

JUSTICE OUT OF BALANCE

How the Election
of Judges and the
Stunning Lack of
Diversity on State
Courts Threaten
LGBT Rights

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An Empirical Examination of Support for LGBT Rights
Claims in State High Courts, 2003-2015

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I. INTRODUCTION: JUSTICE OUT OF BALANCE

In court, everyone should be treated with dignity and respect and our rights should be protected. Yet far too often, implicit bias, ideological factors and outside influences seep into the courtroom, tainting the judicial decision-making process and damaging public confidence in the courts.

The consequences are real. A recent community survey by Lambda Legal, the U.S.'s oldest and largest legal defense organization for LGBT people and people living with HIV, revealed a significant lack of trust in the courts among LGBT and respondents with HIV.¹ When it comes to courts, win or lose, LGBT people need to know that there isn't a thumb on the scales and that we haven't been shut out of the process.

The explosion in judicial campaign spending is affecting the impartiality of our courts. The most comprehensive empirical studies available show that the flood of money in judicial elections causes judges to issue more pro-business rulings,² send more people to jail,³ and sentence more people to death.⁴

Now research commissioned by Lambda Legal shows that state high courts with elected judges are less supportive of LGBT rights claims. The results suggest that this lack of support for LGBT rights [among state high courts with elected judges](#) can be attributed to ideological factors playing a larger role in shaping judges' decisions in these courts.⁵ Growing evidence indicates that state judges who face election, often in increasingly expensive races, can cede justice to politics. [Clearly, the scales of justice are out of balance.](#)

This power imbalance is exacerbated by the serious lack of judicial diversity in our nation's courts. While the U.S. is more diverse than ever, its state judiciaries are not. This is particularly true for state appellate courts, where white males are overrepresented by nearly double their proportion of the nation's population.⁶ For our state courts to render fair decisions and to be seen as legitimate, they must reflect the rich diversity of the communities they seek to serve. [Something has to be done to restore public trust and basic fairness in our courts.](#)

Too little attention is paid to the selection and retention methods, judicial ethics rules and campaign regulations that are supposed to ensure that the judges who serve us are qualified, fair and impartial. Meanwhile far-right groups and powerful special interests *have* been paying attention and are working to game the system by stacking state courts with judges who will rule in accordance with their agendas.

Lambda Legal's [Fair Courts Project](#) works to advance an independent, diverse and well-respected judiciary that upholds the constitutional and other legal rights of LGBT people and people living with HIV. It is Lambda Legal's hope that this resource will support additional research, advocacy, litigation and policy efforts. We need to strengthen fair and impartial state courts and ensure equal access to justice for *everyone*.

II. STUDY: HOW JUDICIAL SELECTION IMPACTS LGBT RIGHTS DECISIONS

The U.S. Supreme Court hears oral argument in fewer than 85 cases each year.⁷ State courts, in contrast, handle more than 100 million cases annually, including 2,000 constitutional law cases decided by state supreme courts.⁸ Nevertheless, the vast majority of research, scholarship and media attention are devoted to the U.S. Supreme Court and the lower federal courts. As a result many advocates fail to appreciate how fair and impartial *state courts* play a crucial role in upholding the rights of LGBT people and other vulnerable groups.

Unlike the federal system, where judges are nominated by the President, confirmed by the Senate and serve for life, judicial selection at the state level varies widely. While some state court judges are appointed, most are elected and stand for re-election, where they are increasingly susceptible to political pressure and special interest money. In recent years, academics and advocacy organizations have begun to examine how these various state judicial selection methods may threaten the impartiality of courts and cause judges to issue decisions favoring certain litigants.⁹

What effect, if any, do these different state judicial selection methods have in shaping outcomes in cases dealing with LGBT rights? If we want state courts to treat LGBT people and people living with HIV fairly, then we have to understand how various judicial selection methods may influence a judge's ability to uphold LGBT rights.



Tyron Garner and John Lawrence, plaintiffs in *Lawrence v. Texas*, celebrate their victory on June 27, 2003.



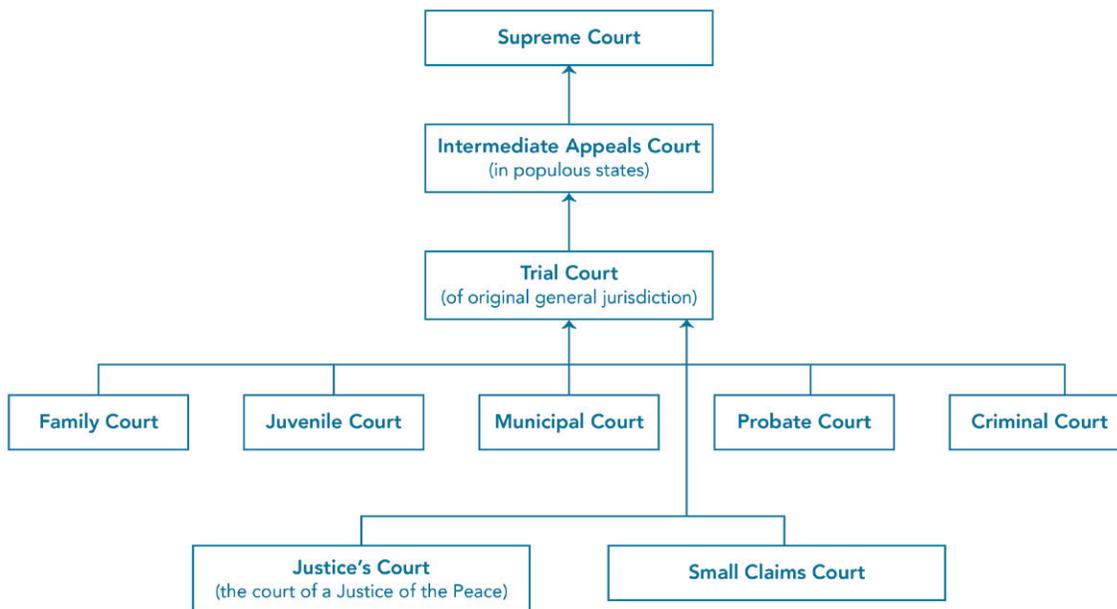
Lambda Legal Senior Counsel and National Director of Constitutional Litigation Susan Sommer and Lambda Legal then-Executive Director Kevin Cathcart, with Nicole and Pam Yorksmith and their children standing in front of the U.S. Supreme Court on decision day, June 26, 2015.

To examine the implications of judicial independence for state courts' treatment of LGBT claims, we collected data on all cases involving LGBT issues decided by state high courts starting in 2003, after the U.S. Supreme Court handed down its ruling in *Lawrence v. Texas*, through 2015. The majority of these cases were constitutional challenges to statutes which barred legal recognition of the relationships of same-sex couples as well as other family law issues which affected same-sex couples, including second-parent adoptions. The cases studied also included litigation by transgender plaintiffs challenging restroom restrictions or issues related to gender on driver's licenses. Other cases included challenges to ballot language concerning anti-LGBT referenda and disciplinary action against attorneys who were alleged to hold anti-LGBT attitudes.

The study's two key principle findings:

1. State high courts whose judges stand for election are less supportive of LGBT rights claims.
2. Results suggest that lack of support for LGBT rights among state high courts with elected judges can be attributed to ideological factors playing a larger role in shaping judges' decisions on these courts.

A Typical State Court System



III. STATE COURTS 101: STRUCTURE AND SELECTION

A. How State Courts Are Structured

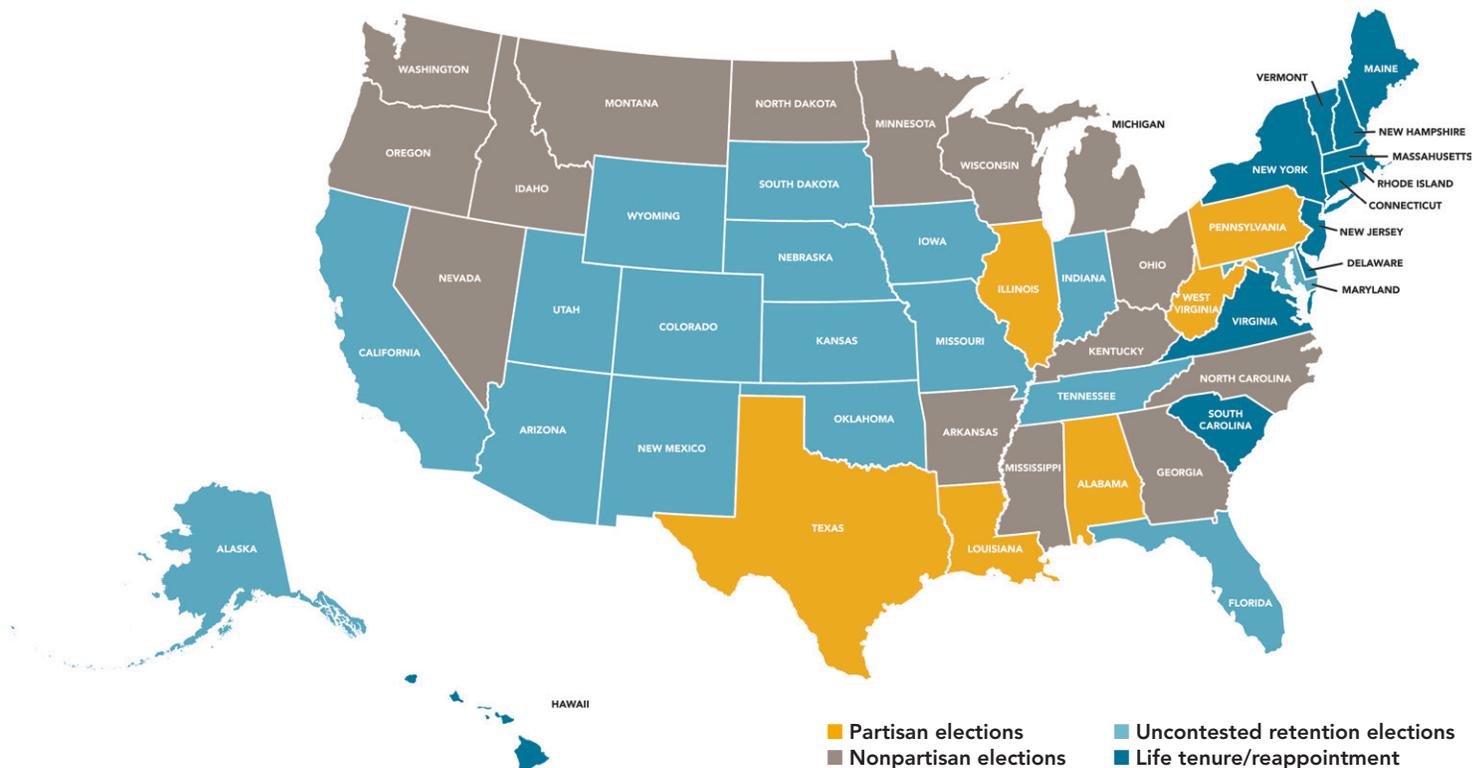
Each state's constitution and laws establish its state courts, which hear all cases not specifically designated for federal courts. Just as federal courts interpret federal laws, state courts interpret state laws. While names and structure of state court systems vary from state to state, there are similarities. Trial courts are generally where cases start. There are two types of trial courts: criminal and civil; although the procedures are different, the structure is generally the same. Appellate courts are intermediate courts that review decisions of the trial courts at the request of the parties. Finally, the high court, typically the state supreme court, hears appeals from the appellate courts. State high courts usually have the final word on important questions of state law.

