

JUSTICE for ALL?

The Importance of a Fair and Balanced
Judiciary to the GLBT Community



HUMAN
RIGHTS
CAMPAIGN
FOUNDATION®

Human Rights Campaign Foundation, 1640 Rhode Island Ave., N.W., Washington, D.C. 20036
phone 202/628-4160 *TTY* 202/216-1572 *fax* 202/347-5323 *website* www.hrc.org

© 2004 by the Human Rights Campaign Foundation. The HRC Foundation grants permission for the reproduction and redistribution of this publication only when reproduced in its entirety and distributed free of charge. The Human Rights Campaign name and the Equality logo are trademarks of the Human Rights Campaign.



Justice for All?

The Importance of a
Fair and Balanced Judiciary
to the GLBT Community



HUMAN
RIGHTS
CAMPAIGN
FOUNDATION®

Introduction

BY CHERYL A. JACQUES

Dear Friends,

Good judges are like spare tires: You may not have any idea how important they are until you need one. But without them, our whole legal system could grind to a halt.

From *Brown v. Board of Education* (outlawing school segregation based on race) to *Roe v. Wade* (recognizing a fundamental right to privacy in reproductive decisions) to *Bush v. Gore* (deciding the outcome of the 2000 presidential election), the U.S. Supreme Court has ruled in some of our nation's most difficult and divisive debates.

The gay, lesbian, bisexual and transgender community has felt first-hand the impact and importance of the U.S. Supreme Court's influence in the wake of 2003's *Lawrence v. Texas* ruling, which finally removed the criminal brand of sodomy laws from our community.

Our nation's courts have played, and will continue to play, a vital role in the GLBT community's journey from second-class citizenship to equal rights under the law. Yet the courts — and the judges whose duty it is to interpret the law and safeguard our rights and liberties — in many ways make up the least-examined branch of government.

Polls show that the selection of judges is not among the most important issues to the average voter. As a former prosecutor and as an advocate for GLBT equality, I can tell you personally that the selection of good, fair-minded judges is not simply one of our priorities — it may just be the most important priority.

“As a former prosecutor and as an advocate for GLBT equality, I can tell you personally that the selection of good, fair-minded judges is not simply one of our priorities — it may just be the most important priority.”

For GLBT Americans, the makeup of the U.S. Supreme Court and the federal bench in the coming years is perhaps the most important indirect outcome of elections.

The document you are holding in your hands right now will help you understand the role your vote plays in shaping the judiciary in the years ahead. I hope you will read it and share it with friends and family. Ask them to keep you and this document in mind when they cast their votes on Election Days to come. Together, we will be picking the leaders who will pick our judges and shape the direction of the law for future generations. Let's be sure to choose well.

A handwritten signature in black ink that reads "Cheryl A. Jacques". The script is fluid and cursive, with the first letters of each name being capitalized and prominent.

Cheryl A. Jacques
President
Human Rights Campaign Foundation



Foreword

BY PAUL M. SMITH

“There are few factors that are more critical to determining the course of the nation, and yet are more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government — the federal judiciary.”

— “The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation,” U.S. Department of Justice, 1988

It is my pleasure to help introduce this publication addressing what should be a matter of concern to all gay, lesbian, bisexual and transgender Americans and their supporters — the role of the courts as decision makers on matters of vital importance to our community. As a lawyer who has worked on many cases in the U.S. Supreme Court as well as other federal and state courts around the country, I can attest to the wide range of issues that are addressed and resolved by courts under our legal and political system.

And as the lawyer who had the honor of arguing the *Lawrence v. Texas* case in the U.S. Supreme Court, I have had an exceptionally close-up view of the ways in which courts can affect the lives of GLBT citizens in particular. The courts — interpreting the U.S. Constitution and the state constitutions — have played, and hopefully will continue to play, a key role in moving this country forward toward a time when members of our community will no longer be second-class citizens, lacking basic rights. But much depends on the judicial philosophy of the people appointed (or, in some states, elected) to the bench. That is a fact that every member and supporter of our community should keep in mind in deciding whether and how to vote.

That is not to say that presidents are always successful when they attempt to choose future justices and judges based on their perceived judicial philosophies. In recent history, a number of justices of the U.S. Supreme Court — including Justices William Brennan, Anthony Kennedy and David Souter — have not conformed to the expectations of those who selected them. But who is making the appointments is nevertheless potentially critical.

Let me close this foreword by saying a few words about the topic of “judicial activism,” which is addressed in this publication. In debates about the courts, the term “activist” tends to be applied to any decisions or judges with whom the speaker disagrees. The reality is that in our constitutional system — where protection of minority rights to liberty and equality are key values — it is the courts’ job to overturn popular laws that are inconsistent with those values. And when they do so, they properly consider what we as a people have learned about the human condition over the years. It was not improperly “activist,” for example, for the U.S. Supreme Court in *Lawrence* to recognize for the first time that same-sex couples and their families have meaningful relationships that are worthy of respect and protection — even though a court 100 years ago might never have understood that. In fact, we need more judges who are able and willing to reflect in their decisions the realities of our complex society as it now exists, even as they apply basic constitutional principles that date from the founding of the republic.

Paul M. Smith is the managing partner of the Washington, D.C., office of the law firm of Jenner & Block, LLP. He argued the groundbreaking case of *Lawrence v. Texas* before the U.S. Supreme Court, helping to usher in a new age of dignity and equality for GLBT Americans. Smith co-counseled *Lawrence* with Lambda Legal (www.lambdalegal.org).

Table of Contents

Executive Summary	2
1 Courts Are Critical to the GLBT Community	4
When All Else Fails, the Courts Protect our Rights	5
What Are Courts and What Do They Do?	7
<i>Lawrence v. Texas</i> : What a Difference a Case Makes.....	7
What's at Stake for the GLBT Community?	8
Adoption	9
Criminal Law.....	10
Marriage	11
2 The Role of Courts and So-called 'Judicial Activism'	12
What Does 'Judicial Activism' Mean?	13
Activist Judges?	15
Is it Unfair for Unelected Judges to Strike Down Laws that Most People Want?	17
Courts Are Important to the Struggle for GLBT Equality	18
Interpreting Laws Often Involves Applying Principles	19
3 The Selection of Judges and the Power of the Courts	22
It Matters Which Judge Hears a Particular Case	23
How Are Judges Selected?	26
Elected Officials Have Many Tools That Can Impair the Power of the Courts	27
Leading Foes of GLBT Equality Are Active About Choosing Judges.....	28
Selecting Fair-Minded Judges — Essential to Protect our Rights and Liberties	29
A Balanced Judiciary Is Also Important	30
Do We Need Judges from a Certain Background?	32
What Kind of Judges Will Be Fair to the GLBT Community?	33
How You Can Help Protect the Courts — and Your Rights	36
About the Author	40
Acknowledgements	41

Executive Summary

Our nation's courts play a vital role in the GLBT community's journey from second-class citizenship to equal protection under the law. Yet the courts — and the judges whose duty it is to interpret the law and safeguard our rights and liberties — are in many ways the least-examined branch of government. Polls show that the selection of judges is not among the most important issues to the average voter, yet all Americans — and the GLBT community and its allies — should be deeply interested in the selection of judges.



Courts make a difference in our lives.

Section One of this publication shows the importance of the courts in our fight for equality. From the historic *Lawrence* decision that removed the criminal stigma from our relationships, to the future battles over marriage equality and the discriminatory Defense of Marriage Act, the courts consider issues that touch every aspect of our lives.

It is important to understand the role of judges — and to be able to rebut charges of “judicial activism.”

