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Litigation, Legislation, and Love: The Comparative Efficacy of Litigation and Legislation for the Expansion of Lesbian, Gay, and Bisexual Civil Rights

Submitted in partial fulfillment
of the requirements
for the Murray State University Honors Diploma

Mallory L. Harrington

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Introduction

Members of the lesbian, gay, and bisexual communities have, for decades, worked to secure the same protections and rights granted to the rest of the American population. The struggle for equality has employed many strategies, but federal litigation and legislation have emerged as the most visible and effective tools for pursuing equality. Lesbian, gay, and bisexual Americans have enjoyed many victories throughout the decades that equality has been considered by the federal government, but these victories have been balanced by crushing defeats which stripped the community of protections afforded to their heterosexual counterparts. Both federal litigation and federal statutes have been employed to expand and limit the scope of civil rights for lesbian, gay, and bisexual people, with varying degrees of success. In investigating trends with regard to civil rights for lesbian, gay, and bisexual people, the federal court system has been more effective in expanding the scope of civil rights than has Congress. This variation is due to the relative level of judicial independence enjoyed by judges and justices and the impact of public opinion on the decisions of the courts, while members of Congress are more subject to the will of their constituents and the framework of the political party system.

This study investigates only court cases and bills which substantively and directly impact lesbian, gay, and bisexual individuals, and will only include legislation and litigation since 1950. This study does not discuss civil rights action with regards to transgender individuals, despite transgender individuals being classified alongside lesbian, gay and bisexual individuals in the majority of American social discourse, as legislation and litigation regarding transgender people tends to be considered more similarly to legislation and litigation regarding gender minorities, and this study focuses on action regarding sexual orientation minorities specifically. Only federal court cases at the appellate level, those heard by the Circuit Courts of Appeal and the Supreme

Court, are analyzed, as these rulings influence public policy to a substantially greater extent than do trial court rulings. Furthermore, only legislation which has been signed by the President of the United States and thus made law is considered, as proposed legislation does not substantively influence public policy unless and until it is codified. This study includes cases and laws which both expand rights for lesbian, gay, and bisexual people and those cases and laws which limit those rights, as actions which limit civil rights should be considered when making determinations as to the overall efficacy of a policy-making approach. The study identifies trends in policy-making which can inform decisions made by interest groups, governing bodies, and individuals who seek to ensure the civil rights of lesbian, gay, and bisexual individuals, as the results of this study indicate which approaches are more likely to be successful in achieving civil rights.

The courts have considered more than eight times as many cases regarding the civil rights of lesbian, gay, and bisexual individuals than Congress has considered bills regarding the same subject matter. Since 1950, federal appellate courts have heard 41 cases which address questions of civil rights for lesbian, gay, and bisexual people, whereas only 5 federal laws have been passed addressing this issue, as gathered from the opinions of federal courts, records of federal court proceedings, the United States Code, and the United States Statutes at Large. In addition to the volume of cases and laws to be considered, this study devotes the majority of its length to examining both the content and impact of the courts' rulings and of Congress' legislation in determining the extent to which both policy approaches have been employed to further, and in some cases limit, the rights of lesbian, gay, and bisexual individuals. This study also examines the possible causes of the different trends discovered, including political and structural features

of the branches which distinguish them from one another and fundamental ideological differences which exist between the institutions.

An examination of the scholarly literature on this topic reveals the relative novelty of the study being undertaken here. There exists little research which directly compares the policy-making efficacy of the courts and Congress in the promotion of civil rights for the lesbian, gay, and bisexual communities. As such, this study serves to fill an important gap in the literature and address questions which were previously not addressed, yet are incredibly relevant to socio-political discourse at this moment in the United States.

This study answers the question central to the efforts of numerous interest groups and salient to a great number of individuals: between Congress and the federal judicial system, which policy-making branch is more effective in creating policy that expands the civil rights of lesbian, gay, and bisexual individuals? In investigating trends with regard to civil rights for lesbian, gay, and bisexual people, the federal court system has been more effective in expanding the scope of civil rights than has Congress. This variation is due to the relative level of judicial independence enjoyed by judges and justices and the impact of public opinion on the decisions of the courts, while members of Congress are more subject to the will of their constituents and the prevailing public opinion within their district and constituency.

Literature Review

A great deal of scholarship in recent years has been devoted to examining the ways in which those who desire to secure equal rights for the lesbian, gay, and bisexual communities can best achieve their desired outcomes. However, few if any studies endeavor to directly address the question of which policy-making approach has contributed the most to the furtherance of rights

for this disadvantaged minority. As such, the research being undertaken in this study constitutes a novel contribution to existing literature. A number of works, encompassing numerous decades of research, have been published which analyze every aspect of the judicial process as it relates to the civil rights of lesbian, gay, and bisexual people and are discussed in this section.

Litigation's Effect on Social Discourse

First, numerous works, such as Keck's "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights" (2009), discuss the overarching effect that civil rights litigation may have on political and social discourse on the issue of civil rights for sexual orientation minorities broadly. Research conducted by Keck has shown that while there are many instances in which litigation that has expanded the scope of civil rights for lesbian, gay, and bisexual people has been met with opposition that stripped the rights of the community through measures such as ballot initiatives and statutes, this trend is far from universal (Keck, 2009). Similarly, another study, conducted by Eskridge, finds that due to the dynamics of political discourse and the effects of reactionary efforts which attempt to counter progress made by the lesbian, gay, and bisexual community, greater attention is called to issues facing sexual orientation minority groups and more action is taken to secure equal liberty for these groups (Eskridge, 2013). Works investigating such facets of this topic serve the important purpose of helping to explain the circumstances under which employing litigation may be the most useful strategy for advancing equality for lesbian, gay, and bisexual people. Furthermore, these works contribute to the understanding of the political strategies used by groups seeking to expand civil rights, and thus serve as a means of expanding the perception of the courts' role in the overarching forum of American society.

Effect of Social Movements' Characteristics

Other scholars have investigated the effect that the internal characteristics of social movements, such as the movement for lesbian, gay, and bisexual civil rights, have on the success that such movements enjoy in litigation efforts. Research authored by McCammon and McGrath shows that access to organizational resources, political opportunities, and legal opportunities increase the likelihood that a social movement will turn to legal mobilization and enjoy success with this strategy (McCammon and McGrath, 2015). The same study also finds that legal precedent and established statutory foundations are both important in movement mobilization and legal success of social movements, and it also finds that judicial preconceptions which are brought to the courtroom may influence the reception of a movement's demands and thus impact the outcome of judicial decisions (McCammon and McGrath, 2015). Analyzing the features of the movement itself is important in understanding the role of litigation in securing civil rights protections for sexual orientation minorities because such investigation leads to a greater understanding of all the actors involved in determining the trajectory of civil rights litigation for lesbian, gay, and bisexual individuals. Since characteristics of a given social movement can be related to the success of that social movement in judicial proceedings, an understanding of the features of these movements can facilitate a greater understanding of the overall workings of the judicial system.