B. How State High Court Judges Are Selected

State high court judges may be elected or appointed. **Elected judges** face voters in three ways: **partisan elections**, where candidates have party labels; **nonpartisan elections**; and up-or-down **retention elections**, in which only the incumbent is on the ballot and voters decide whether to grant another term. The primary model for **appointing high court justices** involves bipartisan nominating commissions, which submit slates of potential nominees to state governors, who in turn choose from such lists. This system is known by many as "**merit selection.**" The methods include **gubernatorial appointment** where the governor makes the selection without the assistance of a commission and **legislative appointment** where judges are selected strictly by a vote of the state legislature.

In the selection of judges on their highest courts, 6 states use partisan elections and 15 states use nonpartisan elections.¹⁰ In 29 states, the governor or legislature initially appoints judges to the highest court.

Once judges are on the bench, states also vary in how they retain their high court justices. Twenty states use contested partisan or nonpartisan elections. Eighteen states hold up-or-down retention elections, where incumbent judges run unopposed. Between contested elections and retention races, 38 states place high court judges' names on the ballot for voters. The remaining states rely on reappointment or grant justices permanent tenure.



IV. STATE COURTS AND THE RIGHTS OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV

The courts of all 50 states and the U.S. territories have broad authority to uphold or restrict the rights of LGBT people and people living with HIV. In addition to interpreting the meaning of state laws and constitutional provisions that have tremendous consequences for individual rights, state courts handle more than 95 percent of all judicial business that most directly impacts people’s lives—including nearly all family cases and criminal matters.¹¹

The stakes are high for everyone. Despite remarkable legal, political and social advances, LGBT people and people living with HIV still face significant challenges—including ongoing [employment](#) discrimination, unfair state [parenting](#) laws, unequal [health care](#) access and abuses by law enforcement in the [criminal legal](#) system. Members of the LGBT community often face multiple and intersecting forms of discrimination based on not only their sexual orientation, gender identity or HIV status, but also race, national origin, socioeconomic disadvantage or immigration status. Many members of our community look to our state courts and the 30,000 state court judges to administer justice.

A. The Freedom to Marry Began with State Courts

Until the U.S. Supreme Court struck down all remaining marriage bans in *Obergefell v Hodges*, state courts played a critical role in the fight for the freedom to marry. At the beginning, state supreme courts outpaced federal courts and legislatures in affirming the rights of same-sex couples to marry. The first rulings in favor of the freedom to marry in Massachusetts, California, Connecticut and Iowa were all issued by state courts interpreting state constitutional guarantees.¹²

The justices on state high courts that ruled in favor of the freedom to marry have something in common: They were all appointed.¹³ The fact that the justices did not have to face the voters in direct contested elections, afforded these high courts the independence required to impartially evaluate the merits of these case. Unfortunately, judicial retention elections left some judges vulnerable to backlash.

One of the early victories in the fight for equal marriage rights came from the Iowa Supreme Court, where the justices, who were appointees of both Republican and Democratic governors, looked at the law and the facts presented and ruled that Iowa's marriage ban was at odds with the guarantee of Equal Protection in Iowa's Constitution.¹⁴ However, Iowa justices have to stand for retention elections. In the year following Iowa's marriage decision, antigay groups, including the National Organization for Marriage and the American Family Association, poured nearly \$1 million dollars into a campaign which resulted in the ousting of three justices as punishment for the marriage ruling, which was unanimous.¹⁵ The anti-retention effort urged Iowa voters to throw out "activist judges" for doing the very thing that judges are supposed to do: decide tough cases and uphold constitutional rights even if those decisions may not be politically popular.



Plaintiffs in Lambda Legal's Iowa marriage case, from the left, Trish Varnum, Kate Varnum, Jason Morgan and Chuck Swaggerty.

A Closer Look at Marriage Equality in States with Elected High Court Judges



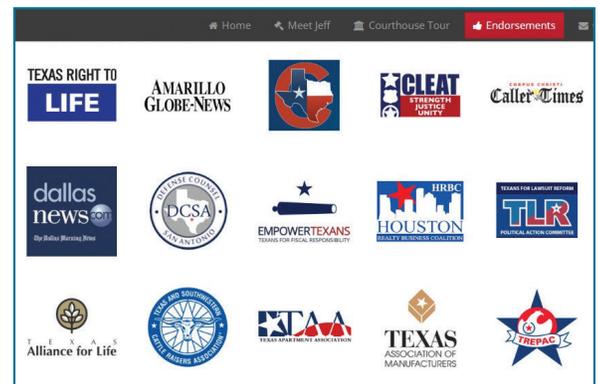
Chief Justice Roy Moore, who was elected on an anti-marriage equality platform, predicted that the Supreme Court marriage ruling would "cause the destruction of our country."

After the Supreme Court's ruling in *U.S. v Windsor* (2013), which found Section 3 of the Defense of Marriage Act to be unconstitutional, federal judges in deeply "red" states, who are appointed and have lifetime tenure, ruled in favor of the freedom to marry in quick succession. In contrast, challenges to discriminatory marriage bans in conservative states with elected judges were met with hostility or delay.¹⁶ Even after *Obergefell*, several elected judges in southern states suggested a willingness to defy the rule of law.¹⁷

The justices of the **Alabama Supreme Court**, who are elected in expensive partisan races, told probate judges in the state to defy a federal court order which granted same-sex couples the right to marry. Alabama's Chief Justice Roy Moore, who is notoriously antigay, cited scripture in a 2002 judicial opinion in a child custody case that shockingly referred to lesbian parents as "immoral," "detestable," "an inherent evil," and "inherently destructive to the natural order of society."¹⁹ After the U.S. Supreme Court ruling in *Obergefell* in 2015 which made marriage equality the law of the land, Alabama Supreme Court Justice Tom Parker suggested on conservative talk radio that a state supreme court ruling "would be a proper organ" for resisting the decision.²⁰

Chief Justice Roy Moore, who was elected on an anti-marriage equality platform, predicted that the ruling would "cause the destruction of our country" and would generate a "great backlash."²¹

In 2011, a same-sex married couple seeking a divorce ended up before the **Supreme Court of Texas** after the state contested their petition for divorce. The justices did not even hear oral argument until November 2013. The court then sat on the case until 2015, when one of the parties ultimately died—still trapped in a legal status and waiting for justice.²² The nine Republican justices on the Texas Supreme Court were elected in partisan contests and some of their websites tout endorsements from groups like Texas Values Voters, Texas Right to Life and Tea Party Patriots.²³



Endorsements from the Texas Supreme Court Justice Don Willet re-election website.

In 2014, **Arkansas Supreme Court** justices, who are elected, heard oral argument in a challenge to the state's discriminatory marriage ban. They held off on issuing an opinion until two new justices joined the court several months later. Then a majority of the court inexplicably ruled that adding justices required a new lawsuit to figure out who should hear the case. This caused two justices to step down from the case over their frustration and ethical concerns with the decision to delay.²⁴ Later, when Justice Donald Corbin retired from the bench, he admitted that he and his colleagues had voted to strike down the state's marriage ban in 2014.²⁵ But the justices held the case, leaving couples in legal limbo until the U.S. Supreme Court ruling, when the Arkansas justices quietly dismissed the case as moot.



Justice Jeff Hughes campaign TV ad.

sex marriage is the adoption by same sex partners of a young child of the same-sex.”²⁷ Justice Hughes practically promised this kind of action during his campaign TV ad, in which he stated that he was “pro-life, pro-gun, pro-traditional marriage.”²⁸

In July 2015, the **Louisiana Supreme Court** dismissed a state court case involving the rights of a married same-sex couple. This was a good result; the Supreme Court's *Obergefell* decision had resolved the issues in the case.²⁶ But one lone Justice dissented. Casting his duty to support the rule of law aside, Justice Jefferson Hughes suggested that he would not follow the Supreme Court's ruling. Justice Hughes went on to inject a bit of shocking antigay bias into his dissent, noting: “The most troubling prospect of same

In November 2015, the **Mississippi Supreme Court** narrowly granted a divorce to a same-sex couple based on the Supreme Court's ruling in *Obergefell*.²⁹ Four of the nine Justices dissented. One Justice wrote: “When five members of the [U.S. Supreme] court hand down an order that four other members believe has 'no basis in the Constitution,' a substantial question is presented as to whether I have a duty to follow it.”³⁰ Another Justice noted that the idea that the U.S. Constitution means what a majority of the Supreme Court says it means “is not necessarily true and should be subject to questioning.”³¹ One of the justices who joined the majority to grant the divorce admitted, “As an elected member of this Court, the politically expedient (and politically popular) thing for me to do is to join my colleagues' separate statements and quote the dissenters in the *Obergefell* case. However, if I did, in my opinion, I would be in violation of the oath of office I now hold.”³²

B. Protecting Relationships and Families

After *Obergefell*, virtually all courts with pending marriage cases moved promptly to implement the ruling. Still, there is so much important work that remains in order to secure the rights, responsibilities, benefits and accurate documents for all family relationships of LGBT people and their children. Parents in many states remain legally unrecognized or severely disadvantaged in state court fights with ex-spouses, ex-partners or other relatives. Some same-sex couples continue to encounter discriminatory obstacles in their efforts to obtain access to two-parent birth certificates or accurate death certificates and turn to state courts for resolution.

Because family law is almost exclusively the domain of the states, state courts play an important role in the advancement or weakening of protections for LGBT families. State courts are also critical to efforts to expand legal recognition of parent-child relationships, based on the actions and intentions of parents in creating and raising children rather than on biological connections alone.

State Court Protection of Families in Iowa

Even after the Iowa Supreme Court issued a unanimous ruling in favor of marriage equality, families headed by same-sex couples still had to fight for the marital presumption of parentage. In 2010, married parents Heather and Melissa MacKenzie sued the Iowa health department after the agency refused to issue a birth certificate for their daughter MacKenzie that listed both mothers as parents.³³ The Iowa Supreme Court eventually ordered the state to provide accurate two-parent birth certificates to all children born to lesbian married parents. Iowa Supreme Court Justices are appointed and stand for retention elections.³⁴

Alabama Supreme Court Refuses to Recognize Adoption

In 2015, the Alabama Supreme Court refused to recognize a lesbian mother as an adoptive parent of her three children even though both women raised the children from birth and consented to the adoption.³⁵ The court ruled that Alabama does not have to recognize second-parent adoptions granted by Georgia courts, breaking with more than a century of precedent requiring states to honor court judgments from other states. The ruling was reversed by the U.S. Supreme Court. Alabama Supreme Court Justices are elected in partisan races.