Pick up any newspaper, any day, and chances are, some politician is accusing a court of “judicial activism.” In Congress and in the state legislatures, foes of GLBT equality are calling for unprecedented limits on the power of courts to do their jobs — to measure legislation against the standards set forth in our U.S. Constitution and its state counterparts. When judges, in fulfillment of this duty, affirm the equality of

the GLBT community, anti-gay forces cry “judicial activism.” In order to preserve our hard-won liberties, it is necessary that we understand the role of the courts in our constitutional system. Section Two explains that crying “judicial activism” is a way of name-calling. Often, when someone criticizes judges for “judicial activism,” it’s a smokescreen and the critic’s true complaint is with the outcome of the case. It equips you, the reader, to address criticisms of the victories that our movement has seen in the courts.



The selection of judges to serve on our state and federal courts is crucial to the GLBT community.

Section Three demonstrates the relationship between *who* makes a decision and *what* decision is made. Because our U.S. Constitution and laws are subject to interpretation and do not spell out the outcomes of every conceivable case that will come before the courts, the judges themselves play a role in developing the law. Advocates for and against GLBT equality agree that the selection of judges can and will affect the ultimate results. This section describes the standards that all judges should meet in order to secure an appointment to the bench, and explains the role of the average citizen in ensuring the appointment of a fair judiciary.



1

COURTS ARE CRITICAL TO THE GAY,
LESBIAN, BISEXUAL AND TRANSGENDER
COMMUNITY



When all else fails, it is the courts that protect our rights.

What issue matters most to GLBT Americans? Equality under the law — nothing more, nothing less. The right to be open and safe at work, at home and in the community. Freedom from the bias-motivated violence that has shattered so many lives. Equal opportunity for equal effort. Critical protections for our families — including everyday needs like health insurance and the right to receive the Social Security survivor benefits that we pay for. Equality means one America, with one rulebook — and the security of knowing that if you play by those rules, you will be treated fairly.

The fight for GLBT equality has made significant gains in recent years. However, without a fair judiciary, hard-earned rights at the local, state and federal level can evaporate. In 2003, the U.S. Supreme Court and the Supreme Judicial Court of Massachusetts demonstrated how critical courts can be in the fight for GLBT equality. Courts matter — and the GLBT community needs to be united in support of fair-minded judges and work to prevent anti-GLBT forces from packing the courts with people who will not enforce the rights of our community.

In other words, the time has come to stand up for the courts that stand up for us. The GLBT community, our families, our friends and our allies are all crucial in the struggle to ensure that our elected officials select fair-minded, unbiased judges who will continue to affirm our right to equal protection under law.

“To hold that the act of homosexual sodomy is somehow protected ... would be to cast aside millennia of moral teaching.”

— *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986)
(Burger, C.J., concurring)

“[The people bringing the case] are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”

— *Lawrence v. Texas*, 539 U.S. 558, 570 (2003)

This publication will show you why you need to make your voice heard in the debate over our courts — and how you can make a difference.

What Are the Courts and What Do They Do?

The U.S. Constitution created three branches of the federal government: the executive (the president and the federal agencies), legislative (Congress) and judicial (courts). At the federal level, the U.S. Supreme Court is the highest court in the land: Once it decides a case, both state and federal courts must follow its decision.

The federal court system is made up of three levels. Below the U.S. Supreme Court are the U.S. Courts of Appeals, also known as the “circuit courts” — 12 courts across the country that each deal with cases from a cluster of states. The third level is the U.S. District Courts, made up of 94 courts with at least one in each state.

A federal case begins at the District Court level, and a decision there can be appealed to the Court of Appeals. Decisions by the Court of Appeals can be appealed to the U.S. Supreme Court if the high court agrees to hear the case. Many of the cases important to GLBT Americans are decided at the lower-level federal courts. Indeed, very few are even heard by the U.S. Supreme Court. That is why we must care about judges at all levels, not just the U.S. Supreme Court.¹

Lawrence v. Texas: What a Difference a Case Makes

In 2003, the U.S. Supreme Court demonstrated the critical role of the courts in the fight for GLBT equality — and why our community must be involved in selecting judges.

On June 26 of that year, the U.S. Supreme Court reached the long-overdue conclusion that people could not be prosecuted and jailed because of their same-sex sexual behavior. The *Lawrence v. Texas* decision, which struck



DID YOU KNOW?

Until the U.S. Supreme Court invalidated so-called sodomy laws in 2003, they were used to justify:

- Excluding GLBT people from certain professions, such as teaching;
- Taking children away from GLBT parents;
- Denying GLBT people's claims of employment discrimination; and
- Forcing certain “offenders” to register as sexual predators.²

down 13 discriminatory state sodomy laws, also overruled the notorious 1986 decision in *Bowers v. Hardwick*, in which a narrowly divided U.S. Supreme Court concluded that gay, lesbian and bisexual Americans could be criminally prosecuted for their private sexual behavior. The *Lawrence* case, masterfully litigated by Lambda Legal, marked a historic change in the status of GLBT people under our U.S. Constitution.

What made the difference between 1986 and 2003? In one sense, the difference was the work of the many national, state and local groups that fight for GLBT rights: litigating groundbreaking cases, working to repeal anti-gay sodomy laws, advancing protective legislation, fostering GLBT-friendly policies in corporate America and fighting laws and constitutional amendments that label GLBT Americans as second-class citizens. In a larger sense, it was the heroism of the GLBT community — living openly, talking to friends and family about our lives, and demanding the full citizenship that we deserve — that created an environment in which the court could do the right thing.

It cannot be denied, though, that in the final analysis, the justices themselves made *the* difference. *Lawrence* stands as an example of the power that the courts play in our everyday lives. It brought GLBT people one case closer to enjoying the promise of equal dignity under our U.S. Constitution and equality for all Americans.

What's at Stake for the GLBT Community: Why *Lawrence* Is Just a Beginning

The *Lawrence* victory opened a door. Once the U.S. Supreme Court decides a case, all other courts in the country must abide by the decision. The fight for equal justice has to be fought one case at a time. The U.S. Supreme Court only answers the questions directly in front of it. That means that the legal decision only directly applies to the specific issue before the U.S. Supreme Court, even though it may announce principles that can be helpful in resolving future cases.

For example, although the U.S. Supreme Court's *Lawrence* decision recognized the basic equality of GLBT people, the justices explicitly noted that they were *not* addressing broader issues of adoption, marriage and other essential rights for GLBT individuals. How the U.S. Supreme Court and lower courts apply *Lawrence* remains to be seen. In fact, the first cases to reach the lower courts after the U.S. Supreme Court's decision in *Lawrence* — cases about very important issues to our community — had disappointing results.

The following cases are examples of how different courts have understood *Lawrence* in various ways.

Adoption

In January 2004, a panel of three federal appeals court judges³ upheld a Florida law that prohibits a lesbian or gay person from adopting children, even if the would-be adopters had served as the child's foster parents for many years. Although fully 25 percent of adoptions in Florida are by unmarried heterosexuals, the court accepted the state's argument that its discriminatory law was justified as a way of making sure that children were placed with married couples because heterosexual people *might* someday marry. The state may even conclude that heterosexuals who never marry are more suitable as parents, the court ruled, because such people provide better role models for the children's sexual and gender identity development.⁴

The parties challenging this discriminatory law asked for a rehearing of the case by the entire court of 12 judges that hears appeals of federal cases in this part of the country.⁵ On July 21, 2004, the court denied this request by a 6-6 vote.⁶ One of the judges who voted to deny rehearing and upheld the ban was William Pryor — a judge who President George W. Bush appointed to the U.S. Court of Appeals and whose nomination was opposed by many GLBT-rights organizations because of his demonstrated hostility to GLBT rights. Pryor, who has been an outspoken supporter of discriminatory sodomy laws, resched-



DID YOU KNOW?

