Champions and Oppressors:

The Varying Roles of the Supreme Court Towards the Queer Community

by

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Queer: **A Note on Terminology**

This paper uses "queer" as its term of choice for the community composed of gay, lesbian, transgender, bisexual, and pansexual individuals, and others of a similar sexual or gender minority. I recognize that the word "queer" is rife with controversy in the current day and age, having been used as a slur and epithet for just as long as it has been used as a personal identifier. However, I have settled on its use within this paper for reasons of inclusion and nuanced meaning. The primary alternative "umbrella term," LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer/Questioning,) is less inclusive and less unitary than would be preferred for the ideal understanding of this paper. I intend my writing, where it pertains to the community at hand, to be understood as meaning not the individual gay community, the transgender community, the lesbian community, et cetera, but as a *combined* community which shares both a history and a future—the *queer* community. The word queer is used over the LGBTQ acronym, as it most clearly expresses this concept throughout the paper.

Abstract

The United States Supreme Court has a long history of engagement with the queer community in America. As the public consciousness slowly turns in the direction of judiciary reform, the Supreme Court's record of both successes and failures in the arena of queer rights should be brought into consideration. In this qualitative study, I interviewed professionals and subject matter experts from across the spectrum of queer-rights causes and Supreme Court studies, bringing responses into conversation with past research and historical reality. Interviews were conducted on a semi-structured basis, tailored to the specific expertise of the interviewee; responses were manually examined to uncover patterns and common threads in the data. This analysis yielded that the queer community tends to be extremely leery and even fearful of the Supreme Court because of its past role in suppressing the community and its failure to provide queer people with basic rights without massive political pressure. These behaviors are primarily a result of excessive politicization and polarization of the Supreme Court, which is institutional in nature and can only be resolved through direct judicial reform efforts. The reform option most conducive to repairing the divide between the Court and the community would involve establishing a set of term limits for Supreme Court justices, ideally the proposed system of eighteen-year terms. As America enters a new era of the struggle for queer rights, it is vital to understand the roles played by institutional actors such as the Supreme Court and develop reform measures that can leverage those actors in ways beneficial for the queer community, as well as other marginalized communities.

Introduction

On June 26th, 2015, the United States Supreme Court decided the *Obergefell v. Hodges* case, concluding that the US Constitution guaranteed the right of same-sex couples to marry. This affirmation of marriage equality is broadly seen as a watershed moment in the history of both the queer community and the Supreme Court, and the culmination of decades upon decades of legal, social, and legislative activism. But when seen as part of the larger picture of the Supreme Court's engagement with the queer community, *Obergefell v. Hodges* takes on a different appearance entirely. Depending on the significance one ascribes to the Court in the overall movement for queer rights, this landmark case may be alternately perceived as a pragmatic move, a simple execution of justice, or a break from decades upon decades of repressive history. The role held by the Supreme Court in the matter of the long struggle for queer equality is complex and multidimensional; while the specific legalistic function of the Supreme Court has been explored by countless papers, articles, and books, these analyses have not thoroughly discussed the particular and substantial role that the Court plays and has played in the history of LGBTQ+ activism, community, and life.

Understanding this role will be useful in two separate fields: first, and most obviously, the queer community itself. Decentralized and diverse as it is, the community remains limited in its ability to understand its history and its place in America. Through silence and active suppression alike, archives are limited in both the degree and the way queer experiences are covered. In comparison to material history and common experience in the queer community, trends in its collective worldview are poorly documented (Wakimoto et al, 2013). This is all the more true as these worldviews pertain to the Supreme Court, which is simultaneously an aspect

