

## **JUDICIAL INDEPENDENCE AND GAY RIGHTS IN THE AMERICAN STATES**

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### **ABSTRACT**

Scholars have noted the connection between electoral pressure and judicial rulings on controversial issues, such as capital punishment (Hall 1987) and sentencing (Huber and Gordon 2004). Indeed, the increased competitiveness of judicial races in recent years has highlighted the desire of interest groups and other opinion leaders to influence voters' choices through publicizing controversial decisions of judges. Building off insights from recent work on same-sex marriage and state courts (Barclay 2009; Keck 2009), we examine the connection between judicial independence and state court support for gay civil rights claims that do not involve the issue of marriage. In particular, we consider the relative influence of institutional arrangements, partisanship, public opinion on homosexuality, and political culture to test whether appellate courts' rulings on discrimination, hate crimes, and family law issues (1980-2008) are consistent with a strategic model of institutional behavior. This study connects to the literature on judicial selection and judicial independence, as well as to scholarship on social movements.

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## **JUDICIAL INDEPENDENCE AND GAY RIGHTS IN THE AMERICAN STATES**

Our paper examines the connection between judicial independence and state court support for gay civil rights claims that do not involve the issue of marriage. Since the founding of the United States, the nation has felt that in order to claim that it is governed in a democratic matter there must be an established rule of law and an independent judiciary. However, at that time and throughout the pages of American history, views on judicial independence have evolved and these changes have influenced the methods by which the states of the republic perceive their own interpreters of the law. The issue facing the States of the Union today is the same that faces every developed nation in the world when trying to grapple with their judiciary – namely, how should the independence of the judiciary be tempered with accountability. The most important factor in determining the relationship between independence and accountability within the judiciary is the method by which judges are selected.

In light of the debates that are currently taking place within state and local governments over how judicial independence should be tempered with accountability, it is important to understand the impact that independence has on how the court approaches and handles the various issues that are currently coming before these judges. Our paper provides a preliminary investigation of this question, in terms of how different approaches to judicial independence in state appellate courts have affected the decisions of jurists when handling cases concerning the rights of lesbian, gay and bisexual persons.

### **PRIOR RESEARCH**

Over the years there have been numerous works have focused on the LGBT rights movement and how the experience of gays and lesbians has evolved within the context of

American life (e.g. D’Emilio, 1983, 1992 and 1993; Cain, 1993 and 2000). Additionally, many scholars within the discipline of political science and in law schools have made contributions which have developed the understanding of the gay and lesbian community in American politics and in the legal system (e.g. Button, Rienzo, and Wald, 1999; Rimmerman, Wald, and Wilcox, 2000; Engel, 2001; Koppelman, 2002).

Much of the work done by political scientists and legal scholars in the field of LGBT rights has focused on the issue of marriage and relationship recognition (e.g. Eskridge, 2002; Rimmerman, 2002; Mezey, 2007). These works have covered a wide range of questions relating to marriage and have contributed to the overall understanding of the courts, political structures and social movements.

While the work done on the issue of marriage has been expansive, there has been very little research focused specifically on non-marriage issues such as employment, housing, adoption, child custody, free speech and free association, defamation, and sexual harassment (Bianco, 1996; Button, Rienzo, and Wald, 1997 and 2000; Rimmerman, Walk and Wilcox, 2000; Pierceson, 2005). This disparity in research is particularly intriguing considering that public opinion supporting the rights of gay and lesbian as individuals has been substantially higher than the support for gays and lesbians as couples.<sup>1</sup> Our study begins to fill this gap in the research.

## **THE COURTS AND JUDICIAL INDEPENDENCE**

Within the literature on the LGBT movement, there have been several works that have specifically focused on the importance of the courts and litigation to the advancement of the movement’s agenda (Pinello, 2003; Mezey, 2005 and 2009; Anderson, 2005; Pierceson, 2005; Mucciaroni, 2008; Keck, 2009). There have also been several works looking at the backlash that

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<sup>1</sup> Yang (2000) shows growing support for individual rights over time. This is compared to the 1996 Pew Research Center’s findings that only 26% of Americans were in favour of same-sex marriage.

has resulted from gay rights legislation (e.g. Brewer, Kaib and O'Connor, 2000; Wald, 2000; Klarman, 2005; Rosenberg, 2008). Within this body of work there has been almost no work looking at lower state courts. Considering that the bulk of litigation impacting LGBT individuals takes place in these lower courts, current work examining only federal cases or cases in state courts of last resort miss the majority of contact that LGBT individuals and groups have with the courts.

Research on the political independence of state courts when handling abortion and capital punishment cases has shown the political independence of the court to play a role in the decisions made (Brace, Hall, and Langer, 1999; Epstein and Kobylka, 1992; Huber and Gordon, 2004). One of the most important factors in determining the independence of a court on the state level is the method by which the judge is selected (Pinello, 1995). Many scholars have produced works that evaluate the different implications of whether a state employs gubernatorial appointment, merit selection, legislative appointment, partisan elections or non-partisan elections (e.g. Bonneau and Hall, 2009).

Crucial to understanding how differences in institutions can impact the types of decision handed down from the bench, is an understanding of judicial independence as well as knowledge of the institutions that create independence. Over the years, scholars have proposed various definitions for judicial independence and a number of methods by which independence can be measured, including:

[The ability of judges to be free] from political pressures and public outcry in order to settle disputes between parties fairly. (Sheldon and Maule, 18)

The degree to which judges believe they can decide and do decide consistent with their own personal attitudes values and conceptions of judicial role (in their interpretation of the law)... in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and... particularly when a decision adverse to the beliefs or desires of

those with political or judicial power may bring some retribution on the judge personally or on the power of the court. (Becker, [1970] 144).