- In many states, judges have denied an adoption simply because the adoptive parent is gay, lesbian, bisexual or transgender.
- Challenges to discriminatory laws denying GLBT people equal access to marriage and its benefits are already before many state courts and a few federal courts.

uled a family vacation to Disney World in order to avoid having his children in the same theme park with gay families. “[M]y wife and I had two daughters who at the time of that vacation were 6 and 4, and we made a value judgment,”⁷ Pryor said at his Senate confirmation hearing.⁸ Without Pryor, the vote would have been 6–5, and Florida’s discriminatory law could have been defeated.

Criminal Law

After its decision in *Lawrence*, the U.S. Supreme Court instructed the courts of Kansas to re-examine a harsh prison sentence handed down in a case there in light of the new ruling. The case, *Limon v. Kansas*, concerned an 18-year-old who was convicted of having consensual oral sex with a 14-year-old boy at a residential facility for mentally disabled youth where both lived. Under Kansas law, if the 14-year-old had been a girl, Limon would have received a maximum sentence of 15 months. However, because both participants were the same sex, Limon received 206 months (approximately 17 years) in prison and five years’ supervised release. When the Kansas court upheld the sentence in 2004, it claimed that punishing a same-sex offender 10 times more harshly than an opposite-sex

offender served the purpose of preventing “the gradual deterioration of the sexual morality approved by a majority of Kansans.”⁹

Fundamental fairness calls for equal punishment for the same crimes, regardless of sexual orientation. That is the lesson of *Lawrence*. The decision in this case, however, puts a gay person in jail for an extra 16 years for committing the same crime for which a straight person would receive a one-year sentence. This case serves as one more example of why courts matter.¹⁰

Marriage

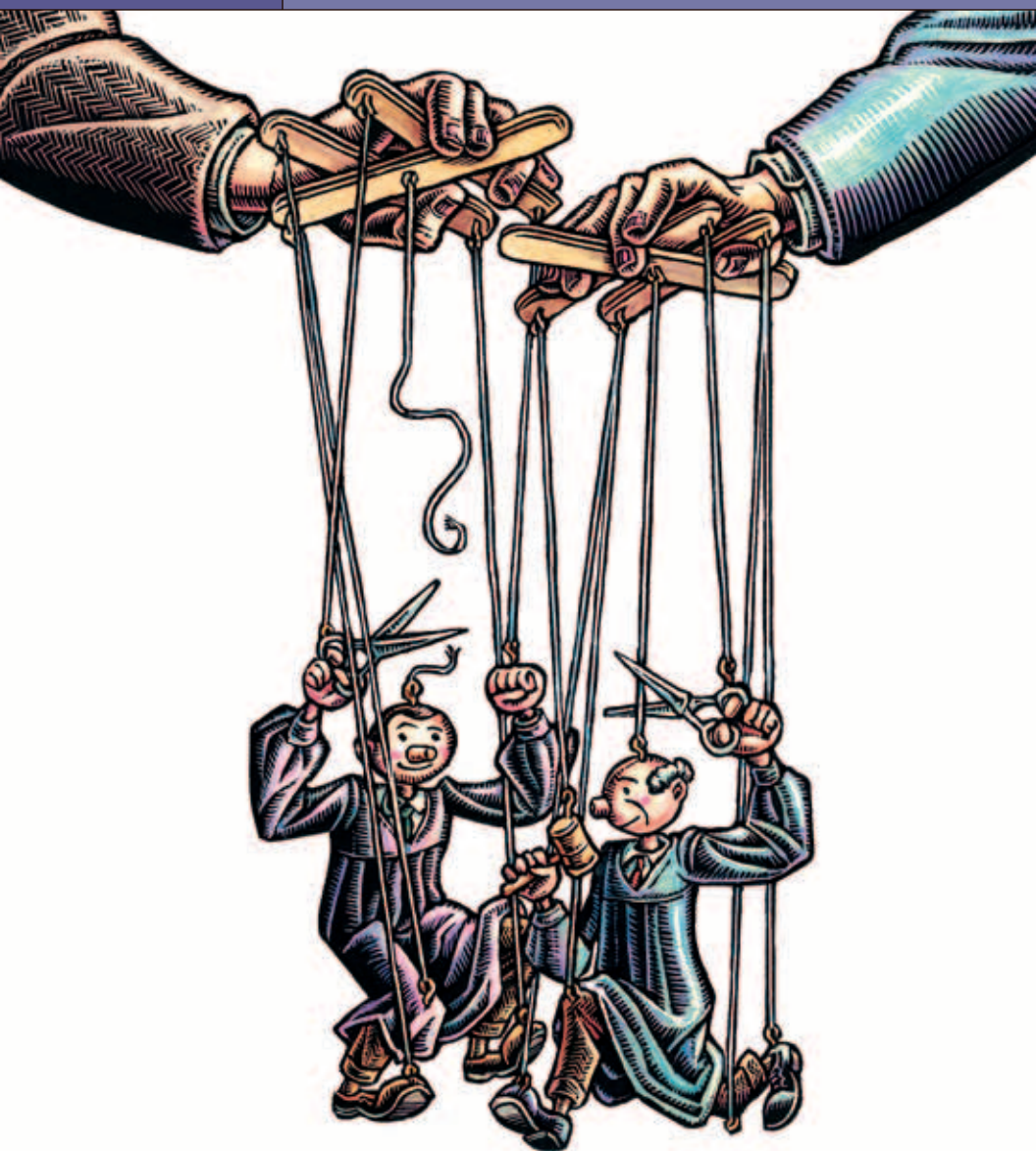
Currently, there are cases in several states, including California, New York and Florida, challenging the state laws that prevent marriage equality for same-sex couples. Although the U.S. Supreme Court in *Lawrence* specifically did not address the issue of marriage equality, the court did recognize the “obligation ... to define the liberty of all, not to mandate its own moral code.”¹¹

Future cases may challenge the federal government’s denial of more than 1,100 federal benefits to same-sex couples. These benefits include Social Security survivors benefits, estate tax benefits, immigration rights, and family and medical leave. Granting these benefits to opposite-sex couples and not to same-sex couples is unfair and contradictory to the idea of equal rights for all.

In our democratic society, federal and state judges are crucial to interpreting the U.S. Constitution and federal and state law to define the rights and protections afforded to GLBT individuals. We, as GLBT people and allies, need to support and demand judges who are dedicated to protecting and recognizing equality for GLBT Americans under the law. These cases, and others like them, affect our lives in a very personal and real way, and underscore the importance of judges in our everyday lives.

2

THE ROLE OF COURTS AND SO-CALLED “JUDICIAL ACTIVISM”



What does it mean when people say that our nation is threatened by ‘judicial activism’?

Politicians and policy-makers often use the term “judicial activism” to condemn judicial decisions with which they disagree. President Bush spoke of “activist judges” when he announced his support of the anti-gay Federal Marriage Amendment in 2004. Both Democratic and Republican senators use “judicial activism” to describe judges’ decisions

“Accusations of ‘judicial activism’ ... have been wielded as political weapons against judges who have overturned statutes and initiatives.”

— “An Independent Judiciary,”
American Bar Association
Commission on Separation
of Powers and Judicial
Independence, 1997

“My sense is that [the phrase ‘judicial activism’] is a label that critics use to attack decisions that they do not like.”

