/EP/Tables2012/GayMarriageFeb2012.pdf>, July 10 2014.

³² See: Gary W. Cox and Mathew D. McCubbins. *Legislative Leviathan Party Government in the House* (Berkeley: University of California Press, 1993); Gary W. Cox and Matthew D. McCubbins, *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives* (Cambridge; New York: Cambridge University Press, 2005).

³³ See: David W. Rohde, *Parties and Leaders in the Postreform House* (Chicago: University of Chicago Press, 1991); John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* (Chicago: University of Chicago Press, 1995).

³⁴ See: Shannon Jenkins, "Party Voting in State Legislatures." *Spectrum: the Journal of State Government* 75, 4 (2002) 10-14; Shannon Jenkins, "The Impact of Party and Ideology on Roll-Call Voting in State Legislatures," *Legislative Studies Quarterly* 31, 2 (2006) 235-257.

³⁵ Paul Frymer, *Uneasy Alliances: Race and Party Competition in America* (Princeton, NJ: Princeton University Press, 1999).

³⁶ Charles Anthony Smith, "The Electoral Capture of Gay and Lesbian Americans: Evidence and Implications From the 2004 Election," *Studies in Law, Politics, and Society* 40 (2007) 103-121 at 104.

³⁷ For an example of how subconstituency politics affects the choices individual legislators make, see: Benjamin G. Bishin and Charles Anthony Smith, "When Do Legislators Defy Popular Sovereignty? Testing Theories of Minority Representation Using DOMA," *Political Research Quarterly* 66 (2013) 796-803.

³⁸ Keith Krehbiel, "Where's the Party?" *British Journal of Political Science* 23, 2 (1993): 235-266.

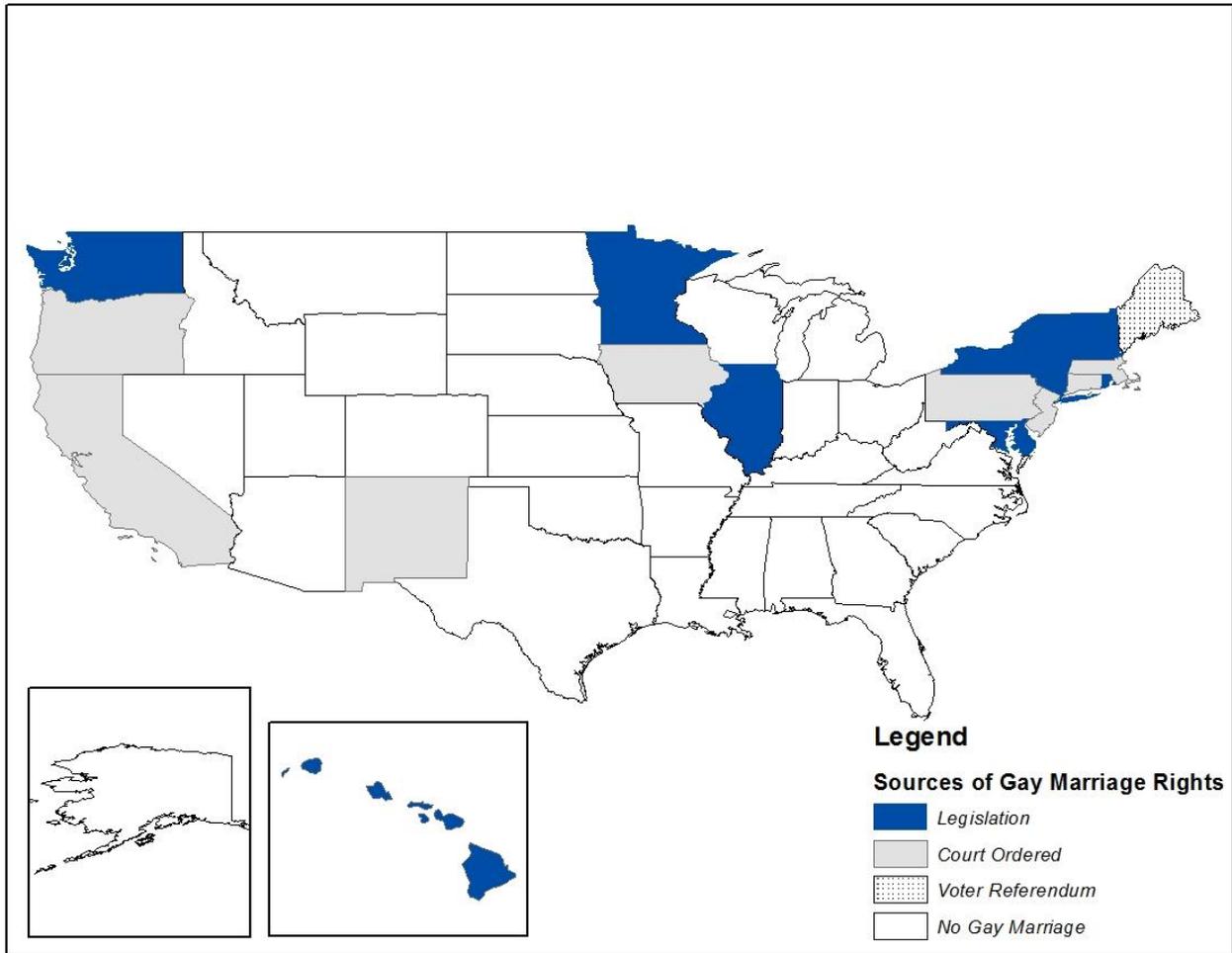
³⁹ Support in the senate dropped slightly during the second vote due to a higher level of absences, but support remained high enough to overturn the governor's veto.