[The ability of judges not to] make decisions on the basis of the sorts of political factors (for example, the electoral strength of the people affected by a decision) that would influence and in most cases control the decision were it to be made by a legislative body such as the U.S. Congress. (Landes and Posner, 875)

The right of judges to be free from inappropriate control by others in the exercise of judicial decisionmaking. (Brice, 312)

Court autonomy from other actors. (Stone, 1992).

In light of these varied definitions, what we mean by “independence” (From whom? For what purpose?) needs to be clearly defined. For the purpose of this study, we apply the definition put forth by Epstein, Knight and Shvetsova in 2001, which is:

Justices operate under maximal levels of independence when they are nearly always able to act sincerely – that is, to act on the basis of their own, sincerely-held preferences (whatever those preferences may be and regardless of the preferences of other relevant political actors) – without fear of facing reprisal from the public or the political regime. In other words, when justices are “independent” they will face low or even no opportunity costs for acting sincerely. (Epstein et al. 2001)

This definition of independence contains two important elements: (1) Judges are independent when they can act without fear of backlash from the other branches of government, and (2) Judges are independent when they can act without fear of backlash from the public in the form of electoral backlash.

In order to operationalize this definition of independence, we adapt and expand upon the spatial model of bureaucratic independence put forward by Ferejohn and Shipan in 1990.

[Figure 1 about here]

The spatial model in Figure 1, represents a case before the court. In this case, the status quo is very not-pro-x, additionally the political actor is even more not-pro-x. The judge in this case is very pro-x. So considering this situation in the context of a strategic judge who will not want to have his/her decisions overridden, the Judge will end up ruling in a way that retains the status quo, rather than at point J. In this way the decision is not sincere since it is based on non-independent factors. And for all cases the further that J gets from P, and as the more the likelihood of judicial override increases, the less independent the court is to act.

[Figure 2 about here]

Figure 2, accounts for the second dynamic of independence. In this situation, like the model for judicial override both the Electorate and the status quo score lowly in favorability for x, and the judge scores highly. In this situation, like in Figure 1, the judge would rule at a point close to the status quo if he/she believes that ruling where they would if they were acting sincerely would result in a backlash from the electorate at the next election.

### **THE INFLUENCE OF JUDICIAL INDEPENDENCE ON CASE OUTCOMES**

The likelihood that a judge will take into account the opinions of the outside public and other entities would seem to be directly linked to the nature of the relationship between the judge and the other outside actors. We view this relationship as being tied to the method by which the judge is selected to serve on the bench and how much influence these outside agents have in that process.

For example, a judge that is selected by strict gubernatorial appointment is less likely to consider the public opinion on a case when writing an opinion than would be a judge who came to the bench by way of either partisan or non-partisan election.

This assumption leads us to anticipate that:

*Hypothesis 1: Liberal courts with more independent operations will be more likely to rule favorably on LGBT cases. The likelihood of an elected judge ruling in favor of the LGBT rights party is lower than that of an appointed judge.*

A recent study by Scott Barclay examining the “activistness” of state and federal judges on the issue of gay marriage has added to the body of literature depicting the deference with which judges give legislative actions (Barclay, 2010). Although Barclay’s findings are based on specific legislative action, we believe that his findings support the assumption that courts are influenced in their decisions by the current political climate of their state.

*Hypothesis 2. The ideology of other political actors at the time of a decision will have an impact on the opinion that is issued by the court. There is a positive relationship between how liberal a government is and the likelihood that a court will rule in favor of gay rights.*

Building on the assumptions that have already been presented about the relationship between the bench and the public, we feel that it is reasonable to assume that variations in public opinion on different issues should be discernable in courts whose judges are closely linked to the public.

Numerous studies over the years have shown that there is a higher level of public support for gays as individuals than for gays as couples (Yang 2000). Based on these findings and our assumptions concerning the responsiveness of the court to the public when the public influences who is on the bench, we anticipate that:

*Hypothesis 3. Courts with elected judges are more likely to rule favorably on cases dealing with individual rights than in cases dealing with relationship or family issues.*

## **DATA AND METHODS**

Our analysis spans the period between January 1, 1981 and December 31, 2000. For the preliminary study we utilized a modified list of cases from Pinello (2003) [Appendix 1.2 of *Gay Rights and American Law*]. In compiling this list, Pinello ran *Westlaw* queries for the terms “homosexual”, “gay man”, “lesbian”, “same sex”, “sexual orientation”, “sexual preference”, and their cognates. The annual case tables from the *Lesbian/Gay Law Notes*<sup>2</sup>, and case tables from other works augmented Pinello’s search. A future revision of this paper will increase this list of cases by searching for “sodomy”, in order to preclude the possibility of overlooking cases containing this term only, and “transgender”, in order to (1) include litigation pertaining to transgender persons in our analysis, and (2) compare the differences in results between cases pertaining to gay and lesbian individuals and those dealing with transgender men and women.<sup>3</sup>

Each case was coded as relating to either Family and/or Child matters, or to Individual Rights. Cases coded as “Family and/or Child” included cases in which the issues were child custody, adoption, relationship rights, relationship dissolution and property rights, etc. “Individual Rights” cases included issues such as sexual harassment, free speech and association, character defamation, military service, sodomy laws, housing discrimination, and employment discrimination.

Case outcomes were coded using a dichotomous variable to denote if the outcome was Pro-LGB (1) or not (0). A dichotomous variable was used to code whether or not appellate cases were unanimous in their decision. To determine the unanimity of a decision, the outcome was all that was considered. Cases with concurring opinions were coded as being unanimous. A case had to have a dissent in order to be coded as not being unanimous.

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<sup>2</sup> Available at [www.qrd.org/qrd/usa/legal/lglw](http://www.qrd.org/qrd/usa/legal/lglw).

<sup>3</sup> Due to the absence of transgender cases, all discussion about the findings of this version of our study refer to lesbian, gay and bisexual (“LGB”) issues.