Effects of Individual Court Decisions

Researchers have also examined the effects of one or a few decisions of the Court on both future cases and on the wider political and social systems of the United States. A study authored by McClain found that the arguments presented to the Supreme Court in *Romer v. Evans* (517

U.S. 620, 1996) in favor of upholding the Colorado state constitutional amendment, such as promotion of morality, protection of the family, religious liberty, freedom of association, and the clash of "equal rights" versus "special rights" are mirrored in arguments presented in *Lawrence v. Texas* (539 U.S. 558, 2003) and *U.S. v. Windsor* (570 U.S. 744, 2013) (McClain, 2013). The same study also showed that the majority opinion in *Windsor* cites *Romer* multiple times. Furthermore, in *United States v. Windsor*, the reasoning applied in *Romer* is used as a template for demonstrating that the constitution prohibits systematically disadvantaging a certain group under the law (McClain, 2013). McClain also shows that both decisions use similar language in referring both to the attitudes implicit in the offending measures and to the imposition posed to lesbian, gay, and bisexual people by the measures being considered (McClain, 2013).In examining the effect that decisions by the Supreme Court have on public opinion and the political system at large, one study describes the effects of the Court's landmark same-sex marriage decision in O*bergefell v. Hodges* (576 U.S. 644, 2015). This study showed that one year following the Court's decision in *Obergefell*, people categorized as holding a conservative worldview were less likely to support same-sex marriage and demonstrated more prejudice toward members of the lesbian, gay, and bisexual community than before the Court's ruling in that case (Perrin, et. al, 2018). These findings are useful in that their explanation of the effect that cases can have and have had not only on the codified protection of rights of the lesbian, gay, and bisexual community, but also on the wider civil rights jurisprudence of the Supreme Court and on the perception of sexual orientation minority groups in society, which can greatly impact the legal and social standing of these groups.

Relationship of Civil Rights Litigation to the Political Climate Generally

Furthermore, researchers and scholars have shown that the wider political climate affects the success of litigation in securing the rights of lesbian, gay, and bisexual Americans. One study, authored by Sobel, finds that efforts to normalize same-sex relationships in the early years of the movement toward equality helped contribute to litigation outcomes favoring lesbian, gay, and bisexual people (Sobel, 2015). In general, this study finds that shifting public opinion has led to greater success in litigation for the expansion of the rights of the lesbian, gay, and bisexual community (Sobel, 2015). In investigating the structural constraints to the courts' action in expanding civil rights protections for sexual orientation minorities, Smith argued that because the courts, lacking both financial and military power, rely on their reputation to maintain their legitimacy within the American political system, and are thus hesitant to make policy that would not be enacted by the other branches for fear of being criticized as improperly activist (Smith, 2013). This is particularly helpful in examining some of the earlier, more restrained decisions the courts made regarding the scope of civil rights for lesbian, gay, and bisexual people, as understanding what constrains the powers of the courts can be useful in understanding why the courts may choose not to act despite being given the opportunity to do so.

Alternatively, however, Becker has shown that judicial independence, which she defines as the application of the law to the facts of the case presented rather than reliance on one's own preconceived biases, has played a substantial role in the litigation surrounding the expansion of civil rights for lesbian, gay, and bisexual people (Becker, 2014). Becker showed that with regard to several marriage equality decisions made by federal circuit courts, the judges made decisions which were not necessarily in alignment with the political views of the president who appointed them, thus indicating that the dynamics of the wider political system may not fully explain the motivation behind certain judges' or justices' decisions (Becker, 2014). Becker further showed

that even in instances when public opinion was not necessarily aligned with the expansion of the scope of civil rights for lesbian, gay, and bisexual people, judges nonetheless decided cases so as to expand those rights (Becker, 2014).

Standards of Review Impact Case Outcomes

Scholars have also investigated the manner in which the application of different standards of review; between rational basis review, heightened or intermediate scrutiny, and strict scrutiny; has impacted the decisions which have been made regarding the expansion of civil rights for lesbian, gay, and bisexual individuals. An examination of the standard of review being applied is helpful in understanding not only the mechanisms by which the courts decide cases, but the rationale underlying the ultimate outcome of cases, which thus shape public policy. Importantly, scholars and analysts will note that the Supreme Court has not articulated the standard of review appropriate for cases involving Equal Protection claims related to sexual orientation (Hunter, 2015 and Leslie, 2014). One researcher, Christopher Leslie at Cornell University, found that statutes which prohibit same-sex marriages were found invalid when courts applied an intermediate scrutiny standard, but similar statutes were found constitutional in instances when the court in question applied rational basis review (Leslie, 2014). In addition, Nan Hunter of the University of Houston argues that the Supreme Court's hesitancy to articulate a proper standard of review by which to hear Equal Protection challenges involving sexual orientation is due to the morality judgement sometimes associated with the class facing discriminatory treatment (Hunter, 2015). This argument can easily be associated with other researchers' findings regarding the effect that public opinion and the wider social and political climate have been shown to have on the decisions of the courts.

Additionally, research on the matter of the level of equal protection scrutiny being applied in cases involving the scope of civil rights afforded to sexual orientation minorities has concerned the trend of the Supreme Court increasingly choosing to hear equal protection cases without examining the level of scrutiny appropriate to the case at hand. As William Araiza of Boston University argues, the Court has recently assumed a more particularized approach to handling equal protection claims, examining individual laws on the basis of rationality in lieu of relying on the traditional suspect classification levels (Araiza, 2014). Araiza supports this claim in his analysis of *Romer v. Evans* (517 U.S. 620, 1996) by explaining that the Court relied upon equal protection analysis and rational basis review without at all considering whether lesbian, gay, and bisexual people should qualify as a suspect class (Araiza, 2014). Araiza's analysis of the Court's recent attitudes toward hearing equal protection cases aligns with the findings of other works in the area of equal protection litigation. Understanding both the trends which have emerged regarding the Supreme Court's equal protection jurisprudence and the implications of these trends provides insight into the Court's decision-making process for cases involving suspect classification and equal protection claims, which can be useful in explaining the decisions reached by both the Supreme Court and the Circuit Courts of Appeals. Given that many of the cases brought by lesbian, gay, and bisexual people contain an equal protection claim, understanding the Court's equal protection jurisprudence is fundamental to understanding the Court's jurisprudence with respect to the scope of civil rights protections afforded to sexual orientation minorities.