⁴⁰ Dave Gram, "Vermont Legalizes Gay Marriage, Overrides Governor's Veto," *Associated Press*, April 8, 2009.

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- ⁴¹ Data regarding the up-to-date state of marriage equality legislation and judicial rulings have been collected from the website of the non-profit organization Freedom to Marry.
- ⁴² “Election Yearbook for the United States 2012 Election Summary,” *PoliData*, accessed at <http://polidata.org/party/uspc12a.pdf> , February 4 2014.
- ⁴³ Project VoteSmart, accessed at <http://www.votesmart.org>, March 12, 2014.
- ⁴⁴ Boris Shor and Nolan McCarty, “Individual State Legislator Shor-McCarty Ideology Data,” July 24 2013, accessed at <http://hdl.handle.net/1902.1/21509> , July 24, 2014.
- ⁴⁵ The archives used for these searches concerned news sources included in the LexisNexis Academic and Factiva data bases.
- ⁴⁶ Michael Barbaro, “The Road to Gay Marriage in New York,” *New York Times*, June 25 2011.
- ⁴⁷ Katherine Q. Seelye, “Rhode Island’s Chafee to Join Democratic Party,” *New York Times*, May 29 2013.
- ⁴⁸ Michael Gormley, “Gay Marriage Decision Inches Ahead in New York as Vote Goes to Senate Floor,” *Associated Press*, June 24 2011.
- ⁴⁹ Jeremy Peters and Danny Hakim, “Republicans Seize Control of State Senate,” *New York Times*, June 8 2009; Danny Hakim, “Come To Order! Not A Chance, if It’s Albany,” *New York Times*, June 24, 2009.
- ⁵⁰ Michael Virtanen, “NY Gov. Patterson to Introduce Gay Marriage Legislation Despite Dim Prospects in State Senate,” *Associated Press*, April 14 2009; Danny Hakim, “Paterson Puts Gay Marriage on Agenda for a Special Senate Session,” *New York Times*, November 6 2009; Michael Gormley, “Analysis: Political, Personal Conflicts Marked the Emotional Defeat of Gay Marriage in NY,” *Associated Press*, December 5 2009.
- ⁵¹ Barbaro, “The Road to Gay Marriage in New York”; Tom Precious, “Another GOP Senator Joins Ranks of Gay Marriage Supporters,” *Buffalo News, N.Y.*, June 14 2011; Gormley, “Gay Marriage Decision Inches Ahead in New York.”
- ⁵² David Kocieniewski, “New Jersey Senate Defeats Gay Marriage Bill,” *New York Times*, January 7 2010.
- ⁵³ Sabrina Tavernise, “Same-Sex Marriage Bill Falls Short in Maryland,” *New York Times*, March 11 2011.
- ⁵⁴ Boris Shor and Nolan McCarty, “The Ideological Mapping of American Legislatures,” *American Political Science Review* 105, 3 (2011) 530-551.
- ⁵⁵ Peyton M. Craighill and Scott Clement, “Support for Same-Sex Marriage Hits New High,” *Washington Post*, March 4 2014.
- ⁵⁶ Andrew R. Flores and Scott Barclay, “Public Support for Marriage for Same-sex Couples by State,” *The Williams Institute*, April 2013, accessed at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Flores-Barclay-Public-Support-Marriage-By-State-Apr-2013.pdf>, July 9 2014.