— Prof. Erwin Chemerinsky,
University of Southern
California Law School¹²

“If activist judges insist on re-defining marriage by court order, the only alternative will be the constitutional process.”

— President George W. Bush, Feb. 4, 2004

that go against their own views. Furthermore, groups on both sides of GLBT issues use the term “judicial activism” to support their views and ideology.

Recently, the phrase has been used in an attempt to build popular support for an anti-gay amendment to the U.S. Constitution.

Like elected officials, anti-GLBT rights groups also use the term “judicial activism” to rally their members against court decisions they do not like. After the Massachusetts Supreme Judicial Court decision in *Goodridge v. Dept. of Public Health* recognized marriage equality for same-sex couples,¹³ the Family Research Council stated its support for an amendment to that state’s constitution that would “give the people of Massachusetts — rather than four activist judges — the power to decide whether marriage will be protected or deconstructed.”

This tells us one thing about the charge of “judicial activism” — we have to be very skeptical when we hear someone use it, regardless of what side of the debate they may be on. Most of the time, this term is used only to describe a person’s or organization’s disagreement with a court decision and has no real meaning by itself. As GLBT voters and allies, we have to look beyond what is said in order to see through the accusations of “judicial activism.”

When officials and groups try to combat decisions they don’t like by intimidating or replacing judges or taking power away from the courts, not only does the GLBT community lose, our system of government is compromised and all Americans lose. Judges must be allowed to make their decisions without pressure from the other two branches of government. The independence of our courts — a hallmark of our democracy

— is damaged by attempts to amend the U.S. Constitution to overturn a judicial decision or to take power away from the courts.

These are real threats. For the last few years, members of Congress and state legislators have been talking openly about impeaching judges for decisions they did not like. After the *Goodridge* decision, calls to impeach the Massachusetts justices were heard across the country. And a proposed constitutional amendment to prohibit marriage between same-sex couples is not just aimed at GLBT Americans. It is also designed to strip the powers of our state judges, by denying them the right to interpret their own state's constitution.

Activist Judges?

But isn't the role of a judge to enforce the will of the legislature? What about accusations that "activist judges" are trying to act like legislators, by making law rather than interpreting it?

In fact, courts interpret the law. The courts make sure that legislatures are playing by the rules set out in the U.S. Constitution. That's why they have to be independent from the legislature.

We hear a lot about an "independent" judiciary. What does that mean? Independent from what? Our U.S. Constitution created three branches of government: the executive, legislative and judicial. The leader of the executive branch — the president — is elected by the people, and appoints other executive branch officials to serve at his or her pleasure. The people also elect the legislative branch — two senators from each state and 435 representatives, each representing congressional districts of about 630,000 people.

“[We will] do whatever it takes to protect, preserve and strengthen the institution of marriage against activist judges.”

— Senator Bill Frist, Jan. 23, 2004

However, we do not vote for the federal judiciary. Federal judges are nominated by the president. The U.S. Constitution gives the U.S. Senate the power of “advice and consent,” which means that senators can vote to reject the president’s nominees. Unlike executive branch officials, whom the president may hire and fire at will, federal judges are not beholden to anyone for their jobs.

The U.S. Constitution guarantees the independence of the courts. It grants life tenure to federal judges, which means that they cannot be fired (except for serious misconduct). It also states that a judge’s salary cannot be reduced while he or she is in office, assuring that judges cannot be punished for making unpopular decisions.

Why does the U.S. Constitution give this kind of job security to judges? Why are they so insulated from the political process that governs the lives and actions of presidents and members of Congress? The answer is that in interpreting our U.S. Constitution and laws, judges will sometimes have to do unpopular things. They cannot fulfill their duties if they are subject to the pressures that executive and legislative officials face.

What kinds of unpopular things might judges have to do? They might have to enforce a law in a way that advances an unpopular person or idea. For instance, the First Amendment very clearly protects the right to free speech. That includes speech by all Americans, even people whom most Americans find offensive, such as Nazis or Ku Klux Klan members. Sometimes — such as when Nazis petitioned to march in a

“The Founders did not always desire popular majorities to prevail, recognizing that tyranny of the majority is tyranny nonetheless.”

— Bruce Fein and Burt Neuborne¹⁵

neighborhood populated by Holocaust survivors¹⁴ — this speech is very unpopular and contrary to our values as Americans. Without protection from political pressure, judges might be unable to ensure that even those with unpopular and offensive ideas receive the protection that our U.S. Constitution guarantees.

More than most Americans, GLBT people understand that this unique role — upholding rights even when it's unpopular to do so — is what makes the courts so critical to our quest for equal justice.

Is It Unfair for Unelected Judges to Strike Down Laws That Most People Want?

Our system of checks and balances was designed to protect all Americans by ensuring that no branch of government is all-powerful and that the government acts according to principles, not power or whim. The U.S. Constitution is the supreme law of the land; any law that violates it is, in a manner of speaking, illegal. And the U.S. Constitution, which begins with the words “We the people,” is a contract between all of the people of the United States and our government. It establishes our rights — lines that the government cannot cross. Think of the judges as referees who make sure that the players in politics follow the rules of a game.

Sometimes a legislature will enact laws that are contrary to the U.S. Constitution — in order to pursue a politically motivated agenda, get re-elected or prove a point to those with whom they disagree. When this happens, the rights of minority groups can get trampled upon. Sometimes, we need the courts to remind the legislature that “We the people” includes *all* the people. At times, a court case may pit the wishes of a majority group against the rights of an identifiable political minority group — for instance, African Americans, people with disabil-



DID YOU KNOW?

In 1968, the year after the U.S. Supreme Court struck down criminal laws against interracial marriage, 72 percent of Americans still opposed interracial marriage.¹⁶ In 2000, when Alabama finally removed the unconstitutional interracial marriage ban from its state constitution, 40 percent of voters — more than 550,000 people — voted to retain the ban.

“People like Judge [Robert] Bork ... think that the only rights you have are the ones that are listed in the Constitution. ... Clearly, he hadn’t read the Constitution.”¹⁷

— Prof. Mickey Edwards, former Republican U.S. representative from Oklahoma

ities or GLBT people. Where a law singles out a group of people for different treatment from everyone else, the U.S. Constitution is particularly strict in requiring the legislature to justify it. Courts are the ones that decide whether the legislature has obeyed the rules.

Courts Are Important to the Struggle for GLBT Equality.

A judge should interpret the law as it is written, right? A judge is not a computer — interpreting the law involves *judgment*.

Courts are often asked to determine whether a law is constitutional. What does this mean? The U.S. Constitution and the 50 state constitutions set limits on the power of government to make laws. The framers of the U.S. Constitution did not attempt to write a law for every situation that might arise. Instead, they wrote a document of general principles.

For instance, the “Establishment Clause” of the First Amendment says that government may not “establish” religion. It’s clear that a law making Buddhism our national religion would not be constitutional. But what about a law that required all government workers to participate in a Buddhist ritual or provided tax dollars to restore a historic temple that would also be appreciated by tourists and architecture students? The Establishment Clause does not explicitly address any of these situations. It is the role of a judge to indicate whether the legislature has gone too far and “established” religion through its laws.

Judges must interpret the words in the U.S. Constitution in order to give them meaning. As times change, judges must read the U.S. Constitution in light of those changes. For example, no computers or Internet existed when the U.S. Constitution was written. But when judges are asked to rule on the constitutionality of laws regarding the Internet, they are able to do so because they can interpret the words to have meaning in today's modern world. Although the people who originally wrote the U.S. Constitution probably were not thinking about GLBT equality, we need judges who will interpret the U.S. Constitution in our modern world to recognize and protect our rights as GLBT Americans instead of restricting them.