of the American government—which has been responsible for immense harm and discrimination against its queer population throughout history—and an apparent agent of justice, upon which are pinned many hopes for a better future. Views of the Court are complex and even contradictory within the queer community, and a more thorough understanding of the way it engages with the community is vital to effective strategy and action within the movement. Secondly, this engagement is useful to pursue a broader understanding of the Supreme Court. As tangled and convoluted as queer thought surrounding the Court might be, the internal workings of the Court itself are equally so: the Supreme Court's pursuit of justice regularly comes into conflict with its supposed institutional status as an objective interpreter of the law, and likewise its history often departs from both. To reconcile these contradictions within the Supreme Court is a monumental task, one which no individual study may completely engage with. However, the Court's engagement with the queer community, and the community's engagement with the Court, may be seen as a microcosm of these larger problems facing the Supreme Court. A more thorough, deep understanding of how the Court engages with one marginalized community may serve to provide insight into its function in other circumstances and towards other communities. These two elements, the smaller-scale — though nonetheless highly significant — issue of the queer community's relationship to the Supreme Court, and the larger-scale issue of the Supreme Court's various disparate roles seen through the lens of the queer community, served to drive the direction of this study. These issues may be distilled into the following central questions:

1. How may the relationship between the queer community and the US Supreme Court, both historical and contemporary, be characterized in each direction?
2. How does the Supreme Court go about making decisions which relate to the queer community?

Literature Review

Intentions: The Supposed Purpose of the Supreme Court

Perhaps obviously, queer rights were not closely considered when the concept and function of the Supreme Court were being laid out in the articles of the Constitution. Nonetheless, the simple facts of its existence, domain, and administration have some significant impact on the unique position held by queerness in the legal sphere and the public consciousness. As such, it is worthwhile to examine not only some modern analysis of the Supreme Court's purpose but also the Court's foundational documents, including Article III of the US Constitution and later legislation that further develops the Supreme Court's place in government.

As is evidenced by any opinion poll, older Americans tend to be more conservative when it comes to supporting queer rights and issues than younger individuals (Brewer, 2003) and this is no less true for members of government. Given the Constitutional provision that Supreme Court justices may serve for life, this anti-queer sentiment would statistically be reflected disproportionately in the demographic makeup of the Court. This is further exacerbated by the conditions and method by which new justices are appointed; candidates are selected by the presidential and legislative elements of government, as laid out in the Constitution, rather than by more direct democratic selection. Additionally, ever since the Judiciary Act of 1869, the number of justices has been hard-set at nine, thus restricting the impact of even indirect democracy on the function of the Supreme Court.

To some, this separation from the democratic system is considered beneficial. In *Judicial Review as a Constraint on Tyranny of the Majority* (2013), Professors Robert K. Fleck and F. Andrew Hanssen critically examine the broadly held belief that the practice of judicial review, a

core component of the Supreme Court since 1803, fulfills the function of guarding against unchecked majoritarian rule, or "tyranny of the majority." This belief, they find, is far from a universal truth, and judicial review can often work against minorities, such as by striking down discrimination protections. They further note, as part of their analysis, that courts "do not base their decisions solely on some abstract notion of equal protection or constitutionality," in direct contrast to the Supreme Court's supposed purpose as a pure constitutional arbiter (Fleck and Hanssen, 2013).

This matter of doctrinal purpose is further expanded upon in Professor Pamela S. Karlan's *The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage* (2011). Karlan pulls apart various Supreme Court cases relating to same-sex marriage, demonstrating the spectrum of factors that feed into the Court's varying rationales. Such factors do include originalism and other theories of constitutional interpretation, but also include justices' conception of identity, religion, and even their "visceral" senses. Karlan contends that during *Hollingsworth v. Perry,* the Supreme Court decided to suspend the planned television of a lower court in part due to the justices' distaste for televised court proceedings. He cites Justice Souter's famous statement that "the day you see a camera coming into our courtroom it is going to roll over my dead body," noting that this was not, in fact, the courtroom of the Supreme Court, but Souter and other justices nonetheless felt the need to impress the Supreme Court's models of operation upon a lower court (Karlan, 2011). Karlan's analysis echoes others that have been published in various fields: despite the image of a pure and objective court which serves to uphold law and Constitution alike, the reality of the Supreme Court centers on the personal sensibilities and biases of its constituent justices. For issues with such strong emotional connections as queer rights, such sensibilities are central to courtroom outcomes.