C. Fighting for Transgender Rights

Transgender people are often the most vulnerable members of our community. Transgender people face harassment and discrimination in areas such as employment, health care, schools, housing, restroom access, foster care, family court matters and detention facilities and prisons. State courts routinely handle cases involving transgender people. In the context of parenting, many state courts have correctly treated custody cases involving transgender parents like any other child custody determination—by focusing on standard factors such as parental skills and the best interests of the child. However, some courts have lacked understanding about the need for a transgender parent’s transition and as a result transgender parents have lost access to their children based solely on their gender identity.



Donisha McShan, a woman who is transgender, was housed with men and addressed with male pronouns. Lambda Legal told facility officials about state and federal laws prohibiting discrimination against transgender people incarcerated in government-funded facilities. The halfway house issued McShan an apology and changed its policies.



Lambda Legal client Kimberly Hively and Lambda Legal Counsel and Employment Fairness Program Strategist Greg Nevins. In 2015, Lambda Legal urged the U.S. Seventh Circuit Court of Appeals to reverse a lower court ruling and allow Hively to present her case alleging that Ivy Tech Community College, where she worked as an instructor for 14 years, denied her full-time employment and promotions, and eventually terminated her employment, because she is a lesbian.

On identity documents, some states and agencies require that transgender people obtain a state court order to make gender marker changes.³⁶ Many of the jurisdictions that administer birth certificates require a court order to change or amend them.³⁷ When it comes to the routine process of filing papers for a name change, transgender people frequently have to deal with courts asking invasive questions about gender transition.³⁸

Transgender Students in Maine

In *Doe v. Regional School Unit*, the Maine Supreme Court held that a transgender girl had the right to use the girls’ restroom at school because her psychological well-being and educational success depended on her transition.³⁹ The school, in denying her access, had “treated [her] differently from other students solely because of her status as a transgender girl.” The court determined that this was a form of discrimination. Justices on the Maine Supreme Court are appointed and never stand for election.

Transgender Discrimination in Illinois Courts

In 2007, the Illinois Supreme Court held that Duann Turner, a 52-year-old low-income transgender woman represented by Lambda Legal, was denied access to the judicial process. The Will County Circuit Court had rejected her request that a \$450 fee related to her name change petition be waived, declaring, “I am not spending the county’s money on something like this.”⁴⁰ The *Turner* case highlights how LGBT discrimination in the judicial system is pervasive and

harmful to LGBT people and to the integrity of the courts. This discrimination is rarely combated; leaving unchecked prejudicial statements, harsher sentencing for LGBT defendants and irrelevant consideration of a person's sexual orientation, gender identity or HIV status. Illinois Supreme Court Justices are elected in partisan elections.

D. Achieving Employment Fairness

Employment fairness issues are a core aspect of the lives of LGBT people and people with HIV. Most people spend a large part of their time working. They depend on their jobs to support themselves and their families and to gain access to health care and other benefits. A number of cities, counties and states have passed laws that help protect LGBT people and people living with HIV from employment discrimination by explicitly covering sexual orientation and gender identity. In addition, many employers and union contracts have nondiscrimination protections for workers. This means that LGBT people can make a valid legal claim under state law. Many complaints are handled by state or local civil rights enforcement agencies, but state courts can also play a role in adjudicating these disputes.

Access to Survivor Benefits in Alaska

Kerry Fadely, who worked at Anchorage's Millennium Hotel, was shot and killed in 2011 by a disgruntled former employee.⁴¹ Alaska's workers' compensation law requires employers to provide survivor benefits to spouses of people who die from work-related injuries. Yet Kerry's same-sex partner, Deborah Harris, was barred from accessing legal protections for survivors, as at the time, Alaska did not allow same-sex couples to marry. Deborah sued. In 2014, the Alaska Supreme Court ruled unanimously that committed same-sex couples must have equal access to the law's protection.⁴² Alaska Supreme Court Justices are appointed and stand for retention elections.



In 2014, Lambda Legal secured a victory for client Deborah Harris when the Alaska Supreme Court unanimously ruled that the State's exclusion of lesbian and gay partners from survivor benefits violated the constitutional guarantee of equal protection.

Prohibiting Public Employers from Providing Benefits

In 2004, Michigan adopted a discriminatory constitutional ban on marriages by same-sex couples. Shortly after its passage, a lawsuit was filed to establish that the amendment didn't restrict public employers from providing benefits to domestic partners. In 2008, the Michigan Supreme Court ruled by a vote of 5-2 that the state constitutional amendment did prohibit public employers from doing so.⁴³ This case effectively prohibited recognition of civil unions, domestic partnerships and other forms of relationship recognition by state and local governments. Michigan Supreme Court Justices are elected in nonpartisan races.



E. Defending People Living with HIV

After three decades, the HIV epidemic in the U.S. continues to have a devastating impact on gay and bisexual men, transgender women and in many communities of color. People living with HIV continue to face discrimination in the workplace, denial of services, denial of access to long-term care facilities and violations of privacy rights. People with HIV also have to navigate uninformed, outdated and hostile HIV criminalization laws. Such discrimination and marginalization undermines the rights of all LGBT people.

If a person living with HIV is accused of violating criminalization laws, it is in state court that they will have to fight it. Most criminal cases involve violations of state law and are tried in state court. Thirty-nine states have HIV-specific criminal statutes or have brought HIV-related criminal charges, resulting in more than 160 prosecutions in the United States in the past four years.⁴⁴

People living with HIV also turn to state courts to address discrimination in the workplace and in public accommodations based on the erroneous and outdated belief that people living with HIV present an immediate risk to the health and safety of others.⁴⁵

Iowa Reverses HIV Criminal Conviction.

In 2014, the Iowa Supreme Court set aside the conviction of Nick Rhoades, an Iowan with HIV who was initially sentenced to 25 years in prison, with required registration as a sex offender, after one sexual encounter with another man during which they used a condom.⁴⁶ In reversing the conviction, the Court recognized that individuals with HIV and a reduced viral load as a result of effective treatment pose little risk of transmitting HIV. In so doing, the Court applied the law in light of current medical understanding of how HIV is and is not transmitted. The ruling made clear that an individual who takes precautions to prevent transmission should not be considered a criminal. Iowa Supreme Court Justices are appointed and stand for retention elections.

F. Securing the Rights of LGBTQ Youth

Numerous studies highlight the overrepresentation of LGBTQ youth and young adults in foster care, juvenile justice and runaway and homeless youth systems, where these youth are likely to interact with state courts. These young people are often particularly vulnerable because their experiences in and interactions with various institutions, including state courts, have a profound impact on the rest of their lives. In addition, state courts hear cases involving LGBTQ youth and family members who encounter discrimination, harassment and other denials of their rights in schools, foster care, juvenile and adult criminal justice systems and immigration systems.



State courts have been critical in the fights to protect LGBTQ youth from bullying and harassment in schools; to secure speech rights in schools and to create safe and inclusive schools through the formation of gay-straight or gender and sexuality alliances. In most states, a juvenile court hears cases for all youth younger than 18 charged with a law violation. In 2013, juvenile courts disposed of one million cases.⁴⁷

Students Protected Against Bullying in New Jersey

L.W., a student in the Toms River Schools in New Jersey, was subjected to antigay harassment and bullying by other students based on his perceived sexual orientation. The harassment increased in frequency and severity as he progressed through school and eventually became so severe that he transferred to another school district. After many of the incidents, L.W. and his mother reported the problems to the school's administration, which took little or no action. In 2007, the New Jersey Supreme Court, in a unanimous decision, ruled that if a school is aware or should be aware of harassment of students based on sexual orientation, it is obligated to act to end the harassment.⁴⁸ New Jersey Supreme Court Justices are appointed and never stand for election.



G. The Experiences of LGBT People in Court

With the rights of LGBT people and their families at stake, it is imperative that cases are decided by judges who weigh the facts and apply the law without bias. Judges and attorneys have an ethical responsibility to make sure LGBT people and people living with HIV are treated fairly and respectfully in courts. But the reality falls far short of that ideal. As lawyers, litigants, defendants and jurors, LGBT individuals can face overt discrimination from state judges as well as more subtle discriminatory practices that have become prevalent in the judicial system.

In 2012, Lambda Legal, with the help of more than 50 supporting organizations, completed a national survey to understand how courts and other government institutions are protecting and serving LGBT people and people living with HIV.⁴⁹ The results show some of the ways in which the promise of fair and impartial proceedings is compromised by bias against LGBT people and individuals living with HIV.

Nineteen percent (19%) of people who responded to the survey reported hearing a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression.

Sixteen percent (16%) of respondents indicated that their own sexual orientation or gender identity was raised in court when it was not relevant.

Fifteen percent (15%) of respondents reported having their HIV status raised in court when it was not relevant.

As is often the case, respondents with multiple marginalized identities—for example, LGBT people who also have a low-income, are people of color or are disabled—reported significantly higher instances of discrimination. Significantly, only 27 percent of transgender people and 33 percent of LGBT people of color said that they “trust the courts.”

Other anonymous surveys conducted by judicial commissions and bar associations also found antigay bias and prejudice in courthouses around the country. These studies universally concluded that the majority of gay and lesbian courts users found courtrooms to be hostile environments, whether in criminal or civil cases.⁵⁰

Transgender Discrimination in Oklahoma State Court

When Christie Ann Harvey, a transgender woman, sought a routine name change in Oklahoma state court, her petition was denied by Judge Bill Graves, who wrote in the decision that to grant a name change in this case would be “to assist that which is fraudulent.”⁵¹ He went on to write “It is notable that Genesis 1:27, 28 states: ‘So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth...’”⁵² When his decision was reversed by the Oklahoma Court of Appeals for abuse of discretion, Judge Graves flippantly remarked to the press, “I guess the guy gets to have his name changed.”⁵³

V. THE STUNNING LACK OF DIVERSITY ON THE STATE COURT BENCH

A. State Courts Must Reflect the Diverse Communities They Serve

In most states, judges simply do not look like the court users who stand before them. While the United States is more diverse than ever, that diversity is not reflected on state courts.

A state judiciary diverse in race, sex, ethnicity, gender identity and expression, sexual orientation and lived and professional experience serves not only to improve the quality of justice, but to boost public confidence in the courts. Judges of different backgrounds help to guard against the possibility of narrow decisions that don't appreciate factual nuances or the consequences of particular rulings.⁵⁴ The absence of judicial diversity results in a biased system that fosters a deserved perception among many segments of our society that the courts are unfair.

Earning the confidence of our diverse society requires access to and full participation in our democratic institutions at the highest levels. When it comes to access and participation, our state judiciaries are failing.