Differences in Approach Between Branches of Government

Additionally, research has been conducted which simply shows that the courts assume a different role in the handling of issues related to the furtherance of civil liberties for lesbian, gay, and bisexual people as compared to the other branches of government. For instance, a study by Knauer showed that while the courts have found in favor of expanding civil liberties for lesbian, gay, and bisexual people, the other branches of government have either taken no action on the matter or attempted to implement policies designed to limit the civil rights of the lesbian, gay, and bisexual community (Knauer, 2020). Furthermore, one researcher, Gwendolyn Leachman at the University of California at Davis, has indicated that in terms of both visibility and stability, litigation remains the best option for the expansion of the scope of civil rights for the lesbian, gay, and bisexual communities (Leachman, 2014).

Research which considers the role of the legislative branch has often considered the specific conditions under which individual legislators and the legislative body as a whole is willing to take action which expands rights for the lesbian, gay, and bisexual communities. One study by Bishin and Smith finds that the internal political landscape of individual legislators' district serves as a determining factor on bills which directly involved the lesbian, gay, and bisexual community (Bishin and Smith, 2013). The same study also showed that legislators from competitive districts are less likely to support high-profile legislation limiting the rights of lesbian, gay, and bisexual people; thus implying that legislators in these competitive districts may appeal to a passionate subpopulation rather than the median voter (Bishin and Smith, 2013). Similarly, a different study indicated that a larger population of lesbian, gay, and bisexual people within a member of Congress's constituency and more favorable opinions of sexual orientation minorities within the member's constituency at large were associated with a greater likelihood that a given member of Congress will participate in symbolic and substantive representational

activities on behalf of their lesbian, gay, and bisexual constituents (Hansen and Treul, 2015). Taken together, these studies provide useful insight into the level of influence that public opinion has with respect to the decisions that members of Congress make on issues related to the civil rights of lesbian, gay, and bisexual people. This consideration is notable in that it may serve to explain both the reasons for Congress as a body acting on certain measures related to the civil rights of sexual orientation minorities and the reasons for choosing not to act on other measures.

Effect of Public Opinion on Legislation

Scholars investigating the role of legislation in expanding the scope of civil rights for lesbian, gay, and bisexual people have examined the role of public opinion and media coverage of issues related to lesbian, gay, and bisexual issues in encouraging legislative action in this regard. For instance, one researcher, Nathaniel Frank, showed that the long-term information campaign and application of public pressure expanded support for the repeal of the United States' Armed Forces' "Don't Ask, Don't Tell" policy (Frank, 2013). Frank indicates that the effects of public opinion and public pressure were instrumental in securing the necessary support for the repeal of the measure across numerous branches of government, but most particularly within Congress (Frank, 2013). Alternatively, however, one study found that there existed a divergence from the majority opinion with regard to the rights of lesbian, gay, and bisexual people and the voting patterns of members of Congress (Krimmel, et. al, 2016). The same study also indicated that a change in voters' opinions on the rights of sexual orientation minorities did not lead to a change in the vote of members of Congress, and that this trend indicated a bias against the majority's will with regard to the civil rights of lesbian, gay, and bisexual people (Krimmel, et. al, 2016). Evidence discussed in the chapter of *LGBTQ Politics: A Critical Reader*

entitled “Equality in the House: The Congressional LGBT Equality Caucus and the Substantive Representation of LGBTQ Interests” suggests that partisanship and a member of Congress’ belonging to the LGBT Equality Caucus in the House of Representatives were correlated with a greater likelihood of voting to repeal “don’t ask, don’t tell” (Snell, 2020). This evidence is useful in that it allows for examination of the factors which may be correlated with an increase in a member of Congress’ amenability to expanding the scope of civil rights afforded to sexual orientation minorities, which may explain Congress members’ past votes and allow predictions about future behavior to be made.

An investigation of the literature on the matter of policy-making for the furtherance of civil rights for lesbian, gay, and bisexual individuals reveals numerous gaps in the scholarly investigation into this topic. Literature exists which addresses a number of individual facets of litigation with regard to lesbian, gay, and bisexual people’s civil rights. Likewise, there is literature which covers numerous facets of the legislative branch’s actions with regard to this topic. However, very little if any literature directly compares these strategic approaches to the expansion of the scope of civil rights afforded to sexual orientation minority groups.

Data and Methods

Data for this study were compiled from federal court records, opinions from federal judges and justices, records from the proceedings of the United States Congress, the United States Code, and the United States Statutes at Large. A thorough examination of these sources resulted in the compilation of forty-two court cases and six pieces of federal legislation which are to be analyzed.

The analysis of these court cases and laws focuses upon whether the primary effect of the decision or law was to expand, limit, or hold steady the scope of rights granted to lesbian, gay, and bisexual people. Those cases and laws which establish that such individuals are entitled to a right or privilege when such entitlement had not been previously established are analyzed as expanding rights. Those cases and laws which establish that a right does not exist or that lesbian, gay, and bisexual individuals, by virtue of their sexual orientation, are not entitled to such a right, are analyzed as limiting rights. Cases which neither establish the existence of a new right nor establish that lesbian, gay, and bisexual individuals are not entitled to a given right are analyzed as holding steady the rights of these individuals and thus maintaining the status quo. No laws are coded as maintaining the status quo because laws, generally speaking, serve to in some way change existing policy on an issue and thus rarely if ever maintain the status quo.

The Supreme Court cases examined for this analysis, along with their subsequent effect on the scope of civil rights granted to lesbian, gay, and bisexual Americans, are enumerated in Table 1 below. *Baker v. Nelson* (291 Minn. 310, 191 N.W.2d 185) is included among the cases heard by the Supreme Court because, despite the Court dismissing the case for lack of a substantial federal question, the case was presented before the Court under a mandatory appeal, and dismissal therefore constituted a decision on the merits of the case and set the case as precedent (Winnick, 1976). *DeBoer v. Snyder* (135 S. Ct. 1040) is included due to the fact that it was consolidated with *Obergefell v. Hodges* (576 U.S. 644) to be heard by the Supreme Court, and both *Altitude Express, Inc. v. Zarda* (590 U.S. ___) and *R.G. and G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission* (590 U.S. ___) are included here for the same reason, as both of those cases were consolidated with *Bostock v. Clayton County* (590 U.S. ___).