Interpreting Laws Often Involves Applying Principles.

Judges are called upon not only to decide issues of law. Sometimes the law includes a standard that requires a judge to look at the facts of the case and make a value judgment. An example of this is the “best interests of the child” standard that applies to adoption, custody and visitation law. In most states, courts determine whether a parent can adopt or who should have custody of a child by deciding what arrangement is in the best interests of the child. In order to make this decision, courts look at a variety of evidence about the parties involved.

Although very few states have explicit laws about GLBT people and custody or adoption,¹⁸ often the parents' sexual orientation has been used to argue that visitation or custody was not in the child's best interest. The passages on p. 20, one from an Alabama custody case and another from a Vermont adoption case, demonstrate how differently two judges may interpret the simple phrase, “the best interests of the child.”

How do you account for these very different results? An important factor in judicial decisions is the judge's view of the role of the court as



DID YOU KNOW?

The U.S. Constitution contains 4,609 words. Its 27 amendments contain a total of 3,105 words. The 14th Amendment, which provides authority for most civil rights decisions, has only 439 words. Since its adoption in 1868, the 14th Amendment has been mentioned in more than 50,000 cases. In March 2004 alone, 565 cases mentioned the amendment.

“If a person openly engages in such a practice [homosexual conduct], that fact alone would render him or her an unfit parent.

“Homosexual conduct by its very nature is immoral, and its consequences are inherently destructive to the natural order of society. Any person who engages in such conduct is presumptively unfit to have custody of minor children under the established laws of this State.”

— *Ex Parte H.H.*, 830 So. 2d 21 (Ala. 2002)
(denying custody to a lesbian parent) (Moore, J., concurring)

“We are not called upon to approve or disapprove of the relationship. ... Whether we do or not, the fact remains that Deborah has acted as a parent of [the two children] from the moment they were born. To deny legal protection of their relationship ... is inconsistent with the children’s best interests. ...

“To deny the children of same-sex partners ... the security of a legally recognized relationship with their second parent serves no legitimate state interest.”

— *In re B.L.V.B.*, 160 Vt. 368 (1993) (allowing the partner of a child’s biological parent to adopt the child under the state’s “step parent” adoption law) (Johnson, J., for the court)

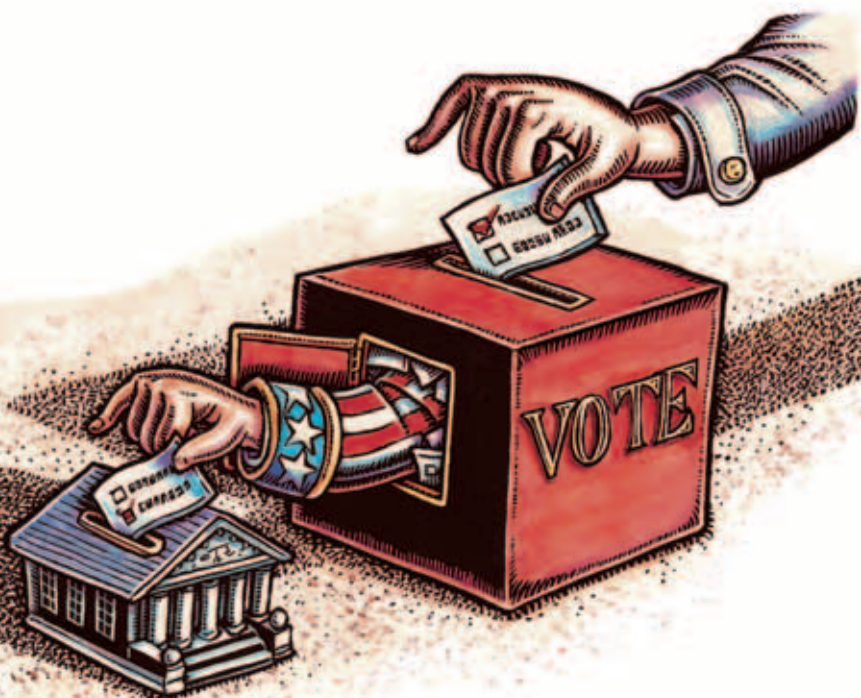
it interprets and applies the relevant law. Justice Roy Moore, the author of the first passage, concluded that the state's job, and consequently his own job, was to discourage homosexuality: "[The state] must use that power [to decide family law] to prevent the subversion of children toward this lifestyle."¹⁹



Justice Denise Johnson, writing for the Vermont court, saw her role differently. Noting that "[t]he intent of the legislature was to protect the security of family units by defining the legal rights and responsibilities of children who find themselves in circumstances that do not include two biological parents," Johnson concluded that an adoption by the parent's partner secured important legal rights for the adopted children. She then characterized the court's role as follows: "It is not the courts that have engendered the diverse composition of today's families. ... But it is the courts that are required to define, declare and protect the rights of children raised in these families."²⁰

3

THE SELECTION OF JUDGES AND THE POWER OF THE COURTS



Judges

have the power and the responsibility to safeguard the rights and liberties that the GLBT community values. It matters which judge hears a particular case.

What a Difference a Justice Makes: Robert Bork vs. Anthony Kennedy

We in the United States are growing accustomed to close decisions. In the 2000 election, Americans learned in a striking way that every vote counts. In a nation of more than 290 million, the presidential election ultimately came down to a few hundred votes. We also have seen many decisions by a closely divided U.S. Supreme Court, where one or two votes made the difference between radically different outcomes.

There are nine justices on the U.S. Supreme Court. When a case is decided, each justice gets one vote on how the case should come out. Many of the landmark cases for GLBT rights have been decided by only one or two votes. For instance, *Romer v. Evans* (the case that said Colorado could not amend its state constitution to exclude GLBT people from access to the political process) was decided by a 6–3 vote.



DID YOU KNOW?

Anthony Kennedy, the justice who wrote the majority opinion in *Lawrence v. Texas*, was nominated by President Reagan in 1987. But Reagan's first choice was Robert Bork, an outspoken opponent of GLBT equality. Bork would have occupied the seat if the U.S. Senate had not exercised its constitutional right to reject him and demand a more fair-minded nominee.

Justice Anthony Kennedy, who cast one of the deciding votes on that case, also wrote the opinion.

Another example is *Roe v. Wade*, the landmark decision guaranteeing a woman's right to choose whether to bear a child and laying the groundwork for cases like *Lawrence*. In March 2004, when the papers of the late U.S. Supreme Court Justice Harry Blackmun were released, we learned that *Roe* was almost overruled in 1992 in a case where the U.S. Supreme Court was considering a challenge to Pennsylvania's restrictive abortion laws. The papers revealed that Kennedy changed his mind, however, and the court upheld the constitutional right to privacy by a 5–4 vote.

“[H]omosexual activists have waged [a campaign] to convince us that homosexuality is just like heterosexuality, just a question of taste, a question of preference and no difference. I think that's not true. ... The Constitution has nothing in it that would prevent a state from ... disallowing homosexual sodomy and disallowing abortion.”

— Robert Bork, former circuit judge, U.S. Court of Appeals for the District of Columbia Circuit, in an interview with Peter Robinson, July 16, 2003

“[T]he fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”

— Justice Anthony Kennedy in *Lawrence v. Texas*, June 26, 2003²¹

“[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court.”