FIGURE 1

Pathways Taken Towards Gay Marriage Rights in the United States



Source: Data derived from Freedom to Marry, "States," accessed at <http://www.freedomtomarry.org/states>, July 24, 2014.

TABLE 1

Paths to Gay Marriage in the United States (2004-2014)

<i>Pathway</i>	<i>State</i>	<i>Total</i>
Court Order	Massachusetts, California, Connecticut, Iowa, New Jersey, New Mexico, Oregon, Pennsylvania	8
Legislature	Vermont, New Hampshire, New York, Washington, Maryland, Rhode Island, Delaware, Minnesota, Hawaii, Illinois	10
Referendum	Maine	1

Source: Freedom to Marry, "States," accessed at <http://www.freedomtomarry.org/states>, July 24, 2014.

TABLE 2

Votes in Support of Gay Marriage in the Vermont State Legislature, by Party

<i>Party</i>	<i>March 2009</i>		<i>April 2009</i>	
	<i>Assembly</i>	<i>Senate</i>	<i>Assembly</i>	<i>Senate</i>
Democrat	84	22	90	21
Republican	6	4	6	2
Independent	4	0	4	0
Total	94	26	100	23

Source: Project Vote Smart, “S-115 – Same-Sex Marriage – Key Vote,” accessed at <http://votesmart.org/bill/9050/24500/same-sex-marriage#.U8GkjvldWs4>, July 12 2014.

TABLE 3*Gay Marriage Votes, Party Identification and Openly-LGBT Legislators in U.S. State Legislatures*

<i>State</i>	<i>Year</i>	<i>Gay Marriage Passed</i>	<i>Democratic Seats Senate</i>	<i>Democratic Seats Assembly</i>	<i>Party ID Governor</i>	<i># Openly-LGBT Members Assembly</i>	<i># Openly-LGBT Members Senate</i>
California	2005	✘	63%	60%	R	3	3
California	2007	✘	63%	60%	R	2	3
New York	2007	✘	45%	70%	D	4	1
Maine	2009	✓	57%	64%	D	1	1
New Hampshire	2009	✓	58%	56%	D	1	0
New York	2009	✘	52%	73%	D	5	1
Vermont	2009	✓	77%	65%	R	4	1
New Jersey	2010	✘	74%	70%	D	1	0
Maryland	2011	✘	74%	70%	D	7	1
New York	2011	✓	48%	67%	D	5	1
Maryland	2012	✓	74%	70%	D	7	1
New Jersey	2012	✘	60%	60%	R	2	0
Washington	2012	✓	53%	56%	D	4	1
Delaware	2013	✓	62%	66%	D	0	1
Hawaii	2013	✓	96%	86%	D	1	0
Illinois	2013	✓	68%	60%	D	3	0
Minnesota	2013	✓	58%	54%	D	2	1
Rhode Island	2013	✓	82%	92%	I	3	1