Case Name	Citation	Effect on Civil Rights
One, Inc. v. Oleson	355 U.S 371 (1958)	Expand
Boutilier v. Immigration and Naturalization Service	387 U.S. 118 (1967)	Limit
Baker v. Nelson	291 Minn. 310, 191 N.W.2d 185 (1971)	Limit
Bowers v. Hardwick	478 U.S. 186 (1986)	Limit
Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.	515 U.S. 557 (1995)	Limit
Romer v. Evans	517 U.S. 620 (1996)	Expand
Oncale v. Sundowner Offshore Services, Inc.	523 U.S. 75 (1998)	Expand
Boy Scouts of America v. Dale	530 U.S. 640 (2000)	Limit
Lawrence v. Texas	539 U.S. 558 (2003)	Expand
United States v. Windsor	570 U.S. 744 (2013)	Expand
Obergefell v. Hodges	576 U.S. 644 (2015)	Expand
DeBoer v. Snyder	135 S. Ct. 1040 (2015)	Expand
Pavan v. Smith	582 U.S. ___ (2017)	Expand
Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission	584 U.S. ___ (2018)	Limit
Bostock v. Clayton County	590 U.S. ___ (2020)	Expand
Altitude Express, Inc. v. Zarda	590 U.S. ___ (2020)	Expand
R.G. and G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission	590 U.S. ___(2020)	Expand
Fulton v. City of Philadelphia	593 U.S. ___(2021)	Limit

Table 1: The Supreme Court cases analyzed in this study and their effect on the civil rights of lesbian, gay, and bisexual individuals.

The cases from the Federal Circuit Courts of Appeal that are examined in this analysis, along with their effect on the scope of civil rights granted to sexual orientation minorities are listed in Table 2, below.

Case Name	Citation	Effect on Civil Rights
Adams v. Howerton	673 F.2d 1036 (1982)	Limit
National Gay Task Force v. Board of Education of the City of Oklahoma City, Oklahoma	729 F.2d 1270 (1984)	Expand
Gay Student Services v. Texas A&M University	737 F.2d 1317 (1984)	Expand
High Tech Gays v. Defense Industrial Security Clearance Office	895 F.2d 563 (1990)	Limit
Equality Foundation of Greater Cincinnati Inc. v. City of Cincinnati	838 F. Supp. 1235 (1995)	Limit
Nabozny v. Podlesny	92 F.3d 446 (1996)	Expand
Able v. United States	88 F.3d 1280 (1998)	No Change
Citizens for Equal Protection v. Bruning	455 F. 3d 859 (2006)	No Change
Witt v. Department of the Air Force	527 F.3d 806 (2008)	Expand
Cook v. Gates	528 F.3d 42 (2008)	No Change
In re Levenson	587 F.3d 925 (2009)	Expand
Massachusetts v. United States Department of Health and Human Services	682 F.3d 1 (2010)	Expand
Log Cabin Republicans v. United States	658 F.3d 1162 (2011)	Expand
Gill v. Office of Personnel Management	682 F.3d 1 (2012)	Expand

Hollingsworth v. Perry	671 F.3d 1052 (2013)	Expand
Bourke v. Beshear	996 F. Supp. 2d 542 (2014)	Expand
Kitchen v. Herbert	755 F.3d 1193 (2014)	Expand
Bishop v. Oklahoma	333 F. App'x 361 (2014)	Expand
Bostic v. Schaefer	760 F. 3d 352 (2014)	Expand
Baskin v. Bogan	766 F.3d 648 (2014)	Expand
Wolf v. Walker	766 F.3d 648 (2014)	Expand
Latta v. Otter	771 F. 3d 456 (2014)	Expand
Sevcik v. Sandoval	771 F.3d 456 (2014)	Expand
SmithKline Beecham Corporation v. Abbott Laboratories	740 F. 3d 471 (2014)	Expand
Tanco v. Haslam	7 F. Supp. 3d 759 (2015)	No Change
Hively v. Ivy Tech Community College	853 F.3d 339 (2017)	Expand

Table 2: The Circuit Courts of Appeal cases analyzed in this study and their effect on the civil rights of lesbian, gay, and bisexual individuals.

The statutes included in this analysis are as follows: the Equal Access Act (20 U.S.C. § 4071), which allowed clubs based on sexual orientation minority status to form in high schools; the Immigration Act of 1990 (104 Stat. 4978), which removed the provision that homosexual conduct can exclude individuals from eligibility to attain United States citizenship; the National Defense Authorization Act for Fiscal Year 1994 (H. R. 2401), which contains language that gave rise to the United States Armed Forces' "don't ask, don't tell" policy; the Defense of Marriage Act (1 U.S.C. § 7), which federally defined marriage as between one man and one woman; the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (18 U.S.C. § 249), which expanded penalties for hate crimes to include those committed on the basis of prejudice against lesbian, gay, and bisexual people; and the Don't Ask, Don't Tell Repeal Act of 2010 (124 Stat.

3515, 3516 and 3517), which allowed lesbian, gay, and bisexual people to serve openly in the United States Armed Forces.