While the Supreme Court's apparent lack of objectivity regarding queer rights is meaningful, constitutional scholar Erwin Chemerinsky places it in the larger context of government in his book *The Case Against the Supreme Court* (2014). Chemerinsky argues that the upholding of justice has, in practice, been the Court's secondary purpose; its primary function has been to maintain the status quo and contemporary power structure throughout its history. He draws from an extraordinarily wide selection of cases to support this argument. One such case, *United States v. Windsor,* saw Section 3 of the Defense of Marriage Act ruled as unconstitutional; however, this, according to Chemerinsky, was a relatively rare example of the Supreme Court serving the purpose of protecting minorities from majoritarian persecution. The power structure which the Court upholds is one of bigotry in countless forms, and through Chemerinsky's framework, the Court's presence and power can be seen as *inherently* hostile to the queer community under present and past conditions. The general body of literature seems to point in this direction; rather than a sacrosanct pillar of law and justice, the American Supreme Court is a body driven by conventional, contemporary American biases, and its supposed function of protecting against the tyrannical majority is not present in its treatment of the queer community, if anywhere.

Positivism and Realism: Political Influence on the Supreme Court

For many decades, the dominant mode of legal thought surrounding the Supreme Court was that of positivist or mechanical jurisprudence, the idea that law may only be judged through extant policy and legal precedence (George and Epstein, 1992). This ideology has thoroughly suffused legal education, and the Supreme Court was not until recently perceived as a lawmaking institution, instead of a purely interpretive institution. This perception remains sharply controversial, and positivism remains the dominant ideology within the Court itself: Justice

Scalia has stated that "[the Constitution] does not conform to our decisions, but our decisions are supposed to conform to it," and Justice Sotomayor explicitly stated her belief in mechanical jurisprudence during her confirmation hearings (Gibson and Caldeira, 2011). Justice Scalia specifically applied this framework to a queer-rights case in his dissent to the *Lawrence v. Texas* sodomy-law case, in which he accuses the Court of failing to follow *stare decisis*, or precedent law, in favor of making what he qualifies as a moral judgment (Allison, 2013).

However, despite its endurance in the Court itself, positivist jurisprudence has long since begun to collapse in the public consciousness in favor of legal realism, a viewpoint that establishes the Supreme Court as fundamentally influenced by its members' political values. Gibson and Caldeira write that "no serious analyst would today contend that the decisions of the justices of the Supreme Court are independent of the personal ideologies of the judges" (Gibson and Caldeira, 2011). The process by which political influence infiltrates the Supreme Court begins with the selection method. In the wake of Robert Bork's failed nomination to the Supreme Court in 1987, scholar Michael A. Kahn explored the assertion that Bork was denied a Court seat for petty political reasons. He concludes that—while Bork was indeed passed over for political reasons—this was far from an abnormal case, arguing that "virtually all rejected Supreme Court appointees claim to be victims of venal political interests," and are correct in these claims (Kahn, 1995). Hulbary and Walker further elaborate on this process, establishing a framework by which Presidents tend to select Supreme Court justices. First in this framework is the matter of "acceptable political philosophies," and the authors found that, of the 96 justices appointed from 1787 to 1967, 78 justices — the overwhelming majority — were explicitly chosen by the President for reasons of political similarity. In contrast, only three justices were chosen with political differences from the sitting President (Hulbary and Walker, 1980).