For our preliminary study we analyzed five states: California, Massachusetts, New York, Ohio, and Texas. These states were chosen in order to account for geographic differences and to provide for variation in the judicial selection methods used by states.<sup>4</sup>

The four methods of selections we consider are:

(1) **Merit Selection** – Also called the Missouri Model, after Missouri, which was the first state to introduce it in 1940.<sup>5</sup> Under this system a commission is established to review the credentials of potential candidates and – in most cases – recommend a short list to the Governor for his approval of one. The oversight of these appointments comes from the public, in the form of retention elections.

(2) **Gubernatorial Appointment** – The Governor of the state makes the appointment – in most states that use this method, the upper chamber of the legislative body (normally the Senate) must confirm appointments. In order to avoid the political balance of these courts from shifting too far in one direction, judges hold long terms and vacancies arise rarely.

(3) **Non-Partisan Elections** – In most cases these elections employ a blanket primary system, in which all candidates are placed on a ballot and the top two from that election then run against each other in a run-off.

(4) **Partisan Elections** – Voters select judges in election between party selected candidates. The candidates are in most cases selected in closed primary election.

We code each state based on the method in which the judge is selected and how the judge retains his/her seat. For states that select using some form of elections, we only code for the general elections (primaries are excluded). Information relating to the selection methods of the

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<sup>4</sup> We exclude from our study the two states that utilize Legislative Election as the mechanism by which jurists are selected. This selection method is currently only used by Virginia and South Carolina.

<sup>5</sup> American Judicature Society. *Methods of Judicial Selection: Missouri*.

[http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=MO](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=MO)

states we sampled was obtained from the Judicature Society’s “Judicial Selection in the States” website, which can be found at: <http://www.judicialselection.us/>. Table 1 provides an overview of the selection methods of the states in our sampling.

[Table 1 about here]

Scores for state citizen and State Supreme Court ideology were pulled from Lindquist’s State Politics and the Judiciary data set.<sup>6</sup> Lindquist uses the Berry, Ringquist, Fording and Hanson scores to measure for citizen ideology<sup>7</sup> and the Party-Adjusted Judge Ideology (“PAJID”) scores to measure to the ideology of the State Supreme Court<sup>8</sup>. The Lindquist data was also utilized in order to obtain information regarding the party affiliation of the governors and the control of both houses of the legislatures for each state in each year surveyed. Scores assigned to each state for judicial selection method were also checked against this dataset. While the Lindquist data classifies New York as Non-Partisan, we classify New York as Merit Selection because of our exclusive focus on courts with appellate jurisdiction.<sup>9</sup>

In order to operationalize our definition of judicial independence, we first had to identify what the sincere preferences of the judges on the panel were. In order to do this we used utilized the year each judge in our sample initially came to be bench, we then assigned each judge each judge a score in the following manner: for judges selected in appointive systems, the Berry

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<sup>6</sup> Lindquist, 2007. Available at State Politics and Policy Quarterly website. [http://academic.udayton.edu/SPPQ-TPR/tp\\_r\\_data\\_sets.html](http://academic.udayton.edu/SPPQ-TPR/tp_r_data_sets.html).

<sup>7</sup> Berry, Ringquist, Fording, and Hanson. “Measuring Citizen and Government Ideology in the American States, 1960-93.” *American Journal of Political Science* 42: 327-348. (1998).

<sup>8</sup> Brace, Langer and Gann Hall. “Measuring the Preferences of State Supreme Court Judges.” *Journal of Politics* 62: 387-413. (2000).

<sup>9</sup> The American Judicature Society ([www.judicialselection.us](http://www.judicialselection.us)) classifies New York’s appellate courts as using Merit Selection since 1977. We verified this classification with the National Center for State Courts, and staff at the New York State Assembly.

ideology scores for state political elite were used, and for the states who elect their judge, the Berry scores for citizen ideology were utilized.<sup>10</sup>

To determine the preferences of the political elite in each case at the time the case was decided, the Berry scores for political elite were used. Likewise, the Berry scores for citizen ideology were utilized to gauge citizen preferences.

The distance between each of these factors and the location of the location of the panel of judges in each case was taken in order to calculate the independence of the court in each of these factors of independence. Once this had been done, we were then able to plot the independence of the court in each case. Figure 3 depicts this.

[Figure 3 about here]

For our preliminary study, we perform a variety of descriptive statistics to evaluate the three hypotheses. We also conduct a series of multivariate models, using both logistic regression and multinomial logit, depending on whether or not our dependent variable was either binary or nominal respectively.

[Table 2 about here]

## **RESULTS**

The findings reported here represent a preliminary investigation into the research questions that this work seeks to answer. Future revisions of this paper will include additional variables, which will attempt to control for other possible explanations. Thus, all findings reported here should be approached with caution.

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<sup>10</sup> See Brace, Langer and Gann Hall (2000) for the rationalization behind this.

Table 2 gives an overview of the LGB cases sampled in this study. 116 cases were considered. Seventy percent of all cases were decided in the Intermediary Appellate courts, and 20.7% were opinions taken by Courts of Last Resort. Out of this sampling, 59.5% related to family and child issues, while the remaining 40.5% of all cases dealt with individual rights. 54.3% of all cases reported a decision that was coded as Pro-LGB.

Out of the 92 cases decided in Intermediary Appellate Courts, 84.8% had unanimous opinions. 52.2% of Intermediary Appellate decisions were Pro-LGB. Out of these cases 56.3% dealt with family and child matters and 43.8% with individual rights. About 48 percent of these decisions were not Pro-LGB and out of those 73.5% of the decisions were unanimous.

Within the 24 opinions issued by Courts of Last Resort, 62.5% were Pro-LGB. Of this, 53.3% related to family and child matters and 46.7% to individual rights.

[Table 3 about here]

Table 3 describes the aggregate ideology scores for the States included in this preliminary study. Both the scores for Citizen Ideology and Supreme Court Ideology are on a 0-100 scale with high scores representing increasing liberalism.