Courts in many states are overwhelmingly homogeneous. While people of color make up more than 40 percent of the population in 13 states, judges of color account for only 21 percent or less of state judiciaries.⁵⁵ For example, according to a report by the Center for American Progress, white Alabamians comprise only two-

Ten-State Comparison of Diversity on the Bench

State	Demographic	General Population	Bar Membership (as of 2004)	Supreme Court ³²³	Appeals Court ³²⁴	District Court ³²⁵
Arizona	White	60.00%	92.00%	100.00%	82.00%	84.00%
	Non-White	40.00%	8.00%	0.00%	18.00%	16.00%
	Men	50.00%	Data unavailable	60.00%	77.00%	73.00%
	Women	50.00%	Data unavailable	40.00%	23.00%	27.00%
Colorado	White	71.00%	94.00%	85.80%	87.50%	88.00%
	Non-White	29.00%	6.00%	14.20%	12.50%	12.00%
	Men	50.30%	Data unavailable	57.14%	81.00%	77.00%
	Women	49.70%	Data unavailable	42.86%	19.00%	23.00%
Florida	White	61.00%	87.00%	71.43%	84.00%	87.60%
	Non-White	39.00%	13.00%	28.57%	16.00%	12.30%
	Men	49.10%	Data unavailable	71.43%	81.00%	73.80%
	Women	50.90%	Data unavailable	28.57%	19.00%	26.10%
Maryland	White	58.00%	86.00%	71.43%	92.30%	83.00%
	Non-White	42.00%	14.00%	28.57%	7.69%	16.90%
	Men	48.40%	Data unavailable	69.00%	69.20%	70.50%
	Women	51.10%	Data unavailable	31.00%	30.70%	29.40%
Missouri	White	84.00%	94.06%	86.00%	84.00%	99.30%
	Non-White	16.00%	5.94%	14.00%	16.00%	.70%
	Men	48.90%	Data unavailable	71.00%	75.00%	94.30%
	Women	51.10%	Data unavailable	29.00%	25.00%	5.67%
New Hampshire	White	93.00%	96.00%	100.00%	No appellate court	100.00%
	Non-White	7.00%	4.00%	0.00%		0.00%
	Men	49.30%	Data unavailable	80.00%		73.00%
	Women	50.70%	Data unavailable	20.00%		27.00%
New Mexico	White	43.00%	79.00%	60.00%	85.00%	82.00%
	Non-White	57.00%	21.00%	40.00%	15.00%	18.00%
	Men	49.40%	Data unavailable	60.00%	70.00%	84.50%
	Women	50.60%	Data unavailable	40.00%	30.00%	15.50%
Rhode Island	White	79.00%	98.00%	100.00%	No appellate court	90.91%
	Non-White	21.00%	2.00%	0.00%		9.09%
	Men	48.40%	Data unavailable	80.00%		68.00%
	Women	51.60%	Data unavailable	20.00%		32.00%
Tennessee	White	78.00%	94.00%	80.00%	91.67%	94.71%
	Non-White	22.00%	6.00%	20.00%	8.33%	5.29%
	Men	48.90%	Data unavailable	60.00%	75.00%	83.00%
	Women	51.10%	Data unavailable	40.00%	25.00%	17.00%
Utah	White	82.00%	96.00%	100.00%	85.80%	94.29%
	Non-White	18.00%	4.00%	0.00%	14.20%	5.71%
	Men	50.30%	Data unavailable	60.00%	57.20%	87.00%
	Women	49.70%	Data unavailable	40.00%	42.80%	13.00%

Ciara Torres-Spelliscy et al., Brennan Center for Justice, *Improving Judicial Diversity* at 49 (2010).

thirds of the total state population, but not one of the Alabama's appellate court judges is black.⁵⁶ Arizona's population is 40 percent non-white, but racial minorities occupy only 18 percent of intermediate appellate and 16 percent of trial court judgeships.⁵⁷ When it comes to the courts of last resort in each state, the numbers are even worse. Only 10 percent of state supreme court justices are non-white and only 3 percent are Latino.⁵⁸ The Arizona Supreme Court has never had a single black or Latino justice.⁵⁹

Today, a majority of all law students are female, yet women account for just 16-34 percent of the state judiciary.⁶⁰ This pattern is most visible in state high courts, where women have historically been almost totally absent.⁶¹ As a country we are just beginning to correct the historical legacy of exclusion of men of color and all women from the legal profession, and much remains to be done.

B. LGBT Inequality on the State Court Bench

LGBT people and people living with HIV are an integral part of the fabric of America and are entitled to equality and liberty under the law. Judges have decided and will continue to decide important life issues for LGBT people. There is every reason to demand that action be taken so that LGBT people do not continue to be significantly underrepresented on the bench.

The number of LGBT judges in state courts is hard to determine because 49 states do not formally collect data on sexual orientation and gender identity as part of a judicial application and reporting process.⁶² There are only two openly transgender judges in the entire country. As far as we know, there are no openly HIV-positive judges and no openly bisexual judges nationwide.

However, out of 340 state high court justices, only 10 identify as openly gay or lesbian. Nine of the ten justices were appointed and all of these appointments were made by Democratic governors.

Spotlight on LGBT Diversity in California State Courts

California is the only state that requires the collection and reporting of demographic data on the sexual orientation and gender identity of state judges. Responding to the questionnaire is voluntary and the identities are kept confidential.⁶³ The latest LGBT-inclusive report, released in 2015, revealed:

- Only 1.1 percent of state judges self-identified as gay, 1.3 percent as lesbian, 0.1 percent as transgender and none as bisexual.
- Of the state's 98 appellate court justices, just one identified as lesbian and one as gay.
- There has never been an openly LGBT Justice of the California Supreme Court.
- 44 of California's 58 counties did not have any openly LGBT judges.⁶⁴



Maite Oronoz Rodríguez,
Chief Justice of the Puerto Rico
Supreme Court.

Openly Lesbian Chief Justice on Puerto Rico High Court

Days before retiring from the Puerto Rico Supreme Court, Chief Justice Federico Hernández Denton reflected on his years of service and concluded that one of the decisions he most regretted was his vote in a 2005 case that interpreted Puerto Rico law as preventing individuals who are transgender from amending their birth certificates to reflect their true identities. In April 2014, Lambda Legal sent Governor Alejandro García Padilla a letter urging that when nominating a new justice to the Court or making any other judicial nominations, he ensure that the judicial philosophy of his nominees includes a commitment to rule fairly and impartially in cases involving LGBT litigants and litigants with HIV and to seek thoughtful jurists who reflect Puerto Rico's rich diversity. In June, 2014, Maite Oronoz Rodríguez was confirmed Associate Justice to the Puerto Rico Supreme Court, marking the first time that an openly lesbian judicial nominee was confirmed to the high court. In 2016, Oronoz Rodríguez was nominated and confirmed as the first openly LGBT Chief Justice in the country.

VI. THE PROBLEM WITH JUDICIAL ELECTIONS

// If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."

— Former Justice Sandra Day O'Connor, U.S. Supreme Court⁶⁵

The U.S. is virtually the only country in the world that selects judges by popular election.⁶⁶ Thirty-eight states hold elections to select judges for their highest courts.⁶⁷ These elections range from contested multi-candidate contests to single candidate up-or-down retention votes. **Ninety percent of appellate court judges face some kind of election.**⁶⁸

Here's the problem: judges are not politicians. Unlike legislative and executive officials, judges by design should decide individual cases without taking popular opinion into account. Each day, thousands of elected judges in state courts across the country make decisions that could cost them their jobs if the law requires a ruling that is unpopular enough to anger a majority of voters or inspire special interest attacks. This threat is particularly acute when counter-majoritarian constitutional rights are at stake, including those of LGBT people. If judges can't safeguard the rights of vulnerable minorities without fear of retaliation, that dynamic renders our constitutional right to due process extremely vulnerable.

The very practice of electing judges is antithetical to the notion of an independent judiciary. Far from being radical or controversial, the idea that judges should not be subject to retaliation for unpopular rulings is grounded in the U.S. Constitution, which grants federal judges life tenure and protected salaries.⁶⁹ Alexander Hamilton explained in Federalist 78 that fidelity to the law cannot be expected by judges who hold their office subject to reelection as the judges' fear of displeasing the re-electing authority would be "fatal to their necessary independence."⁷⁰

Hamilton is right. In recent years, special interests have used the popular election and reelection of state judges to intimidate, vilify or remove judges in the hopes of influencing case outcomes. Still other judges openly run against the legal rights of LGBT people in order to pander to voters. Scholarly research now confirms that their efforts, in some cases, have been successful with tipping the scales in favor of wealthy business interests and against defendants in criminal cases.⁷¹

A. Judges Are Not Politicians

// Judges are not politicians, even when they come to the bench by way of the ballot. And a state's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."

— Chief Justice Roberts writing for the majority in *Williams-Yulee v. The Florida Bar*⁷²

Judges in states with contested partisan judicial contests inevitably feel pressure to curry favor with the political parties that helped elect them and likely feel pressure to rule in ways that will attract the political fundraising necessary to keep them in their jobs.

A critical part of our democracy stands on public confidence in the judiciary. Unfortunately, a 2014 Lambda Legal survey found that LGBT people generally don't trust the court system as a means of achieving justice. Reasonable regulation of campaign and political activities by judges and judicial candidates is paramount to improving confidence in state courts.

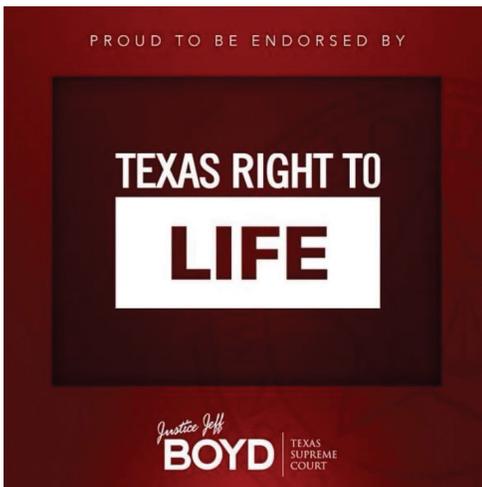
//When you enter one of these courtrooms, the last thing you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law."

— Former Supreme Court Justice Sandra Day O'Connor, *New York Times* op-ed, May 22, 2010

How can we expect justice and a fair trial if judges and judicial candidates are allowed to directly solicit campaign contributions or engage in partisan political activity?

//Justice Don Willett is the most conservative justice on the Texas Supreme Court. Tea Party patriots, pro-life and pro-family conservatives, limited-government advocates, constitutionalists and any who value American liberty should support Justice Don Willett, a rock-solid judicial conservative who has never legislated from the bench. Justice Willett is one of only a few judicial candidates I have endorsed, and I do so wholeheartedly. He must be re-elected in 2012. Please join me in standing with Justice Don Willett."

— James C. Dobson, featured on the "Endorsements" page on DonWillet.com, the campaign website for Texas Supreme Court Justice Don Willett.



Endorsement for Justice Jeff Boyd.

//If you want a Chief Justice who is guided by prayer & not politics."

— Google ad for Judge Dan Kemp's campaign for Chief Justice of the Arkansas Supreme Court.

// Thanks for the endorsement @TXRightToLife."

— Tweet, @JeffBoydTX, Twitter account for Texas Supreme Court Justice Jeff Boyd

//Barack Obama would never appoint Judge Jeff Hughes to the Supreme Court because Judge Hughes is pro-life, pro-gun, and pro-traditional marriage."

— Campaign ad for Judge Jeff Hughes' campaign for Louisiana Supreme Court.