While queer rights were at best a minor issue within this timeframe, they became a much more significant element of broader political thought from the 1970s onward, serving to partially define both conservatism and progressivism (Zelizer, 2010). During Justice Elena Kagan's confirmation hearing in 2010, she was repeatedly questioned on matters of queer rights. In one such moment, Republican lawyer Ed Whelan, speaking against her nomination, stated that "Elena Kagan is a predictable vote, quite possibly the decisive fifth vote, in favor of inventing a Federal constitutional right to same-sex marriage" (Senate Hearing 111-1044, 2010). Senator Whelan was, as it happened, correct; Justice Kagan was indeed the decisive fifth vote in *Obergefell v. Hodges.* Issues of queer rights, then, have been demonstrated as not only matters of interest when appointing new Supreme Court justices, but also as matters of *impact.* Even if one was to assume that a given judge's opinions are informed solely by their understanding of the Constitution and not by their political stances, the appointment of that judge is nonetheless reflective of the political opinions of the Senate. It is undeniable that political opinions, opinions of justices, legislators, and the public, have a concrete impact on decisions made by the Supreme Court. As much as the queer-rights victory of *Obergefell* might have been driven by shifting political opinions, it is also certain that *Baker v. Nelson,* the case which *Obergefell* overturned and which explicitly denied same-sex marriage rights, was also driven by the political biases and prejudices of the time.

Actions and Trends: The Active Workings of the Supreme Court

While these broader-scale political motivations have remained present throughout the Supreme Court's existence, certain persistent trends regarding queer rights can also be seen when examining various historical cases, providing insight into how the Court has acted to form its present complex relationship with the queer community. One trend analysis that proves

particularly valuable is Marc Stein's *The Supreme Court's Sexual Counter-Revolution* (2006), wherein an examination of cases during the American "sexual revolution" of the 1960s-70s brings to light a new interpretation of a period that is largely seen as a time of sexual liberalization. Stein compares famous cases such as *Roe v. Wade* and *Griswold v. Connecticut* to contemporary rulings in the queer sphere, finding that the Supreme Court upheld a "doctrine of heteronormative supremacy" even as it protected other sexual rights. Obscenity laws were gradually liberalized by the Supreme Court in this period, with obscenity newly restricted to content "utterly without redeeming social value," however, obscenity convictions in the case of content largely consumed by gay men—such as physique magazines and textual descriptions of gay sex—were regularly maintained, nonetheless. Stein looks particularly closely at the 1967 case *Boutilier v. Immigration and Naturalization Service*, in which the Court's supposed pattern of sexual libertarianism and egalitarianism is marred by its decision that homosexuality could be defined as a form of psychopathy and be legal cause for deportation (Stein, 2006). *Boutilier*, as one of the most significant queer-related cases of the era, stands out as surprisingly conservative for an age of supposed sexual liberation. However, within Stein's model for the court's engagement with the Sexual Revolution, sexual liberation was only permitted insofar as it was heterosexual in nature. *Boutilier* is, then, far from an anomaly in the Sexual Revolution, and stands perfectly in keeping with *heterosexual* sexual liberation. Thus, it is apparent that homophobia was not merely an issue of individual prejudice for justices, but a doctrinally established and highly targeted form of systemic bigotry within the Supreme Court as an institution.

Anderson makes a more direct examination of the Supreme Court's motives in *A Quest for Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage*

Review after Perry (2011). This look into same-sex marriage-related cases in the 1990s and 2000s indicates that Supreme Court decisions are carefully restricted to strike a political balance between queer rights advocates and opponents, using a strategy that he calls "state neutrality." He argues that pragmatism in service of state neutrality, rather than either outright bigotry or acceptance of queer rights, was the driving force behind Supreme Court decisions in this timeframe (Anderson, 2011). This is a marked departure from the period which Stein covers; the queer-rights culture war which the Supreme Court so fastidiously avoided from the 1990s onwards simply did not exist in the age of the Sexual Revolution. However, this shares a premise with Stein and many others: that the Supreme Court tends more towards political maneuvering than towards blind justice.

This political maneuvering is demonstrated once more in *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People* (2013), by Professor Gary D. Allison. While Allison's central case—the 2003 *Lawrence v. Texas*—ended in a ruling favorable to queer rights when the Supreme Court ruled that anti-sodomy laws were unconstitutional, Allison argues that this ruling and its justification were calculated to accede to popular demand while ignoring questions of fundamental rights. Allison writes out an extensive history of the American queer community, illustrating how the Supreme Court could have drawn from this history of documented queer experiences to establish lasting protections against sodomy laws and general homophobia, before comparing it to the Court's published justification for its decision: a legal rational-basis technicality which leaves the door open to dissent and backlash from electoral and legislative quarters (Allison, 2013). Allison's conclusion that the Supreme Court deliberately chose its actions for a specific outcome is consistent with Anderson's concept of state neutrality, as the Court struck down anti-sodomy

legislation while shying away from a full-throated rejection of homophobia, a calculated move of just the type which Anderson describes.