Of the states sampled, Massachusetts had the highest average aggregate citizen ideology score (most liberal) of 81.26, followed by New York 66.08, California 51.68, Ohio 48.83, and finally Texas 35.22. Interestingly, the average aggregate supreme court ideology scores follow this same ranking of liberalism with Massachusetts having the highest scores of 69.59, and Texas having the lowest of 33.26.

[Table 4 about here]

Table 4 describes the relationship between the Pro-LGB rulings in our sample and the four selection methods considered. Out of the 63 Pro-LGB decisions, 76.2% of them were decided in states that appoint their judges (this grouping represents 57.83% of all cases), and 23.8% were decided in states using electoral methods of selection (representing 45.5% of all cases).

For the cases decided in appointive systems (California, New York and Massachusetts), 83.3% of them were decided in states using Merit Selection, and 16.7% were decided in states that use Gubernatorial Appointment. Within the states that use Merit Selection (California and New York), 54.8% of cases resulted in a Pro-LGB decision. 46.7% of cases dealing with family and child matters and 67.9% of cases involving individual rights had a Pro-LGB decision. In the one state using a strict form of Gubernatorial Appointment (Massachusetts) 80% of cases resulted in a Pro-LGB decision.<sup>11</sup>

For cases decided in electoral systems, 66.7% were decided in states that use a Non-Partisan ballot and 33.3% were decided in states that utilize a Partisan ballot.<sup>12</sup>

The results shown in Table 4 would seem to support Hypothesis 1 (more “independent” selections mechanisms = pro-LGB decisions). More than 57 percent of cases decided in states utilizing appointive systems were decided in favour of LGB rights as compared to 45.5% of cases decided in states using electoral systems. These results should be viewed with caution due to the small number of cases.<sup>13</sup> A series of logit regressions were run, the only variable found to be statistically significant was judicial independence from political elite.<sup>14</sup>

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<sup>11</sup> Because Massachusetts had only 10 cases during this time period, the results should be interpreted with caution.

<sup>12</sup> The samples for electoral systems are currently too small to make an accurate assessment of their impact.

<sup>13</sup> A future study should account for this and provide that the caseloads of electoral systems are at parity with those of appointive states. Also, future revisions of this study should include measures to control for the urbanization of the districts.

<sup>14</sup> Various predictive probabilities will be conducted in future to explore this question more fully.

The results shown in Table 4 fail to support the third hypothesis (elected judges will rule more favorably in cases involving individuals than cases involving families). In states with electoral systems, 50% of cases relating to marriage and child issues were decided in a Pro-LGB way as compared to only 40% of cases relating to individual rights being decided Pro-LGB.

[Table 5 about here]

Table 5 shows the distribution of cases by state and the party of the governor at the time the decision was issued. Out of the 67 decisions issued under Republican governors, 52.2% were Pro-LGB while the remaining 47.8% were not Pro-LGB. This represents 55.6% of the Pro-LGB decisions, and 60.4% of the not Pro-LGB decisions issued in all states. Of the 49 decisions put forth under Democratic executives, 57.1% were Pro-LGB.

Under Republican governors, Massachusetts had the highest percentage of Pro-LGB decisions with 85.7%, and New York had the lowest with only 25%.<sup>15</sup> Under Democratic administrations, California had the highest percentage of Pro-LGB cases with 80%, followed by Massachusetts and Texas who each had 66.7% Pro-LGB.<sup>16</sup>

Overall the results shown in Table 5 lead us to believe that the second hypothesis is not a viable explanation. With a few exceptions, which can be accounted for, the party of the governor at the time of the decision seems not to be related to the outcome of a case. States such as California seem to issue a high percentage of Pro-LGB regardless of the governor's affiliation, while the reverse appears true in Ohio. The results for New York and Texas seem to support Hypothesis 2 with New York reporting 75% of its opinions under Republican governors as not Pro-LGB and 56.3% of the decisions under Democrats as Pro-LGB. Likewise, Texas decides

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<sup>15</sup> Out of the 44 decisions issued by New York courts, only 12 of them were issued under Republican governors.

<sup>16</sup> Out of the 29 cases decided in California, only 5 were decided under Democratic Governors. In MA and TX out of a total of 10 cases each only 3 cases in each state were decided under Democrats.

57.1% of its decisions under Republicans as not Pro-LGB and 66.7% under Democrats as Pro-LGB.

## **CONCLUSION**

The work that has been presented in the prior pages has hopefully laid a foundation for much future research on the role of the courts in LGBT issues other than marriage. Additionally, the initial results offer preliminary support for Hypothesis 1 (liberal courts with more independent operations will be more likely to rule favorably on LGBT cases). It is interesting to note that of the many tests conducted on our data, the only significant variable was independence from political elite when the panel has a liberal slant, which is not surprising since that implies that liberal courts in liberal states will be more favorable to LGBT rights. While more robust tests of these hypotheses are needed, this paper represents an important progression in our understanding of the role of judicial independence in questions of minority rights.

The implications of such research may also benefit LGBT rights organizations by helping interest groups expend time and resources efficiently and effectively. By understanding the relationship between judicial independence and support for LGBT rights, organizations can strategically target specific jurisdictions that have a high probability of returning a favorable decision.

## Bibliography

Achen, Christopher. "Measuring Representation." *American Journal of Political Science* 22 (1978): 475-510.

Adamany, David, and Philip Dubois. "Electing State Judges." *Wisconsin Law Review*, 1975: (3): 731-779.

American Judicature Society. *Judicial Selection in the States, California*. 2010.  
[http://www.judicialselection.us/judicial\\_selection/index.cfm?state=CA](http://www.judicialselection.us/judicial_selection/index.cfm?state=CA).