//I'm a Republican and you should vote for me. You're going to hear from your elected officials, and I see a lot of them in the crowd. Let me tell you something: the Ohio Supreme Court is the backstop for all those other votes you are going to cast... So forget all those other votes if you don't keep the Ohio Supreme Court conservative."

— Ohio Supreme Court Justice Judith French at a GOP rally⁷³

Most states have taken steps to insulate state courts from inappropriate political and special interest influence. However, many states do not go far enough, and others do very little at all.

Victory for Fair Courts in the U.S. Supreme Court

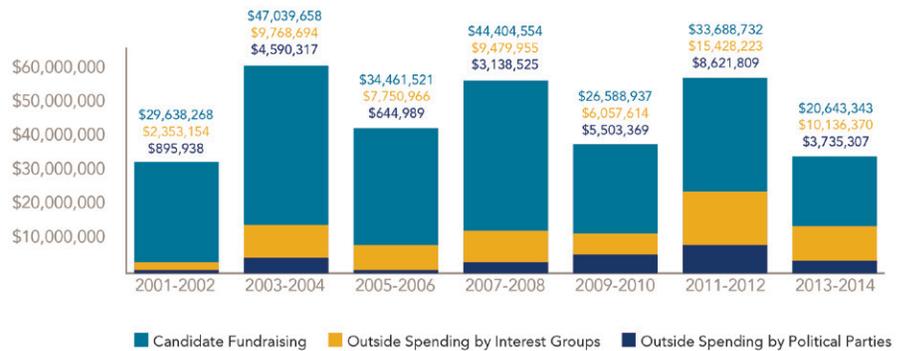
In 2015, the U.S. Supreme Court held in *Williams-Yulee v. The Florida Bar* that states could prohibit judicial candidates from personally soliciting campaign contributions in order to better keep courts fair and impartial. As the Court found, campaign contributions can create an appearance and risk of favoritism. The ruling protected an important aspect of judicial campaign finance laws in the majority of states, which help guard against a perception among the public that justice is for sale. The case paves the way towards securing further reasonable restrictions on judicial campaign conduct in the states that elect judges.

B. Special Interest Spending in Judicial Elections Has Exploded

A century or more ago, many states in the U.S. decided to adopt popular elections as their way of selecting their judges.⁷⁴ Unfortunately, *Citizens United*, the 2010 Supreme Court ruling that unleashed unlimited independent spending in elections, has dramatically altered the politics of judicial races, blurring the line that separates justice from politics.⁷⁵

Dissenting in *Citizens United*, now-retired Supreme Court Justice John Paul Stevens noted the decision “unleashes the floodgates of corporate and union general treasury spending” in judicial elections at a time “when concerns about the conduct of judicial elections have reached a fever pitch.”⁷⁶ Spending on state Supreme Court elections more than doubled in the past decade, exceeding \$200 million and breaking records every cycle.⁷⁷

Outside Spending as a Portion of Total Spending, 2001-14 (Historical Data)



Scott Greytak, Alicia Bannon, Allyse Falce and Linda Casey, *Bankrolling the Bench: The New Politics of Judicial Elections 2013-14*, at 12 (Laurie Kinney ed., 2015).

This spending raises real concerns about the ability of our courts to remain independent and provide equal access to justice—particularly for marginalized, politically unpopular and disenfranchised populations. **Seventy-six percent of Americans believe that campaign cash affects court decisions.⁷⁸ Almost half of judges agree.⁷⁹**

C. Attacks Against Judges Threaten Rulings in Favor of Individual Rights

Political attacks on the courts stemming from rulings affecting the rights of LGBT people and their families are nothing new. Often when judges rule on civil rights issues they risk backlash from those who oppose the rights of minority populations, whom the courts are charged to protect.

For years, those on the far-right have jumped at the opportunity to label any decision with which they disagree as “judicial activism.” This strategy was successfully employed, for example, by antigay groups like the National Organization for Marriage (NOM) in a 2010 campaign to remove three well-respected Iowa Supreme Court justices after that court’s unanimous decision to strike down Iowa’s ban on marriage for same-sex couples. NOM’s bus tour against “activist judges” traveled the state on a crusade of distortion, not only to punish specific justices but also to threaten judges across the nation if they ruled for equality and against NOM’s extreme, antigay agenda.⁸⁰

This line of attack was replicated by politicians and anti-LGBT organizations in the wake of the Supreme Court’s ruling in *Obergefell v. Hodges*. In his dissent, Chief Justice John Roberts wrote that the “five lawyers” (his fellow Justices) who ruled in favor marriage equality “have closed the debate and enacted their own vision of marriage as a matter of constitutional law.”⁸¹ This theme was repeated by Justice Scalia, who wrote, “A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.” And once again, those on the far-right repeated that “five unelected lawyers” were “destroying the once great republic, where people rule,” both widely and often.⁸²

In 2015, an elected Tennessee judge was reprimanded for an opinion decrying the “judi-idiocracy” that resulted in the “iron fist and limp wrist” of the *Obergefell* ruling. Some elected judges in the South continue to resist or defy the ruling in *Obergefell*.⁸³

LGBT civil rights rulings are not the only decisions that are twisted and exploited to undermine judicial independence or take down a judicial candidate. Attack ads are particularly vicious when they exploit criminal legal issues.

If you live in one of the 38 states that elect judges, you may have seen one of those oft-charged “soft on crime” TV ads claiming that a judicial candidate “sides with child predators,”⁸⁴ “is sympathetic to rapists”⁸⁵ or “helped free a terrorist.”⁸⁶

Some of the most manipulative and dishonest TV attack ads don’t come from groups interested in criminal justice at all, but rather from powerful business and political interests that wish to remove judges who rule against them on issues like voting rights, reproductive justice, consumer protections or LGBT equality.

The exact identities of the special interests behind judicial election attack ads are often hard to discern, as many of these groups are not required to disclose their donors or report their expenditures under state law.⁸⁷ Often cloaked in anonymity, these groups use “soft on crime” ads as a means to exploit viewers’ emotions and tilt elections, at the expense of criminal defendants and judicial fairness. Overall, 82 percent of all judicial election attack ads in 2013-14 discussed criminal justice issues.⁸⁸

D. The Consequences for the Due Process Rights of Individuals Are Dire

It might come as no surprise to learn that these judicial election attacks, while vile, are very effective at influencing elections. But it’s disturbing to learn the extent to which the threat of such attacks also influences judges’ rulings. Recent empirical studies suggest that state court judges in criminal cases are imposing harsher punishments on defendants—including death sentences—in apparent attempts to bolster their reelection campaigns.

1. When Justice Is for Sale, More People Go to Jail

A recent study shows that TV attacks ads in judicial elections are costing people their liberty. According to the study, [the more TV ads aired during state supreme court judicial elections, the less likely justices were to find in favor of criminal defendants.](#)⁸⁹ The results predict, on average, that a state with 10,000 ads would see judges vote differently and against criminal defendants in 8 out of 100 cases.⁹⁰

This finding is outrageous, and the implications are far-reaching. Criminal caseloads in our state trial courts totaled about 20.5 million in 2012, and disproportionately represented in this statistic are people of color, low-income people, LGBT people and people living with HIV (with many of these identities overlapping and intersecting).⁹¹ If you are a defendant facing the state in a criminal case, receiving a fair trial is fundamental to accessing justice. This means, among other factors, that the case must be presided over by an impartial judge who makes decisions based on the law and the facts and not on campaign contributions and super-PAC spending or concerns that the judge will be labeled “soft on crime.”

2. Judicial Elections Are Literally Killing People

Concern that bias, prejudice and politics will interfere with the fair administration of justice is particularly consequential when an individual’s very life is at stake. Alarming, a new study from the American Constitution Society shows that justices chosen by voters reverse death penalties at less than half the rate of those who are appointed, suggesting that politics play a part in appeals.⁹² [Whether a justice was elected or not was a far stronger variable in determining outcomes of death penalty cases—beyond state politics and more than race.](#)⁹³

A recent report from the Brennan Center for Justice at NYU School of Law reviewed 10 empirical investigations into the impact that judicial election has on outcomes for defendants. According to the report, “These studies, conducted across states, court levels, and type of elections, all found that proximity to re-election made judges more likely to impose longer sentences, affirm death sentences, and even override sentences of life imprisonment to impose the death penalty.”⁹⁴

As Justice Sotomayor's dissent in *Woodward v. Alabama* noted, “[s]ince 2000 ... there have been only 27 life-to-death overrides, 26 of which were by Alabama judges.” In attempting to explain why Alabama had become the only state in which judges routinely override the decisions of juries in order to impose capital punishment, she surmised that, “[t]he only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.”⁹⁵



Supreme Court Justice Sonia Sotomayor.

3. Corporate Spending Means More Pro-Business Rulings

In several recent judicial elections across the country, million-dollar battles have been waged by trial lawyers and large corporations.⁹⁶ From 2000 to 2009, conservative and business groups spent \$26.3 million on state court elections—more than twice as much as plaintiffs’ lawyers and liberal groups. Campaign contributions in states with partisan judicial races were three times greater.⁹⁷ [A report by the Center for American Progress found that from 1992-2010, the six states with the highest judicial campaign spending ruled in favor of corporations 71 percent of the time.](#)⁹⁸ A study from the American Constitution Society reveals that the more campaign contributions from business interests that justices receive, the more likely they are to vote for business litigants appearing before them in court.⁹⁹ [The analysis reveals that a justice who receives half of his or her contributions from business groups can be expected to vote in favor of business interests almost two-thirds of the time.](#)¹⁰⁰

4. Spending in Judicial Elections Affects Judicial Diversity

Several studies have attempted to determine how different judicial selection methods affect judicial diversity. At least at the trial level, results have been inconclusive, usually showing only minor differences in percentages in states with different systems. Judicial elections have been important for achieving diversity at the trial court level in certain communities—particularly where voters are black or Latino. However, the lack of diversity at the high court level is striking. Only 10 percent of state supreme court justices are nonwhite. Only 3 percent of high court justices are Latino—just 10 total.¹⁰¹ A 2009 report by the American Judicature Society found that appointive methods were more likely than popular elections to place people of color judges on state high courts.¹⁰²

A recent study from the Center for American Progress looked at the success rates of all incumbent state high court justices running for re-election since 2000.¹⁰³ The study found that supreme court justices of color have a harder time holding onto judicial seats than white justices.