— U.S. Constitution, Article II, Section 2

The current spot on the U.S. Supreme Court occupied by Kennedy was nearly occupied by a federal judge named Robert Bork, who opposes constitutional decisions that recognize individual rights not explicitly named in the U.S. Constitution — rights such as privacy and freedom from anti-gay bias. The U.S. Senate argued heatedly about Bork’s qualifications to be a U.S. Supreme Court justice and rejected him in 1987 by a 58–42 vote.

Bork has said publicly that states may constitutionally prosecute people for sodomy. If the Senate had not rejected his nomination, *Lawrence* might have been decided differently, allowing states to continue to make GLBT people criminals because of their sexual practices. Furthermore, Bork was a witness in a May 2004 House hearing, where he expressed strong support for the anti-gay Federal Marriage Amendment, which sought to change the Constitution to prohibit marriage for same-sex couples. In the hearing, Bork stated that no state should ever be allowed to recognize marriage equality for same-sex couples.

By contrast, when President Reagan nominated Anthony Kennedy to the U.S. Supreme Court,²² he was overwhelmingly approved by the Senate after very little debate. Kennedy has since interpreted the U.S. Constitution fairly and in a way that respects the dignity of all Americans. For instance, recognizing the right of GLBT people to live our lives without government intrusion, Kennedy drafted the opinion in *Lawrence*, which struck down all remaining sodomy laws. We must encourage our elected representatives to select fair-minded judges like Kennedy who will protect and expand our rights instead of restricting them.

“Thank goodness some court finally had the courage to say that equal means equal, and others rightly followed, including the U.S. Supreme Court 19 years later.”

— U.S. Rep. John Lewis, D-Ga., Oct. 25, 2003, describing a 1948 decision that struck down California’s ban on interracial marriage

“[T]he people, through their elected officials, have the final say in Constitutional questions.”

— U.S. Rep. John Hostettler, R-Ind., Oct. 13, 2003, in support of a bill that would attempt to insulate the anti-gay Defense of Marriage Act from review by federal courts

How Are Judges Selected?

The U.S. Constitution provides that the president can nominate justices to the U.S. Supreme Court and judges to the lower federal courts. The U.S. Senate then has the power of “advice and consent” regarding these nominees. This means that senators vote on every judicial nominee and have the ability to reject nominees whom they believe are unfit for the federal judiciary. During every presidential administration, some judges are approved by the Senate and others are not. The U.S. House of Representatives has no role in the confirmation of federal judges.

The Senate’s power to give its advice and consent becomes particularly important when the Senate and the president disagree on a particular nominee. Because senators have this power, it is important to elect senators who will support fair-minded nominees and reject nominees who are not qualified to make fair, impartial decisions about civil rights.

Although federal judges are shielded from the political process once appointed, our vote for president and senators is also a vote for the judges that candidate will nominate or approve. Given the importance of judges to our rights and liberties, it is vital that GLBT voters carefully examine a candidate's philosophy about judges before voting on Election Day.

Elected Officials Have Many Tools That Can Impair the Courts' Power to Protect Our Rights and Liberties.

Opponents of judicial independence may also attempt to limit the courts' power to hear cases when they disagree with a decision. One way to do this is through a law that prohibits the courts from hearing certain kinds of cases.

A good example of this kind of legislation is the so-called "Marriage Protection Act" that Rep. John Hostettler, R-Ind., introduced in the 108th Congress. If enacted, this law would purportedly prevent the federal courts from hearing challenges to the so-called Defense of Marriage Act, known as DOMA, a federal law that purports to deny same-sex couples 1,100-plus federal benefits and protections and grant states the right to discriminate against same-sex couples who marry in other states. Hostettler issued a news release explaining that his bill was designed to prevent "activist courts" from recognizing GLBT rights:

"DOMA is good law and passed in 1996 with broad support," said Hostettler. "But marriage opponents know they can easily find activist judges willing to overturn it and create a 'right' to homosexual marriage."²³

Our U.S. Constitution provides a system of checks and balances in which the judiciary plays a crucial role, preventing legislatures from violating the rights of American citizens. Attempts to prevent the courts from doing so are particularly damaging to members of the GLBT community, who are often the targets of discriminatory laws that enjoy popular support.



DID YOU KNOW?

After the U.S. Supreme Court ruled that states could not prosecute gay people simply for having consensual sex, anti-gay activist Pat Robertson, founder of the Christian Coalition, called upon his supporters to pray for God to remove the justices who supported the decision.

All fair-minded citizens who respect the U.S. Constitution should be wary of attempts to change the system of government that has served this country for centuries. Bills like the “Marriage Protection Act” may be unconstitutional themselves, and certainly show a disregard for our system of government. They are an imprudent response to judicial decisions with which their supporters disagree.

On July 22, 2004, the U.S. House of Representatives voted to pass the “Marriage Protection Act” by a vote of 233-194. There was no comparable bill in the Senate at press time.

Still Don't Think It's Worth Your While to Get Active About Choosing Judges? Leading Foes of GLBT Equality Do!

As GLBT Americans and all allies of equality celebrated the historic decision in *Lawrence v. Texas* that finally eliminated the criminal stigma that the GLBT community had borne for decades, anti-GLBT groups mobilized to prevent such victories from ever happening again. Leaders of anti-gay groups on the far right immediately cried foul and demand-

ed judges who would not make decisions like *Lawrence* in the future.

Most famously, anti-gay activist Pat Robertson called upon his followers to pray for the majority justices to retire, claiming that “[w]ith their retirement and the appointment of conservative judges, a massive change in federal jurisprudence can take place.”

James Dobson, head of Focus on the Family, described Anthony Kennedy, the author of the majority opinion in *Lawrence*, as “one of the most dangerous men in this country. Somebody ought to tell him he could be impeached.”²⁴

The people and organizations who actively fight to take rights away from GLBT people are paying close attention to the federal judiciary. Focus on the Family and the Family Research Council devote time and

resources to promoting judicial nominees who share their anti-GLBT beliefs, and who they believe will rule in their favor on future cases.

On their websites and in news releases, these groups attack the federal judiciary whenever the courts protect GLBT rights. They urge their members to ask the president and their senators to appoint conservative judges who will not make such decisions. If these groups were to succeed, almost any decision that recognizes the equality and dignity of GLBT Americans could be overturned.

Selecting Fair-Minded Judges: Essential to the Protection of Our Rights and Liberties

Presidents know that the judges they pick will have a profound impact on the cases that come before the federal courts. In a 1988 report to then-Attorney General Edwin Meese, Justice Department attorneys explained that many important constitutional cases would come before the courts — *“the resolution of which is likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court.”*²⁵ The department declared that the purpose of the report, prepared in an election year, was to communicate “to the public, the media and members of Congress the growing importance of the judicial selection process.”²⁶

Important for our purposes, the 1988 report — drafted two years after *Bowers v. Hardwick* and eight years before *Romer v. Evans*²⁸ — devoted an entire section to predictions about GLBT rights cases that would come before the courts. The report warned that a U.S. Supreme

“[O]ur real last hope for federalism is the election of Governor George W. Bush as president of the United States who has said his favorite justices are Antonin Scalia and Clarence Thomas.”

— Former Alabama Attorney General William Pryor, in a speech to the Federalist Society, July 11, 2000. Pryor is now a judge on the U.S. Court of Appeals for the 11th Circuit.



DID YOU KNOW?

In 1988, the Justice Department under the Reagan administration issued a report that said judicial selection was important because the courts would soon decide whether “sexual preference” would be protected under the Constitution.²⁷

Court decision upholding civil rights for GLBT Americans would “endanger” any state policies excluding gay and lesbian people from employment as school teachers.