—. *Judicial Selection in the States, New York*. 2010.  
[http://www.judicialselection.us/judicial\\_selection/index.cfm?state=NY](http://www.judicialselection.us/judicial_selection/index.cfm?state=NY).

—. *Judicial Selection in the States, Ohio*. 2010.  
[http://www.judicialselection.us/judicial\\_selection/index.cfm?state=OH](http://www.judicialselection.us/judicial_selection/index.cfm?state=OH).

—. *Judicial Selections in the States, Texas*. 2010.  
[http://www.judicialselection.us/judicial\\_selection/index.cfm?state=TX](http://www.judicialselection.us/judicial_selection/index.cfm?state=TX).

Andersen, Ellen Ann. *Out of the Closet and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor: University of Michigan Press, 2005.

Aspin, Larry, and William Hall. "The Friends and Neighbors Effect in Judicial Retention Elections." *Western Political Quarterly*, no. 40 (December 1987): 703-715.

Association, American Bar. *Report and Recommendations of the Task Force on Lawyers' Political Contributions: Part II*. Chicago: American Bar Association, 1998.

Bamforth, Nicholas. *Gay Politics: Identity and Economics in the Urban Setting*. New York: Columbia University Press, 1997.

Barclat, Scott. "In Search of Judicial Activism." *Perspectives on Politics*, no. 8 (2010).

Baum, Lawrence. "Explaining the Vote in Judicial Elections: The 1984 Ohio Supreme Court Elections." *Western Political Quarterly*, no. 40 (June 1987): 361-371.

Baum, Lawrence. "The Electoral Fates of Incumbent Judges in the Ohio Court of Common Plea." *Judicature*, no. 66 (April 1983): 42-50.

Baum, Lawrence. *The Puzzle of Judicial Behavior*. Ann Arbor: The University of Michigan Press, 1997.

Beechen, Paul. "Can Judicial Elections Express the People's Choice?" *Judicature*, no. 57 (January 1974): 242-246.

Benesh, Sara. "Understanding Public Confidence in American Courts." *Journal of Politics*, no. 68 (August 2006): 697-707.

Blasius, Mark. *Sexual Identities, Queer Politics*. Princeton: Princeton University Press, 2001.

Bonneau, Chris. "Campaign Fundraising in State Supreme Court Elections." *Social Science Quarterly*, no. 88 (March 2007): 68-85.

—. "Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections." *American Politics Research*, no. 33 (November 2005): 818-841.

—. "Patterns of Campaign Spending and Electoral Compensation in State Supreme Court Elections." *Justice System Journal*, no. 25 (2004): 21-38.

—. "The Composition of State Supreme Courts." *Judicature*, no. 85 (July-August 2001): 26-31.

—. "The Effects of Campaign Spending in State Supreme Court Elections." *Political Research Quarterly*, no. 60 (September 2007): 489-499.

—. "What Price Justice(s)? Campaign Spending and Electoral Compensation in State Supreme Court Elections." *State Politics and Policy Quarterly*, Summer 2005: 107-125.

Bonneau, Chris, and Gann Hall Melinda. *In Defense of Judicial Elections*. New York: Routledge, 2009.

—. "Predicting Challengers in State Supreme Court Elections: Context and the Politics on Institutional Design." *Political Research Quarterly*, no. 56 (September 2003): 337-349.

—. "'Haves' Versus 'Have Nots' in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases." *Law and Society Review*, no. 35 (2001): 393-417.

—. "Studying Courts Comparatively: The View from the American States." *Journal of Politics*, no. 48 (March 1993): 914-935.

—. "The Interplay of Preferences, Case Facts, Context, and Structure in the Politics of Judicial Choice." *Journal of Politics*, no. 59 (November 1997): 1206-1231.

Brace, Paul, Melinda Gann Hall, and Laura Langer. "Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts." *Albany Law Review*, no. 62 (April 1999): 1265-1303.

Brace, Paul, Melinda Gann Hall, and Laura Langer. "Placing state Supreme Courts in State Politics." *State Politics and Policy Quarterly*, Spring 2001: 81-108.

Brace, Paul, and Brent Boyea. "Judicial Impartiality and the Practice of Electing Judges: The Case of the State Supreme Courts." *2004 American Political Science Association*. Chicago, 2004.

Brennan, Jr., William. "State Constitutions and the Protection of Individual Rights." *Harvard Law Review*, 459 1977.

Brigham, John. *The Constitution of Interest: Beyond the Politics of Rights*. New York: New York University Press, 2000.

Burbank, Stephen, and Barry Friedman. *Judicial Independence at a Crossroads: An Interdisciplinary Approach*. Thousand Oaks: Sage, 2002.

Cain, Patricia. *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Rights Movement*. Boulder: Westview Press, 2000.

Caldarone, Richard, Brandice Canes-Wrone, and Tom Clark. "Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions." *Journal of Politics* 93, no. 560-573 (2009).

Canaday, Margot. *The Straight State: Sexuality and Citizenship in the Twentieth Century America*. Princeton: Princeton University Press, 2009.

Cann, Damon. "Campaign Contributions and Judicial Behavior." *American Review of Politics*, no. 23 (Fall 2002): 261-274.

Cann, Damon. "Justice For Sale? Campaign Contributions and Judicial Decision making." *State Politics and Policy Quarterly*, no. 7 (Fall 2007): 281-297.

Cann, Damon, and Jeff Yates. "Homegrown institutional Legitimacy: assessing Citizens' Diffuse Support for State Courts." *American Politics Research*, no. 36 (March 2008): 297-329.

Champagne, Anthony. "The Politics of Judicial Selection." *Policy Studies Journal*, no. 31 (August 2003): 413-419.

Champagne, Anthony, and Judith Haydel. *Judicial Reform in the States*. Lanham: University Press of America, 1993.

Chayes, Abram. "The Role of Judges in Public Law Litigation." *Harvard Law Review*, 1976: 1308.