The data revealed a:

- 90 percent re-election rate for white incumbents
- 80 percent re-election rate for black incumbents
- 66 percent re-election rate for Latino incumbents

The report found that in many states with elections, “advocates for diversity have succeeded in pressing for diverse appointments, but these victories are often fleeting.”¹⁰⁴ In many states where judges of color were appointed, they were rejected by voters in their first election. The research showed that appointed black and Latino justices running in their first election were only re-elected 68 percent of the time.¹⁰⁵

The findings of the Center for American Progress report suggest that increased campaign spending in judicial elections has a deleterious effect on efforts to foster racial diversity on state supreme courts. For example:

- ▶ Today, all of Alabama's supreme court and appellate court justices, including both its civil and criminal appellate courts, are white. Since spending in Alabama Supreme Court elections skyrocketed in the 1990s, not a single African American has sat on the state's high court.¹⁰⁶
- ▶ The huge spending in Ohio judicial races over the last few decades brought about a loss of racial diversity on the Ohio Supreme Court. Two of the three black justices ever to serve were immediately voted off the high court after their initial appointment.¹⁰⁷
- ▶ Louis Butler—the first black justice appointed to serve on the Wisconsin Supreme Court—immediately lost re-election after a misleading and racially tinged attack ad from his opponent accused him “working to put criminals on the street” including a defendant who was convicted of raping an 11-year-old girl “who went on to molest another child.” Justice Butler was the only incumbent to lose re-election in more than 40 years.¹⁰⁸

E. The Right-Wing Attack on Judicial Campaign Rules

In addition to the growing influence of money in judicial elections, judicial independence is threatened by right-wing efforts to dismantle codes of judicial ethics that exist to prevent judges from turning into political partisans.

James Bopp, longtime general counsel for the National Right to Life PAC, is also the attorney behind lawsuits like *Citizens United v. FEC*, which take direct aim at campaign finance limits. Bopp, who often uses anti-abortion groups as plaintiffs in his lawsuits, has also looked to roll back state restrictions on judicial campaign conduct. Bopp successfully argued *Republican Party of Minnesota v. White*, the 2002 Supreme Court ruling that on First Amendment grounds struck down rules barring judicial candidates from announcing their positions on legal and policy issues.¹⁰⁹ The ruling in *White* significantly weakened the ability of states to limit the political behavior of judicial candidates—creating the conditions that allow judges to run openly on anti-choice and anti-LGBT platforms while campaigning.

Judges must decide individual cases on the basis of the law and the facts, and not on personal politics or popular opinion. When judges make their own personal views on issues a part of their campaign, individuals understandably question whether they will receive a fair hearing. Explicitly or implicitly telegraphing decisions in advance undermines the right to due process.

Unfortunately, almost immediately after the ruling in *White*, judicial candidates in many states were sent questionnaires by political parties and special interest groups seeking to nail down positions on issues like access to abortion, equal marriage rights, voter ID and the role of religion in the public sphere.¹¹⁰ While candidates have a right not to answer such questions, contested campaign pressures often make it difficult to decline.

After *White*, it was not uncommon to see judicial candidates in several states openly expressing anti-LGBT views.

“The rules have changed. I agree with the new rule because I believe the old system kept the voters in the dark and was arbitrary and elitist. I want you, the voters, to know that I oppose abortion. I support having the Ten Commandments in our schools and courthouses. . . . I support the Second Amendment right to bear arms. . . . I believe marriage is between only one man and one woman. I live a life of traditional western Kentucky values. I think the way you think.”

— Rick Johnson, candidate for Kentucky Supreme Courts, embracing the ruling in *White*.¹¹¹

//We can't keep disparaging our military and promoting things like same-sex marriage, L-G-B-T. To hear the President of the United States say that we are promoting L-G-B-T. Let's think about what that is: lesbian, gay, bisexual and transgendered right... Same-sex marriage will be the ultimate destruction of our country because it destroys the very foundation upon which this nation is based."

— Roy Moore, candidate for Chief Justice of the Alabama Supreme Court at a campaign rally in 2012.¹¹²

White also opened the door to a series of lawsuits over the years, by Bopp and others, attempting to expand the ruling to strike other ethics rules that limited campaign conduct like canons prohibiting direct solicitation of contributions and rules designed to limit partisan political activity, like permitting judicial candidates to endorse or campaign for other candidates for political office.¹¹³ Right-wing forces continue to target individual court elections¹¹⁴ and laws governing how state judges are selected, blocking proposed changes from contested elections to merit selection systems in Minnesota and Pennsylvania.¹¹⁵ Bopp filed lawsuits attempting to change the way states with merit selection, like Kansas and Alaska, choose judges.¹¹⁶

//We have a pro-life House and a pro-life Senate and a pro-life governor... We pass pro-life legislation—and we get sued. The next frontier is the courts."

— Mary Kay Culp, Executive Director, Kansans for Life, July 2014¹¹⁷

VII. THE IMPACT OF JUDICIAL SELECTION ON LGBT RIGHTS CASES

In 2015, Lambda Legal commissioned a series of statistical analyses on an expansive new dataset on state high court decisions adjudicating LGBT rights claims. The study was conducted by a team of independent researchers led by Anthony Michael Kreis with support from Ryan Krog and Allison Trochesset. The research compared the outcomes in LGBT rights cases in states with different judicial selection methods, finding that processes through which different states select judges can play a role in how state high courts rule in LGBT cases. Below is a summary of the study. For a complete analysis of the dataset, variables, and findings, please visit Lambda Legal's **Fair Courts Project** at <http://www.lambdalegal.org/issues/fair-courts-project>.

Briefly, the study found that:

1. State high courts whose judges stand for election are less supportive of LGBT rights claims.
2. Results suggest that lack of support for LGBT rights among state high courts with elected judges can be attributed to ideological factors playing a larger role in shaping judges' decisions on these courts.

A. Data: A Look at State High Court Cases

To examine the implications of judicial independence for state courts' treatment of LGBT rights claims, the study's dataset included all cases involving LGBT claims decided by state high courts starting in 2003, after the U.S. Supreme Court handed down its ruling in Lambda Legal's case *Lawrence v. Texas*, through 2015. The search recovered a total of 127 relevant cases.¹¹⁸ Although the data contain decisions from 43 different states of the 50 states and the District of Columbia, there is some variation in the sample, with some states having issued more relevant decisions than others. California had the most LGBT rights cases during this time handing down 12 decisions, followed by Massachusetts with 10 cases.

After identifying a set of relevant cases, rulings were then classified as either favorable or unfavorable to LGBT rights. Cases that either directly upheld rights for LGBT persons, e.g. in favor of marriage rights for same-sex couples, or decisions that the parties would reasonably foresee yielding results that which could particularly benefit LGBT persons, e.g. second-parent adoption, were coded as "pro-LGBT." Those cases where courts denied LGBT rights claims or restricted the legal rights that LGBT persons could avail themselves of were coded as "anti-LGBT." Cases that were not decided on the merits were excluded.

B. Key Variables

The notable variable throughout the analysis is the method by which states select their judges. Although the exact system varies from state to state, most select and retain judges via one of four broad schemes: (1) **Partisan Elections**; (2) **Nonpartisan Elections**; (3) **Uncontested Retention Elections**; (4) **Lifetime tenure or reappointment**. Thirty-eight states have some type of judicial elections; the remaining twelve grant life tenure or use reappointment of some form.

Though the central focus of this research is investigating the extent to which outcomes in LGBT rights cases are influenced by judicial selection methods, it is important to account for additional factors that might also influence judges' decisions on these issues. To summarize, the study controls for four sets of factors that can influence the state high courts' rulings on LGBT rights: (1) the institutional design of a state's **judicial selection mechanism**; (2) characteristics of the panel of judges hearing a case, such as their **judicial ideology**¹¹⁹; (3) the **nature of the legal questions**¹²⁰ being adjudicated in a case; (4) the **political context of the state**¹²¹ in which a court operates. Next, using statistical models, the study generates predicted probabilities of the likelihood a court would rule in favor of LGBT rights, given these factors.

C. Findings

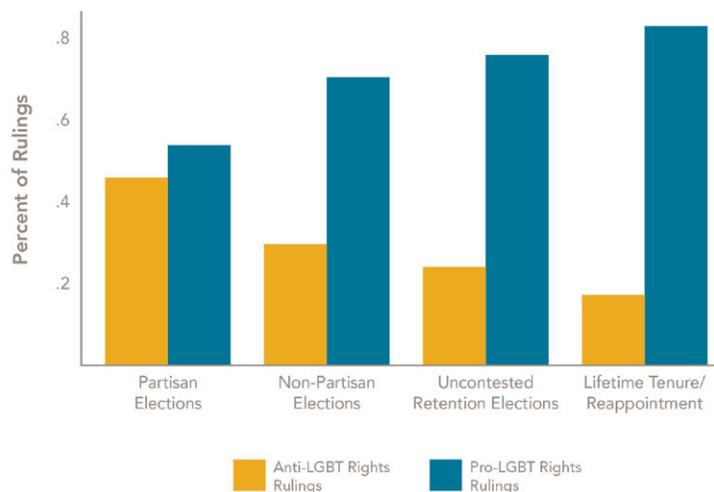
FINDING: State high courts whose judges stand for election are less supportive of LGBT rights claims.

1. The Impact of Judicial Selection of LGBT Rights Claims

The study first examines how the judicial selection mechanism employed for high state judges affects LGBT rights claims. Results of the study show that courts whose judges face either partisan or nonpartisan elections are less supportive of LGBT rights claims. Figure 1 shows that high court judges elected through partisan elections are the least supportive of LGBT rights claims according to the data, supporting a pro-LGBT claim in only 53 percent of cases. Slightly more supportive are courts where high court judges are elected through nonpartisan elections (70 percent of cases), followed closely by high courts where judges are appointed and run in uncontested retention elections (76 percent of cases.) The high courts that are most supportive of LGBT rights are those where the judges are granted lifetime tenure or reappointed, supporting a position favorable to LGBT rights in 82 percent of cases in the data.¹²²

Figure 1.

State High Court Rulings on LGBT Issues across Judicial Selection Methods



FINDING: Results suggest that this lack of support among state high courts with elected judges can be attributed to ideological factors playing a larger role in shaping judges' decisions on these courts.

2. The Impact of Judicial Ideology of LGBT Rights Claims

Judicial selection is not the only factor driving LGBT litigation outcomes. A primary factor in state high courts' willingness to rule against or in favor of upholding LGBT rights is the ideological disposition of the sitting justices. That fact notwithstanding, the role of ideology is noticeably amplified in courts subject to elections, as compared to those whose members are not. In other words, ideology plays a larger role in the decision-making process in less independent courts, where judges are subject to competitive elections. This amplification effect is not uniform for all judges. Judges sitting on ideologically conservative courts are far more sensitive to the appointment mechanism than their counterparts sitting on ideologically liberal courts. This sensitivity helps explain why conservative courts where judges face partisan elections are the least supportive of LGBT claims.

Figure 2.

