

# A Quick History Lesson

The courts have a long history  
of keeping our democracy fair!

Here's how they started:

## THE FRAMERS

The Framers of the U.S. Constitution intentionally set up a three-branch, co-equal system of government. Each branch (the executive, the legislative, and the judicial) has separate duties, and all have the ability to “check” each other. This model has served us well for hundreds of years and is used as a model for fledgling democracies across the world.

Early on, Chief Justice John Marshall wrote that the Supreme Court had been charged with the duty of balancing acts of Congress against the Constitution. This judicial power, which he wrote about in *Marbury v. Madison*, is called “judicial review” and is understood to give the Court the ability to invalidate acts of Congress if such acts were found to be unconstitutional. This laid the foundation for future groundbreaking cases like *Brown v. Board of Education*, *Loving v. Virginia* and *Lawrence v. Texas*, just to name a few.

*It is emphatically the province and  
duty of the Judicial department  
to say what the law is.*

## Marbury v. Madison



Our Constitution establishes the federal judiciary, whose judges are nominated by the president, confirmed by the U.S. Senate and fulfill lifetime appointments. Similar to the federal system, states created systems of their own with trial, appellate and high courts. State and local judges, unlike federal ones, are often elected officials — which means they could be subject to influence by the same political factors that influence our legislators. Some state court judges have campaigns, just like our representatives — and just like our representatives, they need money for those campaigns. An elected judiciary opens the judicial system to attacks, and leaves judges vulnerable to political influences that are barriers to a fair and impartial judiciary.

## Under Attack!

*The courts are frequently coming under attack from legislators and executives in all levels of government. Limiting the courts' jurisdiction and size are threats legislators and interest groups may use to gain leverage against the impartiality of the courts. Should a large group of people be able to pass an amendment that denies equal access to marriage or pass a law that criminalizes being gay, for example? The answers to these questions illustrate why it is so important that we have Everyday Advocates who fight for fair and impartial courts. Fair courts help ensure a fair democracy for all.*



**What are checks and balances?** In the federal system of government, each branch of government (legislative, executive and judicial) has some form of control over each of the other branches. The interactions based upon these overlapping responsibilities form the system of “checks and balances” creating “co-equal” branches of government that prevent any one branch of government from dominating the others. State governments also operate on a system of checks and balances with responsibilities and “checks” similar to the federal system.

**What is judicial activism?** A term sometimes used when people charge that a judge has overstepped the judicial role by “making the law” based on the judge’s policy preferences. The term is often used to attack a judge when someone simply disagrees with the judge’s decision, particularly with regard to civil rights.

**Why do fair and impartial courts matter to LGBT communities?** LGBT people and other minorities are often marginalized and disempowered and, therefore, must rely on the courts for fair treatment and protection. Courts are often the last resort, so it is imperative that the judicial system be accountable to the law and state and federal constitutions — not to politicians who often feel compelled to side with majority will. Courts must be free to uphold constitutional principles of equality for LGBT people without bowing to the will of the majority.

**Shouldn’t a judge make rulings that the majority of the people agree with?** Not necessarily. In order to ensure that the courts remain a place where all people receive fair treatment, courts must make decisions based upon the law and constitution, even if they are not necessarily popular rulings. It is the court’s job to uphold the federal and state constitutions and other laws while remaining free from any outside influences, including popular opinion.

## frequently

## asked questions

An independent judiciary is charged with defending our constitutional democracy.

Becoming an advocate for fair courts should include understanding the very basics of American government, especially how the judiciary operates in our political process. At its core, the American constitutional system is one which protects basic individual rights. Here are some questions that will help you to become informed.

**Are fair courts a partisan issue?** Both major political parties understand the importance of fair and impartial courts. However, as courts around the nation take steps to promote civil rights, whether it be by decriminalizing gay sexual conduct or recognizing the freedom to marry for same-sex couples, social conservatives aggressively pursue nominations and elections of judges who they think will back their political and ideological beliefs rather than focus on the judges’ ability to render fair and impartial decisions.

**What can be done?** As a supporter of LGBT rights, become invested in the future of fair courts. Realize that you have the opportunity to help maintain an equitable system. By taking an active interest and researching the judges up for election or appointment in your area, you can become an invaluable resource in supporting fair and impartial judges. You can inform your community about possible threats to the judiciary by writing letters to local newspapers. And by contacting your elected representatives, you can demand that they appoint only those judges who have a record of making unbiased decisions.

**“Our responsibility . . . is to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time.”**  
Iowa Supreme Court Justice Cady, in the *Varnum v. Brien* decision where the Iowa Supreme Court upheld marriage rights for same-sex couples

**What is judicial independence?** Judicial independence is the concept that the judiciary exists and acts without any undue influence from other governmental branches or outside interests. Judicial independence is essential to maintaining fair and impartial courts. Ideally, fair and impartial courts make unbiased decisions based upon the facts and the laws relevant to each case and without outside influences. Fair and impartial courts are an essential part of the “checks and balances” system of government that has worked well for hundreds of years.

As U.S. Supreme Court Chief Justice Rehnquist once said: **“The Constitution protects judicial independence not to benefit judges, but to promote the rule of law: Judges are expected to administer the law fairly, without regard to public reaction.”**

**How do I stay informed?** Consulting the online resources in this toolkit and staying current with the news are two of the best ways to stay informed. The law is constantly changing. As an active supporter of LGBT rights, try to take some time out of your day or week to learn about these changes. You can also sign up for email updates, such as Lambda Legal’s eNews <http://www.lambdalegal.org/news/online-newsletters/enews/>

**What threatens LGBT access to the courts?** With an increase in public support for LGBT rights—like workplace protections, hate crime laws and marriage-equality measures—comes an increase in the efforts of antigay organizations to block or reverse this progress.

Threats to judges over their decisions are a threat to everyone’s access to justice. When politicians and extremist organizations make such threats, they are trying to weaken the courts and our system of checks and balances, thereby weakening everyone’s rights.

Powerful activists continue to push for constitutional amendments that would effectively eliminate the judiciary’s role in upholding individual rights. Altering federal or state constitutions would remove some of the last opportunities for LGBT persons to redress discrimination they face.