Currah, Paisley, and Lisa Jean Moore. "'We Won't Know Who You Are': Contesting Sex Designations in New York City Birth Certificates." *Hypathia*, no. 24 (2009): 113-135.

Czarnezki, Jason. "A Call for Change: Improving Judicial Selection Methods." *Marquette Law Review*, no. 89 (Fall 2005): 169-178.

- Dahl, Robert. "Decision-Making in a Democracy: The Supreme Court as a National Policymaker Maker." *Journal of Public Law*, 1957: 279-295.
- Dimino, Michael. "The Futile Quest for a System of Judicial 'Merit' Selection." *Albany Law Review*, no. 67 (Spring 2004): 803-819.
- Dimino, Michael. "The Worst Way of Selecting Judges - Except All the Others that Have Been Tried." *Northern Kentucky Law Review*, no. 32 (2005): 267-304.
- Dorris, John. "Antidiscrimination Laws in Local Government: A Public Policy Analysis of Municipal Lesbian and Gay Public Employment Protection." In *Public Policy, Public Opinion, and Political Representation*, by Ellen Riggle and Barry Tadlock. New York: Columbia University Press, 1999.
- Dubois, Philip. *From Ballot to Bench: Judicial Elections and the Quest for Accountability*. Austin: University of Texas Press, 1980.
- Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge: Harvard University Press, 1996.
- Epstein, Lee, and Joseph Kobylka. *The Supreme Court and Legal Change: Abortion and the Death Penalty*. Chapel Hill: University of North Carolina Press, 1992.
- Eskridge, Jr., William, and Nan Hunter. *Sexuality, Gender, and the Law*. New York: Foundation Press, 2004.
- . *Sexuality, Gender, and the Law: 2007 Supplement*. New York: Foundation Press, 2007.
- Feeley, Malcolm, and Edward Rubin. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. New York: Cambridge University Press, 1988.
- Ferejohn, John, and Charles Shipan. "Congressional Influence on Bureaucracy." *Journal of Law, Economics, and Organizations* 6 (1990): 1-21.
- Friedman, Lawrence. *History of American Law*. New York: Simon and Schuster, 1985.
- Gerstmann, Evan. *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection*. Chicago: University of Chicago Press, 1999.
- Geyh, Charles Gardener. "Publicly Funded Judicial Elections: An Overview." *Loyola of Los Angeles Law Review*, no. 34 (June 2001): 1467-1487.
- Geyh, Charles Gardener. "Why Judicial Elections Stink." *Ohio State Law Journal*, no. 64 (2003): 43-79.

- Glick, Henry, and Craig Emmert. "Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges." *Judicature*, no. 70 (December-January 1987): 228-235.
- Goldberh, Deborah, Sarah Samis, Edwin Bender, and Rachel Weiss. *The New Politics of Judicial Elections*. Washington, DC: Justice at Stake Campaign, 2005.
- Hall, Kermit, and Kevin McGuire. *The Judicial Branch*. Oxford: Oxford University Press, 2005.
- Hall, Melinda Gann. "Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study." *Journal of Politics*, no. 49 (November 1987): 1117-1124.
- Hall, Melinda Gann. "Electoral Politics and Strategic Voting in State Supreme Courts." *Journal of Politics*, no. 54 (May 1992): 427-446.
- Hall, Melinda Gann. "Justices as Representatives: Electoral Politics and Strategic Voting in State Supreme Courts." *American Politics Quarterly*, no. 23 (October 1995): 485-503.
- Hall, Melinda Gann. "State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform." *American Political Science Review*, no. 95 (June 2001): 325-330.
- Hall, Melinda Gann. "Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives." *Journal of Politics*, no. 69 (November 2007): 1147-1159.
- Hall, Melinda Gann, and Chris Bonneau. "Does Quality Matter? Challengers in State Supreme Court elections." *American Journal of Political Science*, no. 50 (January 2006): 20-33.
- Hall, Melinda Gann, and Chris Bonneau. "Mobilizing Interest: The Effects of Money on Citizen Participation in state Supreme Court Elections." *American Journal of Political Science*, no. 52 (July 2008): 457-470.
- Hall, William, and Larry Aspin. "The Roll-Off Effect in Judicial Retention Elections." *Social Science Journal*, 1987: 415-427.
- Hall, William, and Larry Aspin. "What twenty Years of Judicial Retention Elections Have Told Us." *Judicature*, no. 70 (April-May 1987): 340-347.
- Hellman, Arthur. *Restructuring Justice*. Ithaca: Cornell University Press, 1990.
- Hojnacki, Marie, and Lawrence Baum. "'New Style' Judicial Campaigns and Voters: Economic Issues and Union Members in Ohio." *Western Political Quarterly*, no. 45 (December 1992): 921-948.
- Hubber, Gregory, and Sanford Gordon. "Accountability and Coercion: Is Justice Blind When It Runs for Office?" *American Journal of Political Science* 48 (2004): 247-263.

Jackson, Donald, and Jr., James Riddlesperger. "Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court." *Judicature*, no. 74 (December-January 1991): 184-189.

Kane, Melinda. "Social Movement Policy Success: Decriminalizing State Sodomy Laws 1969-1998." *Mobilization: The International Journal of Research in Social Movements, Protest, and Contentious Politics* 8 (2003): 313-334.

Keck, Thomas. "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights." *Law and Society Review*, no. 43 (2009): 151-185.

Langer, Laura. *Judicial Review in State Supreme Courts: A Comparative Study*. Albany: SUNY Press, 2002.

Lax, Jeffrey, and Justin Phillips. "Gay Rights in the States: Public Opinion and Policy Responsiveness." *American Political Science Review* 103 (2009): 2009.

—. "Institutions and Representation: Policy Responsiveness in the U.S. States." *2009 State Politics and Policy Conference*. Chapel Hill, 2009.