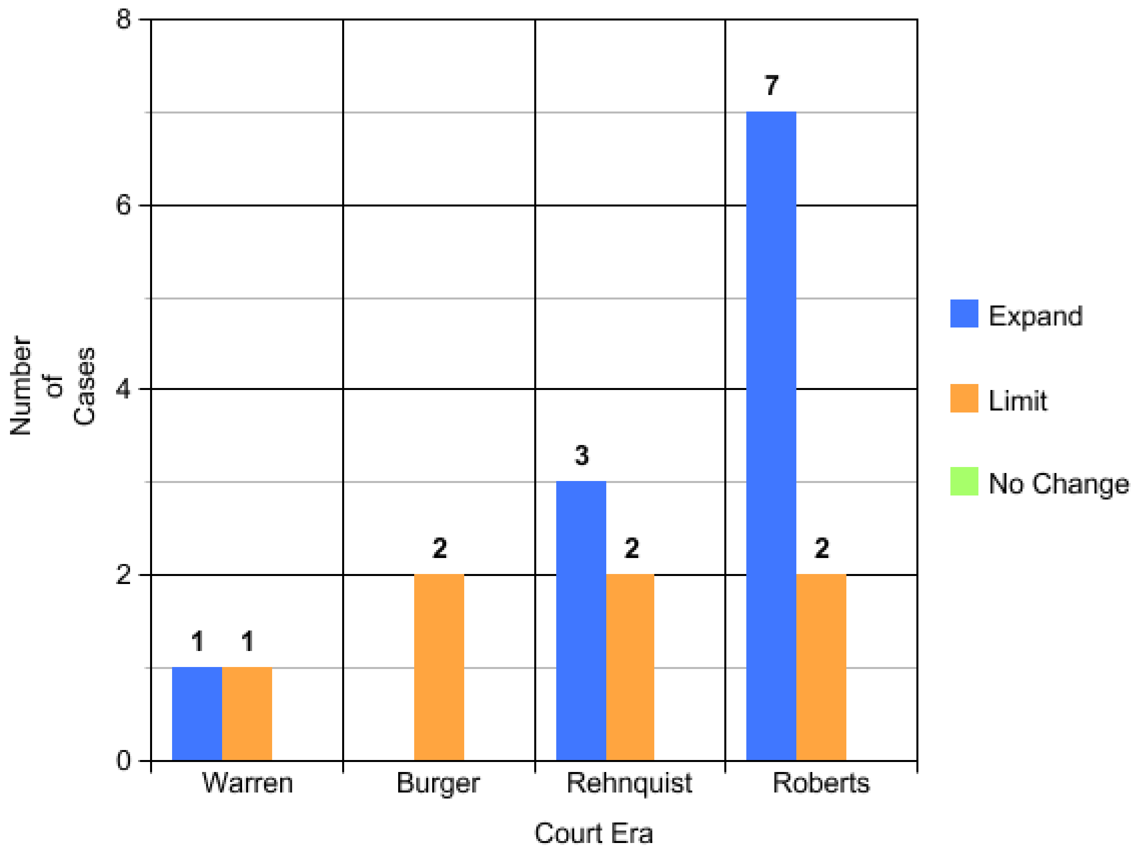
Descriptive statistics were run on the compiled data so as to determine the frequencies of each effect: expansion of rights, limitation of rights, and maintenance of existing policy. Analysis of these data also included analyzing the cases and laws by decade, Supreme Court era, and Circuit court. In addition to determining which policy-making approach has been the most effective, this analysis was conducted to examine the effect of factors such as public opinion, the personal ideology of judges and justices, the history of the nation, the effect of contemporary events, and regional differences to help further explain the discrepancies shown between the effectiveness of the courts in expanding the rights of sexual orientation minorities as compared to the effectiveness of the United States Congress.

Results

The results of this analysis show that, of the forty-four cases heard by federal appellate courts and the United States Supreme Court, thirty expanded the scope of rights of lesbian, gay, and bisexual people, ten limited that scope, and four maintained the status quo with regard to the scope of rights for sexual orientation minorities. As such, 68.18% of the decisions that federal appellate-level courts have made on this issue, then, have served to expand the scope of civil rights, while 22.73% have limited it. With regard to legislation which impacts the scope of civil rights for sexual orientation minorities, of the six federal laws which have been passed since 1950, four have expanded the scope of civil rights while two have limited this scope.

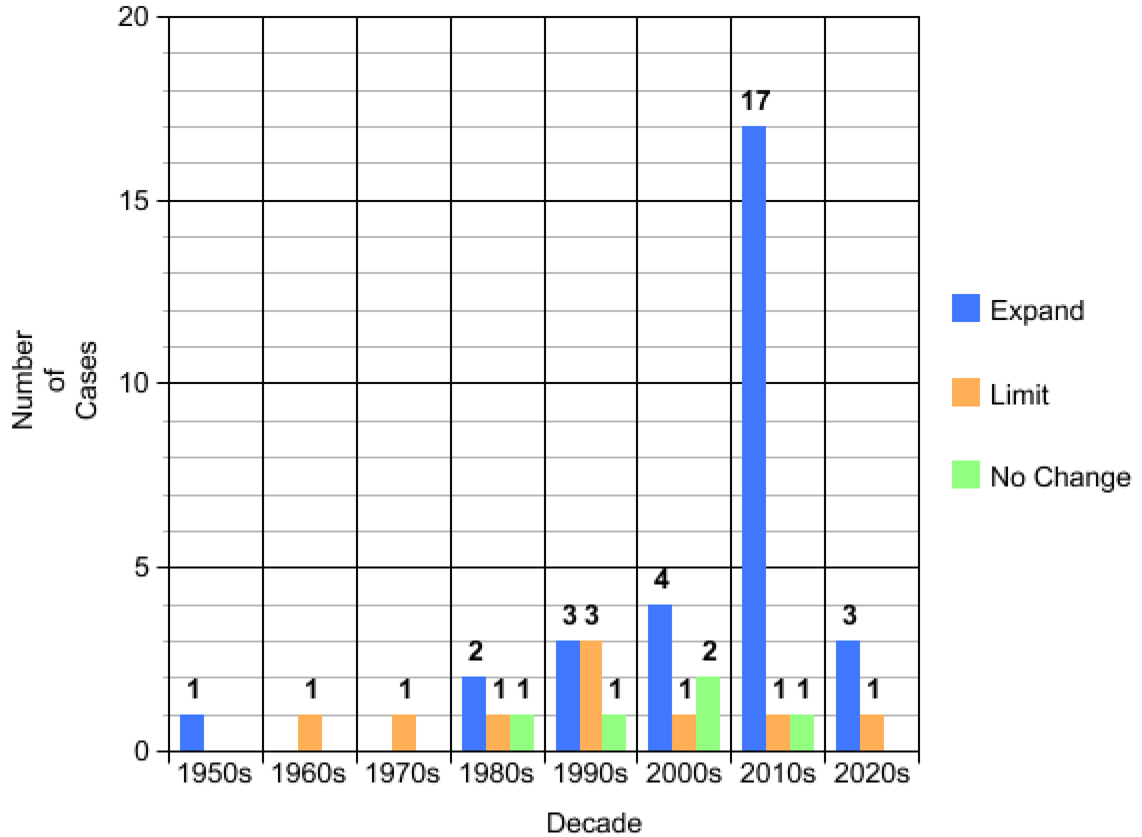
Perhaps of even greater interest in this investigation is examining how the number and effect of policies enacted has changed both over time and by region. As illustrated in Figure 1 below, the greatest number of Supreme Court opinions issued regarding civil rights for lesbian, gay, and bisexual people have been issued during Chief Justice Roberts' tenure as chief justice.