The Effect of State High Court Ideology on Support for LGBT claims¹²³

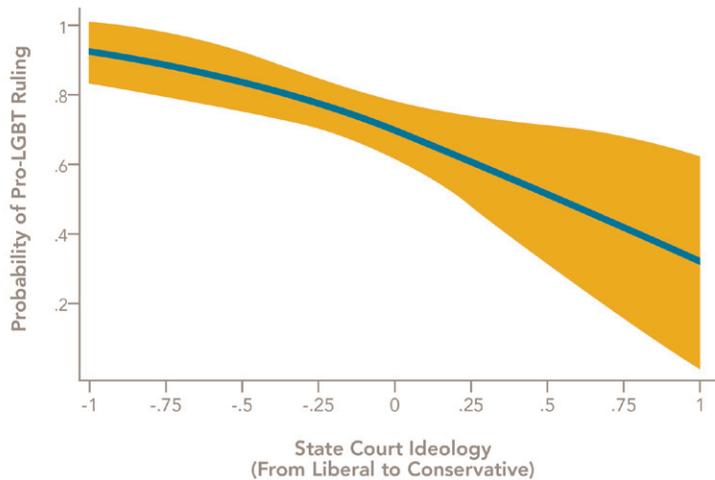


Figure 2 demonstrates the effect of the ideological disposition of sitting justices on support for LGBT rights claims. Figure 2 shows more ideologically conservative courts are less supportive of LGBT claims. The empirical results lend strong support for an ideological account for state court decision-making in cases involving LGBT legal claims. For instance, the probability of an ideologically moderate court ruling in a pro-LGBT position is 62 percent, holding all other variables at their mean or modal value. Contrast this with a highly conservative court, where the predicted probability of a pro-LGBT ruling drops precipitously to 32 percent; or for a very liberal court where the probability jumps to 90 percent.

3. The Interaction between Judicial Selection and Judicial Ideology on LGBT Rights Claims

Although the effects of variables for judicial selection mechanisms and ideology of judges are interesting in their own right, the interaction between these variables can provide several key insights into how the institutional design of a court can condition judicial behavior. It is plausible that certain selection systems encourage judges to behave more ideologically than others on cases dealing with LGBT rights. For instance, with political constituencies that must be appeased, elected judges may respond to their constituents by voting in ways that reflect their constituents' views.

Figure 3.

The Effect of Partisan Elections in Enhancing Ideological Voting by State High Courts

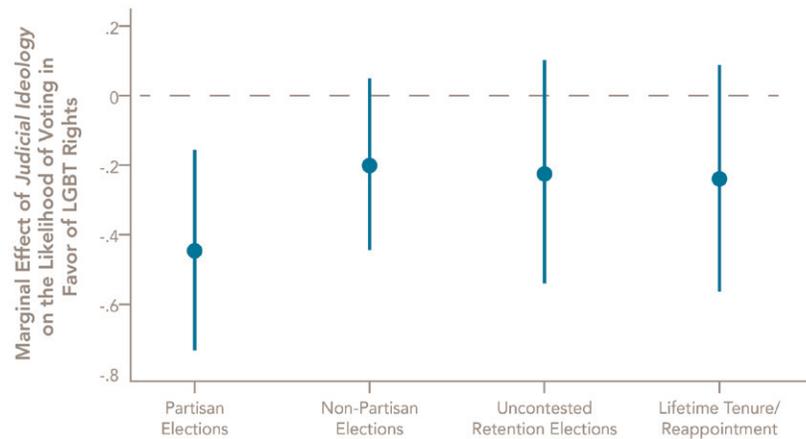


Figure 3 presents the interaction between the **judicial selection mechanism** variables and the **judicial ideological positioning** on the high court. Figure 3 shows that as courts become more ideologically conservative, they become less supportive of LGBT rights; however, this effect is strongest for courts where judges are selected through partisan elections.

Figure 4.

Selection Methods and Levels of Support for LGBT Rights in Ideologically Liberal Versus Ideologically Conservative State Courts

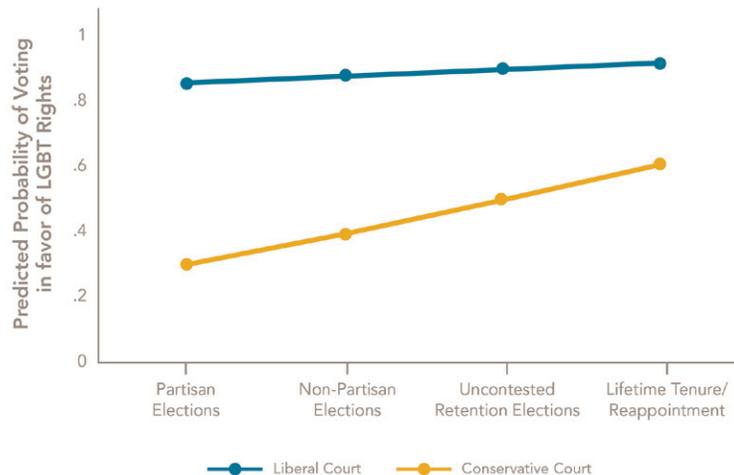


Figure 4 presents the probability of a state high court’s supporting LGBT rights across different methods of selection. Judges sitting on ideologically conservative courts are far more sensitive to the appointment mechanism than their counterparts sitting on ideologically liberal courts. As the graph displays, liberal courts are more likely to vote in favor of LGBT rights claims, regardless of how the judges are seated. Conservative courts where judges face partisan elections are the least supportive of LGBT rights claims. The probability of a conservative panel of judges who face partisan elections is only 20 percent, holding all other variables at their mean or modal value. That probability increases to 37 percent for nonpartisan elections, and up to 42 percent when facing uncontested retention elections, and more than doubles up to a probability of 57 percent for courts that have lifetime tenure or reappointment systems.

4. The Interaction between Political Context of the State and Judicial Selection Mechanisms on LGBT Rights Claims

Overall, if judges are responsive to the electorates of their states, then the clearest way to observe the implications of the effects observed in Figures 3 and 4 would be to examine courts' treatment of LGBT issues in liberal versus conservative states. This is explored by examining the interaction between **judicial selection mechanism** and the **political context of the state** as determined by the *State Citizen Ideology* score.

Figure 5:

Political Context of the State and the Effects of Different Selection Mechanisms on Support of LGBT Claims

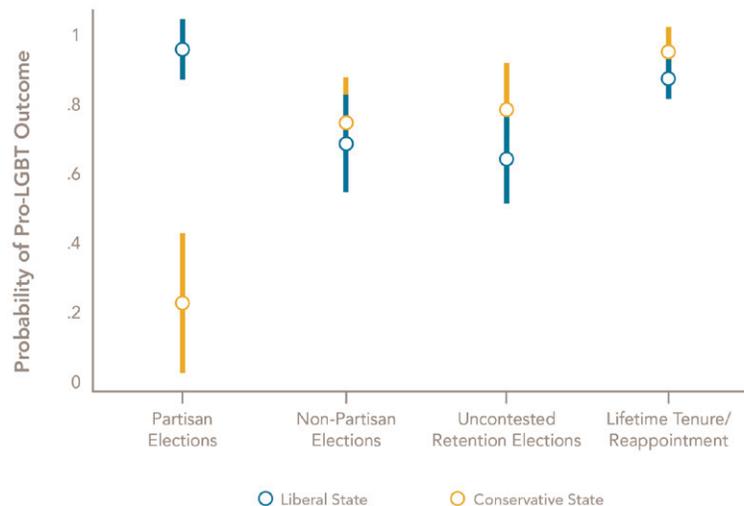


Figure 5 presents the predicted likelihood of support for LGBT claims across selection mechanisms for an average state designated “conservative,” compared to an average state designated “liberal” (drawn from the 25th and 75th percentile of the *State Citizen Ideology* variable, respectively). As demonstrated by the graph, there is a considerable gap between judges elected in partisan elections in states with liberal versus conservative populations. Courts whose members are selected through partisan elections in more liberal states are considerably more supportive of LGBT positions than their counterparts in liberal states with other appointment designs. Conversely, judges on courts selected through partisan elections in states with more conservative electorates are considerably more hostile to LGBT legal claims. To illustrate, for states with partisan elections, the predicted probability of a state high court ruling in a pro-LGBT position in state with a liberal citizenry is extremely high at 94 percent; in stark contrast, the probability of a pro-LGBT position drops to 22 percent for courts housed in conservative states with partisan elections. For every other type of selection mechanism, there is no statistical distinction to between courts with conservative versus liberal citizenries.

VIII. A SOCIAL JUSTICE AGENDA FOR ACHIEVING FAIR AND IMPARTIAL COURTS

Significant reform is needed to ensure impartial state courts that treat LGBT people and people living with HIV fairly and inspire confidence among the diverse communities these courts serve. It is time for advocates in all states to take action by pushing measures to strengthen judicial independence, promote judicial diversity and expand access to justice. Specifically, we offer seven recommendations that are key components to advancing a social justice agenda for achieving fair and impartial courts.

A. Stop Electing Judges

It is time to stop putting our rights—most especially our constitutional right to due process—at risk by continuing the practice of electing state judges. The damaging consequences resulting from the explosion of political and special interest group involvement in judicial elections, and in particular, the impact on the

legal rights LGBT people, has become undeniably clear. Similarly, retention elections are now systematically targeted by politicians and special interest groups.

State court judges must decide cases based on constitutional and legal principles—not political pressure, popular opinion or fear of retaliation. In too many ways, judicial elections undermine judges’ ability to perform their essential role as independent arbiters of the law. The need to appease voters, special interest groups and political partisans threatens judicial independence and integrity in states that require candidates to face off against each other. Furthermore, the increasingly corrosive influence of money in elections, combined with the escalating assault on reasonable regulation of judicial campaign conduct, have made efforts to reform judicial elections very difficult. Selection and retention by popular election is no way to ensure access to justice for marginalized, politically unpopular and disenfranchised populations or to inspire public confidence in our court system.

Ending judicial elections won’t be easy. Recent efforts to replace judicial elections with commission-based appointment systems have stalled, and many states’ merit-selection systems have only narrowly survived repeated attacks by political partisans. Dynamic campaigns led by diverse national, state and local organizations will be required, and social justice groups that understand why access to fair and impartial courts that safeguard the rights of all people is so critical must champion those efforts.

B. Institute Commission-Based Appointment of Judges (Merit Selection)

A commission-based appointment system of selecting judges based on merit is the best way to ensure due process, boost public confidence in the courts, improve the quality of justice and guard against money and political influence affecting judicial decision-making. The task of a judicial nominating commission in a merit selection system is to solicit applications for judicial vacancies, screen and interview candidates, and recommend a list of the most qualified candidates to the appointing authority—usually the governor. Currently, 22 states use a commission-based appointment method to select high court judges. Many states with contested elections already use commission-based appointment to fill interim supreme court vacancies. There are several states that select high court judges through a commission-based appointment system without the use of retention elections.

Not all commission-based systems are created equal. The value of such a merit system depends on proper design and effective function. Drawing on the expertise of our colleagues at Justice at Stake, the Brennan Center for Justice at NYU School of Law, and the Institute for Advancement of the American Legal System, we recommend that the best commission-based appointment systems should include at least the following elements:

- ▶ Judicial nominating commissions that consist of commissioners who are professionally, politically, geographically and demographically diverse. Diversity in nominating commissions should be established by statute when possible.
- ▶ Clearly established and published procedures for how judicial nominating commissions will operate, with written ethics procedures for conflicts.
- ▶ Mandatory implicit bias training and diversity training for commissioners.
- ▶ Clarity and prioritization of diversity in the nominating process and strategic recruitment measures to ensure wide distribution of judicial opening announcements.
- ▶ Transparency in the application and interview process, and published record keeping.