Lax, Jeffrey, and Phillips. "How Should We Estimate Public Opinion in the States?" *American Journal of Political Science* 53 (2009): 107-121.

Lindgren, Ralph, Nadine Taub, Beth Ann Wolfson, and Carla Palumbo. *The Law of Sex Discrimination*. 3rd. Belmont: Thomas Wadsworth, 2005.

Markey, Karen. "An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families." *New York Law School Journal of Human Rights* 14 (1998): 721.

Marshall, Ann-Maria, and Scott Barclay. *Queer Mobilizations: LGBT Activist Confront the Law*. New York: New York University Press, 2009.

Melnick, R. Shep. *Between the Lines: Interpreting Welfare Rights*. Washington: Brookings, 1994.

Mezey, Susan Gluck. *Gay Families and the Courts: The Quest for Equal Rights*. Lanham: Rowman & Littlefield Publishers, Inc., 2009.

Mezey, Susan Gluck. "Judicial Interpretation of Legislative Intent: The Role of the Supreme Court in the Implication of Private Rights of Action." *Rutgers Law Review*, 1983: 36: 53-89.

—. *Queers in Court: Gay Rights Law and Public Policy*. Lanham, Md.: Rowman & Littlefield Publishers, Inc., 2007.

Murphy, Walter, Herman Pritchett, Lee Epstein, and Jack Knight. *Courts, Judges, & Politics: An Introduction to the Judicial Process*. 6th. Boston: McGraw Hill, 2006.

National Center for State Courts. *Call to Action: Statements of the National Summit on Improving Judicial Selections*. Williamsburg: National Center for State Courts, 2002.

Norrander, Barbara. "Choosing Among Indicators of State Public Opinion." *State Politics and Policy Quarterly* 7 (2007): 111.

Norrander, Barbara. "Measuring State Public Opinion with the Senate National Elections Study." *State Politics and Policy Quarterly* 1 (2001): 111-125.

O'Brien, David. *Judges on Judging: Views from the Bench*. Chatham: Chatham House Publishers, Inc., 1997.

Perry, Michael. *The Constitution, the Courts, and Human Rights*. New Haven: Yale University Press, 1982.

Pierceson, Jason. *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada*. Philadelphia: Temple University Press, 2005.

Pinello, Daniel. *Gay Rights and American Law*. Cambridge: Cambridge University Press, 2003.

Pinello, Daniel. "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis." *Justice Systems Journal* 20 (1999): 219.

—. *The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy*. Westport: Greenwood Press, 1995.

Prillaman, William. *The Judiciary and Democratic Devay in Latin America: declining confidence in the rule of law*. New York: Greenwood Publishing Group, 2000.

Richards, David. *The Case for Gay Rightys: From Bowers to Lawrece and Beyond*. Lawrence: Univeristy Press of Kansas, 2005.

Rimmerman, Craig. *The Lesbian and Gay Movement: Assimilation of Liberation?* Boulder: Westview Press, 2008.

Rimmerman, Craig, Kenneth Wald, and Clyde Wilcox. *The Politics of Gay Rights*. Chicago: The University of Chicago Press, 2000.

Rosenberg, Gerald. *The Hollow Hope: Can Courts Bring About Social Change*. Chicago: University of Chicago Press, 1991.

Rubenstein, William. *Cases and Materials on Sexual Orientation and the Law*. 2nd. St. Paul: West, 1997.

Schaffner, Brain, Matthew Streb, and Gerald Wright. "Teams without Uniforms: The Nonpartisan Ballot in State and Local Elections." *Political Research Quarterly*, no. 54 (March 2001): 7-30.

Scheingold, Stuart. *The Politics of Rights: Lawyers, Public Policy and Political Change*. 2nd. Ann Arbor: University of Michigan Press, 2004.

Sheldon, Charles, and Linda Maule. *Choosing Justice: The Recruitment of State and Federal Judges*. Pullman: Washington State University Press, 1997.

Smith, Anna Marie. "Reproductive Technology, Family Law, and hte Postwelfare State: The California Same-Sex Parents' Rights 'Victories' of 2005." *Signs: Journal of Women in Culture and Society*, no. 34 (2009): 827-850.

Starr, Karla. "Adoption by Homosexuals: A Look at Differing State Court Opinions." *Arizona Law Review* 40 (1998): 1497.

Stephenson, Matthew. "When the Devil Turns...': The Political Foundations of Independent Judicial Review." *Journal of Legal Studies*, no. 32 (January 2003).

Streb, Matthew. *Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections*. New York: New York University Press, 2007.

Stychin, Carl. *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights*. Philadelphia: Temple University Press, 1998.

Thielemann, Gregory. "Local Advantages in Campaign Financing: Friends, Neighborhoods, and Their Money in Texas Supreme Court Elections." *Journal of Politics*, no. 55 (May 1993): 472-478.

Watson, Richard, and Rondal Downing. *The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan*. New York: John Wiley and Sons, Inc., 1969.

FIGURE 1

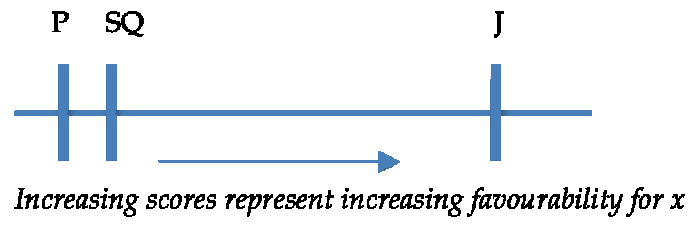
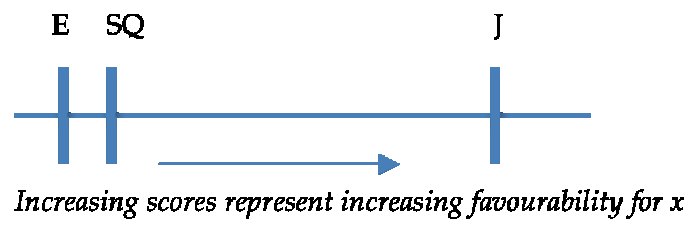