Figure 1: The number and effect on the scope of sexual orientation rights of Supreme Court decisions by Chief Justice



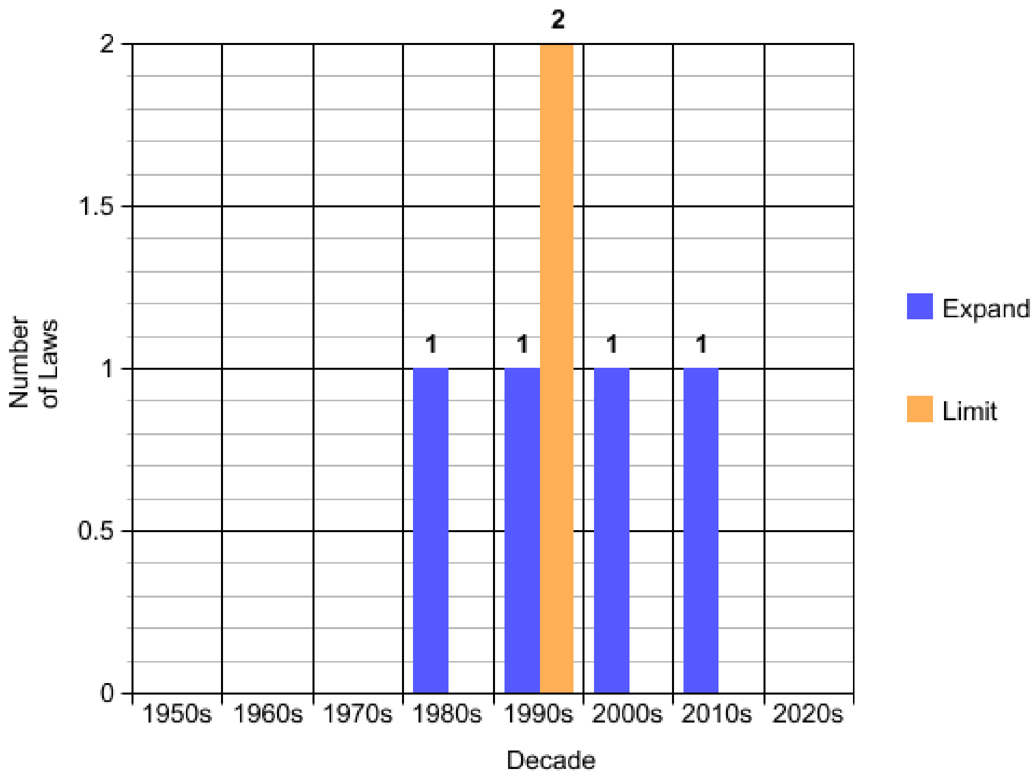
Similarly, the greatest number of judicial opinions at all levels of appellate jurisdiction regarding this area of the law were issued in the decade from 2010 through 2019. Overwhelmingly, these decisions served to expand the scope of civil rights guaranteed to lesbian, gay, and bisexual people, as seen in Figure 2 below.

Figure 2: The number and effect on the scope of sexual orientation rights of all appellate-level decisions by decade.



Additionally, all legislation regarding the rights of sexual orientation minorities, whether with the intent to expand or limit the scope of this group's civil rights, has been passed since 1980, as illustrated in Figure 3 below. Furthermore, all but one piece of legislation passed in the decade between 1990 and 1999 served to limit the scope of civil rights granted to lesbian, gay, and bisexual individuals, a trend which can also be observed in Figure 3.

Figure 3: The number and effect of legislation on the scope of sexual orientation rights by decade.



The results of this analysis reveal numerous trends which can serve to illuminate how, when, and why the judicial and legislative systems choose to enact policies which affect the civil rights guaranteed to lesbian, gay, and bisexual people.

Analysis

Of paramount importance to this study is understanding not only what trends have arisen regarding civil rights for lesbian, gay, and bisexual people but also examining the underlying factors which drive members of the federal appellate judiciary and members of Congress to take certain actions and refrain from taking others. While the previous section established that the federal appellate courts have taken more action to impact the scope of civil rights for sexual orientation minorities than has Congress and also established a number of trends related to

changes in action over time; this section will endeavor to explain the systemic and historical factors which drive these trends.

The results of this study reveal a great deal about how the courts and Congress are both influenced by and influential to public opinion. It is evident that, at least at times, judges and justices have allowed public opinion to serve as a means of deciding which are considered with regard to civil rights for lesbian, gay, and bisexual people and how these cases will shape federal jurisprudence on this issue. In the majority opinion in the case of *Obergefell v. Hodges* (576 U.S. 644, 2015), Justice Anthony Kennedy acknowledges this, stating "... cultural and political dialogues allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law" (576 U.S. 644, 2015). In this statement, it is clear that Justice Kennedy is indicating that shifting public opinion has served as a motivator for the courts to hear cases related to civil rights for lesbian, gay, and bisexual people.

Public opinion data regarding Americans' views toward same-sex couples validates Justice Kennedy's claim that public opinion toward the lesbian, gay, and bisexual communities has become more favorable over time (576 U.S. 644, 2015). The General Social Survey (GSS), conducted by the National Opinion Research Center (NORC) at the University of Chicago, an independent research organization, has gathered public opinion data on same-sex sexual relations since 1973. Data from the GSS shows that in 1980, 1121 of the 1404 respondents, or 79.84%, believed that sexual relations between people of the same sex were "always wrong" or "almost always wrong" (Smith, et. al, 2018). By contrast, in 2016, 787 of the 1820 respondents, or only 43.24%, believed that same-sex sexual relations were "always wrong" or "almost always wrong"

(Smith, et. al, 2018). The trend of fewer people disfavoring same-sex relations is consistent for the surveys conducted between these years as well, indicating that public opinion towards lesbian, gay, and bisexual people has slowly improved over time.

Additionally, Justice Kennedy's claim that the courts have heard a greater number of cases regarding the rights of sexual orientation minorities as public opinion has grown more favorable toward these groups also holds true. While only seven cases regarding the civil rights of lesbian, gay, and bisexual people were heard by federal appellate courts in the thirty years between 1950 and 1989, thirty-five have been heard in the thirty years between 1990 and 2020, as shown in the results section of this work. These factors, taken together, indicate that public opinion regarding lesbian, gay, and bisexual people plays at least some role in the courts' willingness to hear cases which relate to the civil rights afforded to these communities.