C. Promote Judicial Diversity

A state judiciary diverse in race, ethnicity, gender identity and expression, sexual orientation and lived and professional experience serves not only to improve the quality of justice, but to improve public confidence in the courts. It is absolutely critical that state judiciaries be composed of judges who truly reflect the diversity of the population and understand the issues facing the communities they serve. Social justice and

human rights organizations can and should be on the front lines of pushing for diverse, high-quality, and fair state court judges.

One of the best ways to promote judicial diversity is to advance a properly designed merit selection system with a judicial nominating commission that prioritizes diversifying the judicial bench. Advocates can also play a critical role by educating their constituencies about the importance of judicial diversity; disseminating vacancy announcements and encouraging individuals to pursue a path to the bench; holding elected and appointing authorities responsible for their diversity records; and advocating for improved data collection on the diversity of all applicants and judges that is inclusive of sexual orientation and gender identity.

D. Strengthen and Defend Judicial Codes of Conduct

Judges are not politicians. The rules that govern judicial campaign conduct in the 38 states that require at least some judges to stand for election are essential components of ensuring the independence, impartiality and fairness of the judiciary. In recent years, rules regulating judicial campaign conduct have been attacked as unduly restrictive of candidates' free speech rights. At a time of rising spending and politics in judicial elections, rules that preserve the public's confidence in the judiciary and protect the due process rights of litigants are more important than ever.

Social justice advocates should encourage state courts and legislatures to adopt and strengthen reasonable rules governing judicial campaign conduct. Protecting and promoting these rules is important as a means of safeguarding the due process rights of litigants and preserving public confidence in state courts. Judges are charged with safeguarding our cherished rights and liberties and ensuring equal access to justice for all. Social justice advocates should oppose weakening rules to allow candidates for judicial office to campaign against the rights of many of the vulnerable communities or politically unpopular groups judges have a duty to serve.

E. Support Anti-Bias and Cultural Competency Training

Ensuring that state judges are fair-minded and approach the decisions they make without bias or prejudice is of utmost importance both for our legal system and for the rights of vulnerable people, whom our legal system has an obligation to protect. Implicit and explicit bias poses a serious threat to securing fair and impartial state courts. Cultural competency and anti-bias education strengthen the state court system, affirm the dignity of court users, and work environments of judges, court staff and attorneys.

Improving the cultural competency of the bench with regard to gender and sexuality issues, and equipping legal practitioners with resources to curb LGBT bias, will increase the likelihood of fair and just results in court proceedings for LGBT people. Social justice advocates can work with organizations like Lambda Legal to become part of our emerging network of educators who have the skills and training to deliver anti-bias and cultural competency trainings to state court systems in all regions of the U.S.

F. Engage Constituencies by Educating Community Members About the Importance of Fair and Impartial Courts

State courts have broad authority to protect or restrict the rights of LGBT people and people with HIV, and they decide fundamental cases that touch on nearly every aspect of life and every issue. It is critical for more social justice and human rights advocates to promote the connection between fair courts and important rights and issues affecting our communities. For example:

- ▶ **Voting rights:** The right to vote is a state-based right and is protected by state constitutions. Therefore, state courts play a central role in defining the constitutional right to vote.¹²⁴ Evidence suggests that elected judiciaries rule more narrowly regarding voting rights, and appointed judges tend to issue opinions that more broadly interpret the constitutional right to vote.¹²⁵
- ▶ **Reproductive justice:** State legislators are passing laws at a rapid pace to restrict access to abortion. State courts are increasingly important for upholding reproductive rights. Lawsuits challenging these

new restrictions are pending or have been recently decided by elected Supreme Court justices in many states.¹²⁶ Still, many state courts are hostile to reproductive rights claims, and judicial elections make judges susceptible to popular opinion and political influence, particularly in “red” and “purple” states where restrictive laws are more prevalent to begin with. Anti-abortion forces also are targeting individual court elections and laws governing how state judges are selected.¹²⁷

- ▶ **Environmental justice:** Special interests seeking to unravel environmental regulations and limit liability for polluters are spending heavily in judicial elections. Recently, the Ohio Supreme Court, which elects justices in partisan races, ruled 4-3 that cities and counties can neither ban nor regulate fracking through zoning laws or other restrictions. In a dissenting opinion, Justice William M. O’Neill wrote that the “oil and gas industry has gotten its way.”¹²⁸ Indeed, the Ohio oil and gas lobby contributed heavily to state legislative campaigns, and gave \$8,000 for the Justice who wrote the pro-industry ruling and \$7,200 for another who concurred.¹²⁹
- ▶ **Redistricting:** In 2015, the Florida Supreme Court, where Justices are appointed through a commission, invalidated several congressional districts as unduly influenced by partisanship.¹³⁰ In 2016, the North Carolina Supreme Court, where judges are elected in partisan races, upheld the state’s redistricting map by a 4-3 ruling in a case alleging that the map discriminates against black voters.¹³¹ The North Carolina General Assembly received drafting assistance for the map from the Republican State Leadership Committee, a group that also spent millions of dollars to keep the North Carolina Supreme Court conservative.¹³²

To better understand how state courts impact fundamental rights and how these courts are being targeted, see the Piper Fund’s series of Fair Courts Toolkits, available at www.proteusfund.org/piper/resources

G. Build Dynamic Networks with Diverse Allies to Advance Fair Courts

The powerful, organized threat to fair and impartial state courts requires a dedicated, aggressive and well-coordinated response to prevent extensive damage to our democracy and the further erosion of our constitution right to due process. State courts and the judges who serve play a significant role in deciding cases involving LGBT equality, reproductive justice, voting rights, criminal justice, consumer protections and environmental justice.

Greater interest and activism can help to increase public awareness of the ways that money, politics, ideology and bias undermine judicial independence, affect case outcomes, impede diversity, and impact access to justice. Fair courts networks made up of a diverse range of players can work together to create dynamic educational and advocacy campaigns for positive change, while providing strategic support to defeat political and interest group efforts to capture the courts.

IX. CONCLUSION

Fair and impartial state courts are critical to making the case for equality. The courts of all fifty states and the U.S. territories, along with the more than 30,000 state court judges, have broad authority to uphold or restrict the rights of LGBT people and people living with HIV. But the scales of justice are out of balance. The stunning lack of diversity in the judiciary of our state courts and the broken judicial election process for selecting judges in most states contributes to a biased system that threatens access to justice for LGBT people and people living with HIV. Lambda Legal’s new research and the growing body of evidence indicate that state judges facing election, often in increasingly expensive races, are ceding justice to politics. Something has to be done to restore public trust and basic fairness. Lambda Legal’s Fair Courts Project works to advance an independent, diverse and well-respected judiciary that upholds the constitutional and other legal rights of LGBT people and people living with HIV. It is our hope that this resource will support additional research, advocacy, litigation and policy efforts to strengthen fair and impartial state courts and ensure equal access to justice for everyone.

Acknowledgments

Lambda Legal extends deep appreciation to the Piper Fund, a Proteus Initiative for supporting this important research and publication. Lambda Legal would also like to thank Open Society Foundations and the Rockefeller Brothers Fund for their generous support of the Fair Courts Project.

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117. Zoe Greenberg, "Anti-Choice Groups Seek to Stack State Courts," Rewire, (July 24, 2014) <http://threalitycheck.org/article/2014/07/24/anti-choice-groups-look-to-stack-state-courts/>
118. Specially, we searched cases that included one or several of the following terms: "homosexual," "same-sex," "gender identity," "transgender," "gay," "lesbian," "bisexual," "sexual orientation," "sexual preference," "LGBT" or "queer."
119. Although political scientists have developed a number of different measures for judicial ideology, this study relies on the innovative scores developed by political science professors Adam Bonica and Michael Woodruff. Their campaign finance scores (CFscores) for state high court judges are based on campaign contributions and the ideologies associated with various contributors. See, Bonica, Adam. 2013. Database on Ideology, Money in Politics, and Elections: Public version 1.0. Bonica, Adam. 2014. "Mapping the Ideological Marketplace." *American Journal of Political Science*, 58 (2): 367-387, available at <http://onlinelibrary.wiley.com/doi/10.1111/ajps.12062/abstract>. Contributions made by the judges themselves, as well as contributions towards the judges' campaigns are also factored in. In the absence of elections, the ideology of the appointing body (governor or legislature) was factored in, based on their campaign contributions data. A score above 0 indicates a more conservative leaning ideology, while scores below 0 are more liberal. Thus, in the context of our regression models, we expect the coefficients for this variable to be negative if conservative courts are less supportive of LGBT issues.
120. Two legal issues of particular interest are constitutional issues and family law. Cases centering on constitutional questions may be more subject to strategic litigation. Family law cases include all actions related to marriage, divorce, civil unions, child custody and adoption that were not constitutional challenges. This study includes two variables capturing whether a case involved a constitutional issue or a family law (coded 1, if yes; 0, otherwise). These variables are labeled Constitutional Law Case and Family Law Case, respectively.
121. This study employs commonly used measures developed by political scientists to capture the ideological character of a state's citizenry and governmental

officials. These measures—State Citizen Ideology and State Government Ideology—were originally developed by a the team of political scientists in Berry et al. (1998) and are imputed from ADA interest group ratings of each state's congressional delegation. See, William D. Berry, Evan J. Ringquist, Richard C. Fording and Russell L. Hanson. "Measuring Citizen and Government Ideology in the American States, 1960-93." *American Journal of Political Science*, Vol. 42, No. 1 (Jan.), pp. 327-348. Both of these measures were gathered online from: <https://rcfording.wordpress.com/state-ideology-data/>. A control was added for whether the deciding court was the focus of a highly competitive electoral cycle within two years prior to the decision. The relative metric for assessing competitiveness will likely be based on both primary election vote share and general election vote share, where applicable. This variable is labeled as Competitive Elections.

122. These data do not allow firm conclusions to be drawn about the impact of judicial selection mechanisms on LGBT rights claims based on the selection mechanism variable alone. There are far fewer cases in our data that were decided by courts in partisan or non-partisan elections. This may be due, in part, to strategic litigants who forum shop for courts that plaintiffs perceive as having greater independence and, therefore, are more likely to rule in favor of LGBT plaintiffs. While this explanation works well for impact litigation, it less satisfying for other types of cases like non-constitutional family law cases that are not deliberative actions intended to advance a broader end.
123. The graph demonstrates that more ideologically conservative courts are less support of LGBT rights.
124. Joshua A. Douglas, "The Right to Vote Under State Constitutions," 68 VAND.L.REV. 89 (2014).
125. Id.
126. Supra note 114.
127. Id.
128. State ex rel. *Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271, (Ohio 2015).
129. Darrel Rowland and Jim Siegel, "Ohio's Oil-and-Gas Industry Donations, Ruling Tied?," *Columbus Dispatch*, (Feb. 22, 2015). <http://www.dispatch.com/content/stories/local/2015/02/22/industry-donations-ruling-tied.html>
130. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).
131. Billy Corriher, "North Carolina Supreme Court Disregards U.S. Supreme Court in Redistricting Case," Center for American Progress (Jan. 20 2016), <https://www.americanprogress.org/issues/civil-liberties/news/2016/01/20/129372/north-carolina-supreme-court-disregards-u-s-supreme-court-in-redistricting-case/>
132. Id.

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