FIGURE 2



**FIGURE 3**



*Increasing scores represent increasing independence in case  $x$ , score does not reflect favourability of  $x$ , rather the independence of the court to rule sincerely.*

**TABLE 1: Selection Methods in the States**

	<b>Selection Method</b>	<b>Notes</b>
California	Merit Selection	<i>Though the Governor of CA can appoint judges without the input or approval of an independent nominating commission, judges must face the voters in retention elections.</i>
Massachusetts	Gubernatorial Appointment	
New York	Merit Selection	<i>Judges in the appellate courts of New York have been selected by Merit Selection since 1977. Judges on the trial courts (called “Supreme Courts”) are selected in partisan elections. New York has a hybrid court system with two intermediate appellate courts: The Appellate Division and the Appellate Term. Both courts are selected using merit selection and were used in this study.</i>
Ohio	Non-Partisan Elections	<i>Candidates are initially selected in partisan primaries. Winners of the primaries run on a non-partisan general election ballot.</i>
Texas	Partisan Elections	

**TABLE 2: Characteristics of LGB Cases in Sample (1980-2000)**

<b><u>Type of Court</u></b>	<b><u>Percent (number)</u></b>
Intermediary	79.31 (92)
Last Resort	20.69 (24)
All cases	100 (116)
<b><u>Primary Issue in Case</u></b>	
Family	59.48 (69)
Individual	40.52 (47)
<b><u>Pro-LGB decisions</u></b>	54.31 (63)
<b><u>Intermediary Courts</u></b>	
Unanimous Opinion	84.78 (78)
Pro-LGB Decision	
<i>Family</i>	56.25 (27)
<i>Individual</i>	43.75 (21)
<i>Unanimous Opinion</i>	87.5 (42)
<b><u>Courts of Last Resort</u></b>	
Pro-LGB Decision	
<i>Family</i>	53.33 (8)
<i>Individual</i>	46.67 (7)

**TABLE 3: AGGREGATE IDEOLOGY SCORES FOR STATES SAMPLED**

	<b>Mean</b>	<b>Median</b>	<b>Mode</b>	<b>Standard Deviation</b>
<b>California</b>				
Citizen Ideology	51.68	51.11	--	3.07
Supreme Court Ideology	49.67	42.18	33.59	17.98
<b>Massachusetts</b>				
Citizen Ideology	81.26	82.39	--	7.81
Supreme Court Ideology	69.59	76.58	76.58	11.14
<b>New York</b>				
Citizen Ideology	66.08	66.62	--	5.06
Supreme Court Ideology	55.6	57.45	50.61	3.3
<b>Ohio</b>				
Citizen Ideology	48.83	49.22	--	3.92
Supreme Court Ideology	40.18	37.61	37.59	5.62
<b>Texas</b>				
Citizen Ideology	35.22	35.36	--	4.97
Supreme Court Ideology	33.26	35.27	34.17	5.27

**NOTES:** “Citizen Ideology” scores represent the Berry et al. (1998) citizen ideology measure. The variable is measured on a 0-100 scale with higher scores indicating increasing liberalism. Scores pulled from Lindquist “State Politics and the Judiciary” data set. “Supreme Court Ideology” scores represent the average ideology measured with the Party-Adjusted Judge Ideology (“PAJID”) scores (Brace, Langer, and Hall 2000). The variable is on a 0-100 scale with higher numbers representing increasing liberalism. Scores pulled from Lindquist “State Politics and the Judiciary” data set.

**TABLE 4: DATA BY SELECTION METHOD**

	<b>Family- Pro</b>	<b>Individual- Pro</b>	<b>Total Pro</b>
<b>Appointment</b>	50.98 (26)	68.75 (22)	57.83 (48)
<i>Merit</i>	46.66 (21)	67.86 (19)	54.79 (40)
<i>Gubernatorial</i>	83.33 (5)	75 (3)	80 (8)
<b>Elections</b>	50 (9)	40 (6)	45.45 (15)
<i>Non-Partisan</i>	42.86 (6)	44.44 (4)	43.48 (10)
<i>Partisan</i>	75 (3)	33.3 (2)	50 (5)
<b>TOTAL</b>	<b>50.72 (35)</b>	<b>59.57 (28)</b>	<b>54.31 (63)</b>

**Note:** Caution should be used in drawing conclusions from the partisan elections and gubernatorial appointment results because of the small number of observations.

**TABLE 5: PRO-LGB RULINGS,  
BY PARTISAN AFFILIATION OF GOVERNOR AT TIME OF DECISION**

	<u>Republican Governor</u>		<u>Democratic Governor</u>		<b>Total Pro-LGB</b>
	<b>Pro-LGB</b>	<b>Anti-LGB</b>	<b>Pro-LGB</b>	<b>Anti-LGB</b>	
California	62.5 (15)	37.5 (9)	80 (4)	20 (1)	65.52 (19)
Massachusetts	85.7 (6)	14.3 (1)	66.7 (2)	33.3 (1)	80 (8)
New York	25 (3)	75 (9)	56.3 (18)	43.8 (14)	47.73 (21)
Ohio	47.1 (8)	52.9 (9)	33.3 (2)	66.7 (4)	43.48 (10)
Texas	42.9 (3)	57.1 (4)	66.7 (2)	33.3 (1)	50 (5)
All Partisan	52.24 (35)	47.76 (32)	57.14 (28)	42.86 (21)	
<b>TOTAL</b>	<b>55.56 (35)</b>	<b>60.38 (32)</b>	<b>44.44 (28)</b>	<b>39.62 (21)</b>	<b>54.31 (63)</b>