However, public opinion is not the sole factor to which the courts have turned in informing their consideration of cases regarding the civil rights of lesbian, gay, and bisexual people. One notable example of this is the 1996 United States Supreme Court case of *Romer v. Evans* (517 U.S. 620, 1996). This case established that laws, initiatives, and state constitutional amendments which prohibited enforcement of local policies against discrimination on the basis of sexual orientation were constitutionally invalid. The case also overturned a policy which was supported and passed by a majority of voters in Colorado, where the case originated. GSS data from 1996 shows 66.14% of respondents that year believed that same-sex relations were "always wrong" or "almost always wrong" (Smith, et. al, 2018). Clearly, the Court's decision in this case was not substantially influenced by public opinion. The majority opinion in this case, also authored by Justice Kennedy, appears to apply a textualist interpretation style, such as when it states, "Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It

prohibits all legislative, executive, or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians" (517 U.S. 620, 1996). This passage makes it quite clear that the Court examined the state constitutional amendment on the basis of the text of the amendment and formulated their opinion on that basis. This application of textualism exemplifies the Court's exercise of judicial independence in deciding some cases. Judicial independence is defined here as the Court's application of the facts of a case in determining both the case and the precedent it sets, without regarding the views of the majority of the population. When considering both the fact that the constitutional amendment which was directly overturned by the decision in *Romer v. Evans* was passed by a democratic majority and that a majority of Americans in 1996 held disfavorable views regarding sexual orientation minorities, it becomes clear that judicial independence was exercised in deciding this case. *Romer v. Evans* is not the only case in which judicial independence has been exercised with the effect of expanding the scope of civil rights for lesbian, gay, and bisexual people, as *Lawrence v. Texas* (539 U.S. 558, 2003) also defied public opinion in order to invalidate laws against consensual same-sex sodomy.

Judges and justices are able to exercise judicial independence because the Framers of the United States Constitution devised methods by which to ensure that the judicial system was kept, at least to a degree, separate from the branches which were much more beholden to the will of the majority. This separation allows the judiciary to make decisions which would be opposed by the population, and thus not likely to be implemented by the executive or legislative branches. In *Federalist No. 78*, Alexander Hamilton defends the necessity of an independent judiciary by stating, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution… Limitations of this kind can be preserved in practice no other way than through

the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void" (Hamilton, 1788).

One feature of the federal judiciary which was designed to facilitate the exercise of judicial independence is the lifetime tenure of federal judges and justices, contingent upon good behavior. This is also defended in *Federalist No. 78*, when Hamilton states, "That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence" (Hamilton, 1788). Lifetime appointment allows judges and justices to make decisions which may not be favored by a majority of the population, but nonetheless secure the constitutional rights of some minority group, without concern that these decisions may result in removal from their position. In this way, the Framers established a judiciary which, by its very nature, was better suited to expanding the scope of civil rights for lesbian, gay, and bisexual people.

An additional factor which ought to be considered in investigating the courts' comparative effectiveness in this matter is the unique relationship that judges and justices of the nation's highest courts have with the executive branch, and primarily the president. As outlined in Article II, Section 2 of the United States Constitution, the president has the authority to, "...nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law…" (U.S. Const. Art. II, §2). As this passage prescribes, the justices of the Supreme Court and the judges of the Circuit Courts of Appeal are appointed by the president. As such, it should follow logically that the individuals

which a president appoints will hold a similar ideological position to him. So, it is reasonable then to assume that Democratic presidents will appoint judges and justices to the courts who are ideologically liberal to moderate, while Republican presidents will appoint justices and judges who are ideologically conservative to moderate. Taking for instance only those justices who were serving on the Supreme Court from 2010 through 2019, when the majority of litigation impacting the scope of civil rights for sexual orientation minorities was underway, we can see that this expectation is, at least in many instances, met. For instance, Justices Ruth Bader Ginsburg and Elena Kagan, generally regarded as quite liberal liberal justices (Epstein, et. al, 2015), served during this period and were appointed by Democratic Presidents Clinton and Obama, respectively (Federal Judicial Center). Applying an attitudinal framework to analyzing the Court's decisions on this issue would lead to the conclusion that justices who were appointed by Democratic presidents, and thus can be assumed to hold a more liberal ideology, would be more amenable to expanding the scope of lesbian, gay, and bisexual civil rights than would conservatives.

This trend is expected based upon data which show that those whose ideologies are more Democratic to moderate- leaning tend to have a more favorable view of sexual orientation minorities than do those with more Republican-leaning ideologies. An analysis of General Social Survey (GSS) data from 1994 through 2016, when there was a great deal of social and political discourse about the rights to which lesbian, gay, and bisexual people are entitled, showed that 42.22% of respondents who were Democratic-to-moderate leaning believed homosexual relations never wrong, compared to 25.84% of Republican- to-moderate leaning respondents (Smith, et. al, 2018). This explanation, of course, is contingent upon the assumption that justices' attitudes toward issues drives their votes on cases related to an issue, an assumption for which

there is some evidentiary support (Epstein and Martin, 2012). Therefore, if we assume that judges and justices are ideologically similar to the president who appoints them, and that a judge or justice is influenced at least in part by his or her attitudes regarding an issue, then the trend of more cases being heard which expand the scope of civil rights for sexual orientation minorities from 2010 through 2019 can be explained, at least in part, by examining the political ideology of the presidents who were responsible for appointing the judges and justices which served during this period.

On the other hand, Congress' relative ineffectiveness regarding expanding the scope of civil rights afforded to sexual orientation minorities can also be explained through an examination of public opinion and factors inherent in the structure of the United States' government. Since 1950, the United States Congress has passed six laws which substantially affect the scope of civil rights for lesbian, gay, and bisexual people. Of those six, two have explicitly limited the rights of these groups: the Defense of Marriage Act (1 U.S.C. § 7), defining marriage as between one man and one woman, and the National Defense Authorization Act for Fiscal Year 1994 (H. R. 2401), containing language which gave rise to the Armed Forces' "don't ask, don't tell" policy. A third law, the Equal Access Act (20 U.S.C. § 4071), only incidentally expanded the rights of sexual orientation minorities. This law, which mandates that public high schools which have at least one extracurricular club must allow other clubs to form, was passed to ensure that schools could not prohibit religious groups from forming school clubs. However, the wording of this law is such that extracurricular clubs such as gay-straight alliances and other clubs established for the benefit of lesbian, gay, and bisexual students must also be allowed to form. Given that one-third of the laws Congress has passed which are related to the civil rights of sexual orientation minorities have served to limit the scope of these rights, it is clear that the

principles upon which Congress is operating in passing these laws differs from those principles upon which the federal appellate judiciary relies.