“State sodomy laws would be only the beginning.

Any public policy that treats homosexuals disadvantageously, in the military, in government, in schools, or in any other facet of public life, would be open to question. ... The justification for these restrictions have included the fear, whether or not justified, of homosexual recruiting or abuse in the schools and the desire to avoid providing homosexual role models for young and impressionable children. Under strict scrutiny, policies of this kind would be subject to substantial challenge in the courts.”²⁹

Finally, the report noted that constitutional protection for GLBT people probably would invalidate anti-gay policies in custody cases.³⁰

A Balanced Judiciary Is Also Important.

Because the U.S. Supreme Court hears only about 100 cases a year, federal appeals courts have the last word in 99 percent of federal court cases. And it matters which judge hears the case. A recent study of more than 4,000 cases decided by federal courts showed that the ideology of the president who appointed the judge is a good predictor of how he or she will decide the case, particularly in cases where the interpretation of the U.S. Constitution is important (abortion decisions, affirmative action, etc.).³¹

Federal appeals court judges hear cases as members of three-judge panels. The study also found that the composition of the panel affects the way that a judge will rule. The study supports what most of us

“No reasonable person seriously doubts that ideology ... helps to explain judicial votes.”

— “Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation” by Cass R. Sunstein, David Schkade and Lisa Michelle Ellman, 2004

know to be true: the presence of a colleague whose point of view differs from the judge’s own may affect his or her decision-making process. An ideologically balanced makeup of the courts results in a balance in the types of decisions that the courts will make.





DID YOU KNOW?

President Bush nominated to a federal appeals court seat Timothy Tymkovich, the lawyer who defended Colorado's anti-gay Amendment 2, an effort to invalidate all anti-discrimination laws protecting GLBT people in that state. He now serves on the U.S. Court of Appeals for the 10th Circuit.

To Secure Our Rights, Do We Need To Have Judges From a Certain Background?

It is best to have a diverse judiciary. Even when there is a difference of opinion among judges, the chance is higher that a fair decision will be made. If all sides of an issue are being explored, it is likely that the final decision will be fair and recognize the dignity of all parties involved. Accordingly, we have to make sure that our views are represented in the judiciary, and that there are judges who recognize the importance of equality for GLBT Americans.

This does not mean that we only want GLBT judges to decide GLBT cases. What we want are judges who are fair and impartial, and who do not use the legal system to promote their own personal agendas. We do not want a judge who will use the legal system to promote his or her own agenda of bias against GLBT people and deny us equal protection of the laws. We want a judge who will hear all the facts of the case and decide it fairly.

Some people try to make the discussion about judicial nominations into something that it is not. They claim that it is religious discrimination to insist that someone uphold the law and recognize equality for GLBT individuals even

if it is against their religious beliefs. Others claim that GLBT judges should not be allowed to judge cases where GLBT people are involved.

This tactic has been tried before. In 1974, Judge A. Leon Higginbotham, an African-American federal judge, was asked to recuse himself from a trial involving racial discrimination. In his decision refusing to step aside, he wrote, “[i]t would be a tragic day for the nation and the judiciary if a myopic vision of the judge’s role should prevail, a vision that required judges to refrain from participating in their churches, in their non-political community affairs, in their universities.”³²

The notion that African-American judges should not be able to decide race-related issues, or that GLBT judges should not be able to preside over GLBT matters, is not only discriminatory; it is illogical. If all judges who were the same race or sexual orientation as one of the parties in a particular case were required to recuse themselves, the bench often would be empty. For instance, if both black and white judges were required to step down from a case that pitted a black party against a white one, few judges would remain to hear the case. Moreover, to say that only the minority judges in a case should have to step down makes an unfair, arbitrary judgment about their ability to be objective.

Far more than race or sexual orientation, the true measure of a judge is judicial temperament — the ability to look at the facts of a case and decide it based on the law and the U.S. Constitution while recognizing the dignity and equality of all individuals.

What Kind of Judge Will Be Fair to the GLBT Community And Protect Our Rights and Liberties?

We believe that the hallmarks of a good judge are a steady judicial temperament and commitment to equality. Because so much is at stake in the judicial confirmation process, it is important to urge the president to nominate only judges who will safeguard our rights and liberties. We must also examine all nominees to the courts and urge the Senate to reject those who would not uphold the principles of equality and fairness held by mainstream America and guaranteed in our U.S. Constitution.

All nominees must meet traditional standards for competence and integrity. They must be experienced attorneys or judges with a record of strict adherence to the ethical standards of the legal profession. Their positions on the constitutional issues of greatest concern to GLBT Americans are also important. Only those nominees who possess exceptional intellectual ability, distinguished experience in law, and a temperament that would enable them to make decisions fairly, impartially and with an open mind should be confirmed for lifetime appointments to the courts.

In the many battles to enact legislation protecting GLBT people from discrimination in the workplace and public accommodations, opponents of equality have attacked such laws as “special rights” or “special preferences for homosexuals.” These characterizations are a calculated misstatement of the facts: The right to work at one’s job without fear of being fired for who one loves is a right that all Americans should enjoy. Anti-discrimination laws protecting our community do not grant “special” status any more than existing civil rights laws give “special” status to individuals because of their race, religion, sex, age or disability.

Federal law and the laws of 36 states currently allow an employer to fire a person simply because he or she is gay, lesbian or bisexual. Only four states have adopted laws that explicitly prohibit discrimination on the basis of gender identity and expression. Although many states have adopted hate crimes laws to protect the GLBT community from bias-motivated violence, a federal law has not yet passed. Some nominees for federal judgeships have argued that Congress lacks authority to pass such laws. Even if these laws ultimately are enacted, they could be vulnerable to invalidation by judges who do not agree that Congress has the power to protect GLBT people.

It is key to support judges who see themselves as part of an independent judiciary that has a meaningful role in our system of checks and balances — not simply as a rubber stamp for the legislature.

When deciding whether a judge is worthy of a lifetime appointment, the following criteria should be taken into account:

- Demonstrated commitment to full equality under law for GLBT Americans; people with HIV/AIDS; women; people with disabilities and racial, ethnic and religious minorities.
- Demonstrated commitment to the constitutional right to privacy and individual liberty, including the right of two adults to enter into consensual intimate relationships.
- Respect for Congress' constitutional authority to promote equality and civil rights and to pass laws protecting our community and other citizens from discrimination and violence.
- Sophisticated understanding of and commitment to the separation of church and state and the protection of citizens with minority religious views or no religious views.
- Respect for state legislatures' attempts to address discrimination and violence based on sexual orientation, gender identity and expression, disability, race, ethnicity and other factors through laws that meet the requirements of the U.S. Constitution.

How **You** Can Help Protect The Courts — and Your Rights

The voice of every individual who believes in GLBT equality is important in the fight for the equality of all Americans. When one person urges his or her senator to vote in a way that recognizes the dignity of GLBT people, it makes a difference. When one person tells a family member about the inequality faced by GLBT Americans, it makes a difference. When one person tells a friend about the importance of judges in our lives, it makes a difference. When one person votes for an elected official who believes in the equality of all Americans, it makes a difference. Together, these actions are powerful, and together, we can change the world.

Voting is an important tool that we in a democracy may sometimes take for granted. The U.S. Supreme Court has recognized that voting is an important right that must be protected because, through voting, we preserve our other rights. Whenever we vote, we are expressing our beliefs and feelings about the rights and protections that we have, or that we should have. Only through exercising the right to vote can we elect fair-minded public officials who will, in turn, select fair-minded judges to protect our rights.