Once again, the literature tends toward the same implication: that for all its reputation of clean-cut legal judgment, the Supreme Court is a thoroughly political institution—and subject to the same cultural impacts, political leanings, and pragmatic rationales as any other political body. Its function towards the queer community is largely ruled by this facet of its existence, and while it may not be necessarily hostile, the nature of the American societal and political environment has historically resulted in Supreme Court decisions that range from inconvenient roadblocks to deadly affirmations of bigotry.

Public Opinions: General Views and Consequences of the Supreme Court

Perhaps the most comprehensive volume on queer history with the Supreme Court is the book *Courting Justice: Gay Men and Lesbians v. The Supreme Court* (2001), by Joyce Murdoch and Deb Price. Aside from its use as a compendium of significant court cases, *Courting Justice* serves as an invaluable indication of the queer community's attitudes towards the Supreme Court. These attitudes are shown to be complex, nuanced, and varied; while the sheer number of appeals over the past decade serve to illustrate the hope and faith that community members have held in the power of justice, there remains a constant, underlying wariness: a sense that the Supreme Court, as a core element of the American government, has never been truly friendly to queer individuals. The general belief among activists in *Courting Justice* is that a proper carriage of justice is the exception, rather than the rule. Legal discrimination, through action or inaction, is the norm throughout Murdoch and Price's narrative (Murdoch and Price, 2001). This study discusses this matter with leaders in the queer community, in hopes of gathering a more complex and nuanced idea of the community's attitude towards the Court.

On the other side of court decisions, the meaningfulness of the court's behavior is not in doubt. A 2017 study titled *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes* (2017), by Margaret E. Tankard and Elizabeth Levy Paluck, shows that the 2015 *Obergefell* decision positively shifted the public perception of social approval of gay individuals and same-sex marriage alike. While there was no meaningful impact on individuals' own beliefs towards gay people, gay people were perceived as having greater approval from society (Tankard and Paluck, 2017). As Tankard and Paluck point out, prior research shows that this is often sufficient to impact public behavior even without any change in *actual* public opinion. As such, even separated from their material impacts, Supreme Court decisions can change the social landscape and impact queer individuals' well-being.

Significance

Where the workings and motivations of the President or Congress are somewhat more transparent to the public, those of the Supreme Court are often more obscure. This is due to a compound of many factors, from how Court seats are populated to the still-dominant myth of positivist jurisprudence. Insofar as queer rights are concerned, the direct relation of the public to the Presidency and legislation allow for a direct engagement with those responsible for laws affecting the queer community. The Supreme Court, in contrast, is separated from the population it is intended to serve; justices have no fear of accountability or de-election as a Senator or Representative might. This has been the way of things since the Court's inception well over two centuries ago, and while the Court's mechanical function has not changed, the world has changed around it. For this reason, the Supreme Court must be effectively understood in the modern day, of which queer rights are a part—a part which, to some extent, helps *define*

the modern day. Through the lens of the queer community, we may examine the disconnects that have arisen between the Supreme Court and the nation in which it functions.

While there is extant research examining the role which the Supreme Court plays in the history of the queer community, this study will add to this by focusing not merely on the functions which the Court carries out, but how the administrative policies which the Court embodies play into this. The method by which justices are selected and retained, the dominant modes of jurisprudence practiced by the Court, even the very existence of a Supreme Court in political society—these policy matters each have their impact on the Court's behavior toward queer individuals. Moreover, the political and cultural battle surrounding queerness has brought to light contradictions within these varied functions of the Supreme Court. Supposed objectivity comes into conflict with the personal beliefs and prejudices of the human beings who run the Court, legal positivism fails to square with judgments made from a place of political convenience, and the views of the people personally affected by the Court's actions do not align with justifications for the Supreme Court's existence. To reconcile these fundamental inconsistencies within a central pillar of the American government, the Supreme Court must change, and it *will* change. An internally inconsistent body cannot sustain itself forever. By examining the manners by which these contradictions operate, and the effect they have upon target populations, we can endeavor to ensure that when the Court does change, it changes for the better.