Members of Congress, and by extension Congress as a body, are substantially more beholden to the will of the American majority than are federal judges and justices. As such, examining public opinion polls can be quite revealing as to the motivation of legislators in introducing and passing certain legislation. Poll data from Gallup shows that in 1996, the year that the Defense of Marriage Act was made law, only 27% of respondents supported state-sanctioned same-sex marriages (McCarthy, 2021). Data from the GSS corroborates these findings, showing that 66.14% of respondents in 1996 believed that same-sex relations were either “always wrong” or “almost always wrong” (Smith, et. al, 2018). One can thusly conclude that a majority of the population was not in support of same-sex marriage, and thus either favored or did not distinctly oppose the provisions of the Defense of Marriage Act. Given, then, that members of Congress are elected to their positions by a majority vote in the district in which they reside, it would stand to reason that those legislators who voted to pass this act did so in accordance with the will of the majority of their constituents. Similarly, one year after the Don't Ask, Don't Tell Repeal Act of 2010 (124 Stat. 3515, 3516 and 3517) was passed, Gallup data showed that 53% of respondents supported state-sanctioned same-sex marriage (McCarthy, 2021) and data from the GSS showed that 50.57% of respondents believed that same-sex sexual relations were either only “sometimes wrong” or “not wrong at all” (Smith, et. al, 2018). Both of these examples demonstrate that legislation related to the civil rights of lesbian, gay, and bisexual people tends to follow closely with public opinion of these groups.

The primary motivator for members of Congress in voting on legislation which affects the scope of civil rights for lesbian, gay, and bisexual people is, generally speaking, the will of

their constituency. This is unsurprising, given that the American system of representative democracy is established such that members of Congress function to represent the interests of their constituents. As outlined in Article I the United States Constitution, members of the House of Representatives are elected to serve two-year terms (U.S. Const. Art 1, §2), and members of the Senate are elected for six-year terms (U.S. Const. Art 1, §3). These fixed terms served the purpose of ensuring that legislators remained accountable to their constituents and retained a connection with the will of the people they serve. As such, members of Congress may be fearful of alienating portions of their constituency by casting an unpopular vote on controversial subject matter, like lesbian, gay, and bisexual rights, for fear that this may impact their chances of being re-elected. As former President James Madison explains in *Federalist No. 52*, "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people" (Madison, 1788). This statement makes clear that the Framers intended for the members of Congress to be influenced by the prevailing desires of the majority in making decisions, and as such fundamentally explains why Congress has been much less effective than have the courts in securing the civil rights of lesbian, gay and bisexual people, as these groups have long been disfavored by a majority of the American public.

It is likely that the trends noted in this analysis do not in and of themselves reflect the full reality of how the courts and Congress have handled business related to lesbian, gay, and bisexual people. There is likely a high degree of interrelatedness between the litigation being heard and the laws being passed. For instance, litigation which concerns the constitutionality of

the Defense of Marriage Act only came about in response to the passage of that act. It is very likely that this is the case for other areas of litigation related to this topic.

This analysis did not consider the degree to which certain judicial decisions or laws brought about changes for lesbian, gay, and bisexual people. However, this is one factor that is likely also quite important in understanding the full scope of the difference noted in the efficacy of these two methods of advancing civil rights. While some decisions by the courts made rather small changes to the situation of civil rights for lesbian, gay, and bisexual people, other decisions and laws made monumental changes. In order to fully examine which approach has been most useful in securing substantial and lasting progress in the area of civil rights for sexual orientation minorities, it is likely useful to examine the degree to which any given action has changed the situation of civil rights for these groups.

Examining the systemic factors which are at play in influencing the actions of members of the federal judiciary and members of Congress allows one to understand the motivations which generally drive these individuals in their decisions regarding civil rights for lesbian, gay, and bisexual people. It should, naturally, be noted that these explanations do not account for all decisions made by every actor at every time in which decisions affecting the civil rights of sexual orientation minorities are being made, however these explanations can and do account for many of the decisions which have been made.

Conclusion

Investigating the comparative efficacy of two policy-making approaches, litigation and legislation, with regard to expanding the scope of civil rights afforded to lesbian, gay, and bisexual individuals reveals numerous important and interesting trends. Primarily, this

investigation has revealed that the federal appellate court system has considered many more cases impacting the scope of these civil rights protections than Congress has passed laws of the same sort, hearing roughly eight cases for every one law Congress passed in this area. However, this investigation has also revealed that the courts have expanded the scope of civil rights protections for sexual orientations more in the period since roughly 2010 than in the period from 1950 through 2009. This investigation also showed that the courts heard the most cases regarding lesbian, gay, and bisexual rights in the decade from 2010 through 2019, whereas Congress passed the most laws related to sexual orientation minority civil rights in the decade between 1990 and 1999.

This study considered numerous explanations for the disparities which were noted. Public opinion polls revealed that the American peoples' inclination towards or against a certain issue can influence both the courts and Congress. However, this investigation also examined how judges and justices are more empowered to disregard public opinion and practice judicial independence in deciding cases, a luxury not afforded to members of Congress, who are much more beholden to the will of the people. This analysis also considered the inherent features of the American governmental system which serve to reinforce the roles that the judiciary and the legislature are able to play in impacting the scope of civil rights for any minority group, but more specifically for sexual orientation minorities and the historical and constitutional foundations of these constraints and traditions.

While it is true that many of the most important issues facing lesbian, gay, and bisexual people, including allowing same-sex marriage for all Americans and prohibiting workplace discrimination on the basis of sexual orientation, have been addressed by the federal courts or Congress, there is still work to be done to ensure that sexual orientation minorities have true

equality with heterosexual people, and as such, this study is relevant. Issues such as same-sex couples adopting children, parental rights of same-sex partners in divorce situations, and sexual orientation change efforts, also called conversion or reparative therapies, which attempt to change a person's sexual orientation from lesbian, gay, or bisexual to heterosexual, and which are often criticized as ineffective and abusive to lesbian, gay, and bisexual youth, have largely gone unaddressed at the federal level. This study can provide insight as to which policy-making approach may be the most effective at expanding the scope of civil rights in those areas.

This study is useful in that it can serve as a framework for examining the policy-making approaches being employed for the expansion of the scope of civil rights for other minority groups, including women, racial and ethnic minorities, and even gender minority groups such as transgender people. The implications of this study can also be applied by interest groups, political leaders, and individuals when determining how best to influence policy for the benefit of lesbian, gay, and bisexual people and other minority groups.

Members of the lesbian, gay, and bisexual communities have committed themselves to ensuring that the civil rights afforded to them are the same as the civil rights afforded to heterosexual people, and have slowly achieved success in these areas. However, there still exist policy areas wherein sexual orientation minorities are not afforded the same civil rights as the heterosexual majority. The findings of this study can be applied in continuing to work toward complete equality for lesbian, gay, and bisexual Americans, and these findings also show that progress toward equal rights is attainable for sexual orientation minorities through the mechanisms established by the Framers over two hundred years ago. The dedication of advocates for lesbian, gay, and bisexual civil rights, and the diligence of federal judges, justices, and

legislators has allowed members of sexual orientation minority groups to participate in society just as heterosexual people do, and to live and express themselves with pride.

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