Throughout our history, Americans have realized the importance of voting and have fought and died for the ability to exercise that right. African Americans have fought numerous times throughout our history to gain and maintain the right to vote, including the ratification of the 15th Amendment to the U.S. Constitution. Women secured the guar-

anteed right to vote with the ratification of the 19th Amendment in 1920. Later, people fought to lower the voting age to 18 (through the ratification of the 26th Amendment), allowing citizens who were fighting for our freedoms in the U.S. military to vote in our elections. All of these groups fought to give us the right to express ourselves through voting. It is our duty to use this right to express our support for GLBT equality.

As GLBT Americans and allies, our lives, our families and our freedoms are at stake in this fight, and we each have to do our part to make sure that the judges who protect these important aspects of our lives are fair and impartial. We can also talk to those who care, to edu-

“Only through exercising the right to vote can we elect fair-minded public officials who will, in turn, select fair-minded judges to protect our rights.”

cate them on the importance of voting and the critical role judges play in our lives. By making our voices heard through voting, we can make a difference, and by working together, our combined

votes can create change. Because judges protect our rights, we have the responsibility to protect and defend the independence and fairness of our judges.

References

- 1 While each state also has its own state court system, the examples used in this publication will focus on the federal judicial system.
- 2 See *e.g.*, Lawrence, 539 U.S. at 581; Ex Parte H.H., 830 So. 2d 21 (Ala. 2002).
- 3 The federal Courts of Appeals hear cases in three-judge panels that vote on the outcome of cases.
- 4 See Lofton v. Kearney, 358 F. 3d 804 (11th Cir. 2004).
- 5 When the majority of active judges disagree with a three-judge panel's decision, they may vote to rehear the case en banc, which means that all active judges hear and decide the case together.
- 6 See Lofton, 2004 U.S. App. Lexis 15056 (July 21, 2004). A majority of the active judges on the court is required in order to secure a rehearing.
- 7 Senate Judiciary Committee hearing, June 11, 2003.
- 8 Since this decision came down, anti-gay adoption bills have been introduced in two states, Iowa and Kentucky. The outcome of the Florida case could therefore have an impact in other states as well.
- 9 State v. Limon, 83 P. 3d 229, 236 (Kan. Ct. App. 2004).
- 10 The Kansas Supreme Court granted Limon's petition for review May 24, 2004. See 2004 Kan. Lexis 284.
- 11 Lawrence, 539 U.S. at 571.
- 12 Prepared statement of Erwin Chemerinsky to the ABA Commission on Separation of Powers and Judicial Independence, February 21, 1997 at 2.
- 13 Goodridge v. Dept. of Public Health, 798 N.E. 2d 941 (2003); Goodridge was litigated by the Gay and Lesbian Advocates and Defenders (www.glad.org).
- 14 See Skokie v. National Socialist Party of America, 373 N.E. 2d 21 (Ill. 1978).
- 15 Bruce Fein and Burt Neuborne, "Why Should We Care about Judicial Independence and Accountable Judges?" *Judicature*, September – October 2000, at 6.
- 16 In 1968, 72 percent of the American public opposed interracial marriage. In 1978, 54 percent of Americans continued to disapprove of interracial marriage and, by 1991, Americans finally approved by the slim majority of 48 percent to 42 percent. See Evan Gerstmann, *Same-Sex Marriage and the Constitution* (2004).
- 17 American Constitution Society and the Constitution Project, *The Federal Marriage Amendment: When Should the Constitution be Amended?* Panel Discussion, March 19, 2004.

- 18 Florida is the only state that has a law forbidding GLBT people from adopting. Fla. Stat. § 63.042 (3), “No person eligible to adopt under this statute may adopt if that person is a homosexual.” Oklahoma has a law that prohibits the state from recognizing adoptions by two people of the same sex conducted outside of the state. 2004 Okla. Sess. Laws 176.
- 19 Ex Parte H.H., 830 So. 2d at 38.
- 20 In re B.L.V.B., 160 Vt. 368 at 376.
- 21 Lawrence, 539 U.S. at 577 (quoting Bowers, 478 U.S. at 216 (Stevens, J., dissenting)).
- 22 After Bork’s rejection, Reagan nominated Douglas Ginsburg, another judge on the U.S. Court of Appeals for the D.C. Circuit. Ginsburg withdrew shortly after being nominated when it was reported that he had smoked marijuana.
- 23 News release, Office of Rep. John Hostettler, R-Ind. (Oct. 16, 2003). Available at www.house.gov/hostettler/News/Hostettler-news-2003-10-16-marriage-protection-act.htm.
- 24 James Dobson, Restore the Foundation Rally, Aug. 23, 2003.
- 25 Report to the Attorney General: “The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation” (Oct. 11, 1988) at iii.
- 26 *Id.* at iv.
- 27 *See id.*
- 28 The U.S. Supreme Court case that overturned an attempt by the state of Colorado to amend its state constitution to remove rights from GLBT people.
- 29 Report to the Attorney General, *supra* note 25, at 25, 27.
- 30 *See id.*
- 31 See Cass R. Sunstein, David Schkade and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, at 352 (2004).
- 32 Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs, 388 F. Supp. 155, 180–181.

About the Author

Lara Schwartz is senior counsel with the Human Rights Campaign. She provides legal advice to HRC on judicial nominations, marriage equality, constitutional law, and federal benefits, and promotes the appointment of fair-minded judges to the federal bench through research and advocacy. Schwartz also develops and promotes legislation on issues that affect the everyday lives of GLBT people and their families.

Before joining HRC, Schwartz was associated with the law firm of Gilbert, Heintz & Randolph LLP, where she litigated in the areas of legislative redistricting, voting rights, fair housing, and insurance. Before that, she was with the law firm of Skadden, Arps, Slate, Meagher, and Flom LLP, where her practice focused on securities litigation. Lara served as law clerk to the Honorable Ronald Lee Gilman on the U.S. Court of Appeals for the Sixth Circuit. She is a graduate of Harvard Law School and Brown University.

Acknowledgements

The author consulted with numerous legal experts, whose input was invaluable. They include: Bert Brandenburg, Justice at Stake; Mary Bonauto, Gay and Lesbian Advocates and Defenders; Marge Baker, People for the American Way; Marcia Kuntz; J.J. Gass, Brennan Center for Law and Justice; Alexis Hill; Doug Kendall, Community Rights Council; Judy Applebaum, National Women's Law Center; Liz Seaton, Human Rights Campaign; Paul Smith, Jenner & Block; and Michael Adams, Lambda Legal.

Other HRC staff who made significant contributions to the project include: James Decker, associate director for design; Steffan DeClue, foundation grant writer, who prepared our proposal to the Open Society Institute; Praveen Fernandes, public policy advocate; Kevin Layton, general counsel, who provided guidance at all stages of research and writing. Also providing editorial guidance were: Janice Hughes, associate director for publications; Robin Reed, editorial manager; and Kim Mills, education director. Several other HRC staff participated in discussions on the role of the courts in the fight for GLBT equality.

A very special thanks to Lisa Haney for her illustrations and OmniStudio for design.

Finally, this publication was made possible by a generous grant from the Open Society Institute. Special thanks to John Kowal, who not only provided the opportunity to produce this piece, but also helped to make it a success.



HUMAN
RIGHTS
CAMPAIGN
FOUNDATION®

www.hrc.org

A project of the Human Rights Campaign Foundation, 1640 Rhode Island Ave., N.W., Washington, D.C. 20036

8 / 2004