Sources: Freedom to Marry, “States,” accessed at <http://www.freedomtomarry.org/states>, July 24, 2014; PoliData, “Election Yearbook for the United States 2012 Summary,” accessed at <http://polidata.org/party/uspc12a.pdf>, July 12, 2014; Project VoteSmart, accessed at <http://www.votesmart.org>, July 12, 2014.

TABLE 4

Effect of LGBT Legislators on the Success or Failure of Gay Marriage Bills in State Legislatures

	<i>Passed</i>	<i>Failed</i>	<i>Total</i>
LGBT Legislators (1 or more)	11	7	18
No LGBT Legislators	0	0	0
Total	11	7	18

Source: Project VoteSmart, accessed at <http://www.votesmart.org>, June 20, 2014.

TABLE 5*Effect of Partisan Control of State Government on Success of Gay Marriage Bills*

<i>State</i>	<i>Year</i>	<i>Dem Majority Senate</i>	<i>Dem Majority Assembly</i>	<i>Dem Governor</i>
New Hampshire	2009	✓	✓	✓
Maine	2009	✓	✓	✓
Vermont	2009	✓	✓	✗
New York	2011	✗	✓	✓
Maryland	2012	✓	✓	✓
Washington	2012	✓	✓	✓
Delaware	2013	✓	✓	✓
Hawaii	2013	✓	✓	✓
Illinois	2013	✓	✓	✓
Minnesota	2013	✓	✓	✓
Rhode Island	2013	✓	✓	✗

Source: Freedom to Marry, "States," accessed at <http://www.freedomtomarry.org/states>, July 12, 2014; PoliData, "Election Yearbook for the United States 2012 Summary," accessed at <http://polidata.org/party/uspc12a.pdf>, July 12, 2014.

TABLE 6*Effect of Partisan Control of State Government on Failure of Gay Marriage Bills*

<i>State</i>	<i>Year</i>	<i>Dem Majority Senate</i>	<i>Dem Majority Assembly</i>	<i>Dem Governor</i>
California	2005	✓	✓	✗
California	2007	✓	✓	✗
New York	2007	✗	✓	✓
New York	2009	✓	✓	✓
New Jersey	2010	✓	✓	✓
Maryland	2011	✓	✓	✓
New Jersey	2012	✓	✓	✗

Source: Freedom to Marry, “States,” accessed at <http://www.freedomtomarry.org/states>, July 12, 2014; PoliData, “Election Yearbook for the United States 2012 Summary,” accessed at <http://polidata.org/party/uspc12a.pdf>, July 12, 2014.

TABLE 7

Effect of Partisan Control of Legislatures and Governorships in States Without Gay Marriage on Choice of Judicial Path to Gay Marriage

<i>States</i>	<i>Democratic Majority Assembly</i>	<i>Democratic Majority Senate</i>	<i>Democratic Governor</i>	<i>Stayed Court Rulings Legalizing Gay Marriage</i>
Colorado, West Virginia	✓	✓	✓	1
Kentucky	✓	✗	✓	1
Nevada	✓	✓	✗	0
Arkansas, Missouri, Montana, Nebraska ^a	✗	✗	✓	1
Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia ^b , Wisconsin, Wyoming	✗	✗	✗	10

Source: Freedom to Marry, “States,” accessed at <http://www.freedomtomarry.org/states>, July 12, 2014; PoliData, “Election Yearbook for the United States 2012 Summary,” accessed at <http://polidata.org/party/uspc12a.pdf>, July 12, 2014.

^a Nebraska does not have partisan identification in the state legislature.

^b Virginia elected a Democratic governor in 2013, Republicans maintained majorities in both chambers of the state legislature.