Methodology

While much of the information for this study was drawn from various literature sources, information was also gathered via a series of interviews with several disparate figures involved

with various matters relevant to the research questions. Interviews were conducted with movement leaders in the queer community, as well as scholars for whom the Supreme Court is an area of expertise. Interviews were chosen above other forms of data gathering because of the degree of flexibility they offer, and their ability to provide useful qualitative data which would not be available in the general literature, but which could effectively be placed into conversation with that literature. This study's data's integrity hinged on this latter element: the ability for the data to constructively engage with the wealth of information that could be accrued from historical, social, and political literature. This engagement flows in both directions; while the initial interview questions were rooted in ideas found in the literature, the data gathered from those interviews were also examined to find trends and concepts which guided focus and interpretation of the literature.

While interview questions and broad topics were tailored to the individual interviewee, the interviews may be divided into two general categories: those dealing more closely with the queer community and those dealing with the Supreme Court, although there is, by necessity, overlap between the two. Interviews falling into the former category, those that focused more heavily upon the queer community, were generally targeted at leaders in queer movements. This ensured that the subjects held expertise in the subject matter at hand, but also may have introduced a minor element of bias. They were primarily conducted to gauge community attitudes and collective experiences towards and with the Supreme Court and served to indicate which historical court cases are viewed as most significant by the community itself, as well as *how* they were viewed. Interviewees were asked what the general opinion of the Supreme Court was within the queer community, how that differed from the general opinion of other branches of government, and what community experiences have shaped these views. More broadly, the

conversation was guided to focus on the interviewees' professional experience with the Supreme Court during their time as community leaders and their evaluations of the Court's allyship and/or hostility.

Interviews with queer leaders served to deal with the publicly identified role of the Supreme Court, and to a lesser extent, its historical role. Interviews with scholars, on the other hand, were primarily concerned with the political role of the Supreme Court, regarding its nature and how its conceptual function interplays with modern issues of queer rights. They also dealt with the historical role, again guiding my focus toward literature. Questions included the effects of Supreme Court policies such as justiceship for life, political appointment, and judicial review. Scholarly interviews allowed for a better understanding of the Court's political landscape, its general level of bias, as well as systems in place to combat that bias. This was effectively used in my policy analysis and allowed me to formulate recommendations better suited to the political reality of the Supreme Court.

On a technical level, the interviews took place and were recorded with whatever methods were most convenient. Typically, they were virtual, and usually took place via secure Zoom Meetings or Microsoft Teams software. For the sake of privacy concerns, the interview recordings and subsequently compiled transcripts were stored on a password-protected external drive and promptly deleted after the data analysis process.

Positionality

When dealing with issues so emotionally volatile and subject to constant bias as queer politics and policy, it is necessary to note my position relative to the matter. I am a cisgender and bisexual man, who is also in a long-term romantic relationship with another man. This

information was disclosed to interviewees ahead of interviews with leaders in the queer community, both for the sake of forthcomingness and in hopes that the interviewees would be more candid with the knowledge that they were speaking to another community member. Moreover, readers are advised that my analysis is coming from a place of bias within the community and may inform my conclusions. This is, unfortunately, a longstanding problem within queer studies; individuals within the community often have a specialized perspective but are likewise predisposed to certain modes of thought. Many of my interviewees were not only leaders but members of the queer community, rendering their perspectives and experiences colored by their identities and the beliefs to which they have dedicated themselves. As the author, I have done all within my power to critically examine my perspective and avoid tainting either interview questions or analysis with any preconceived ideas derived from my perspective and identity.

Strengths and Limitations

As a result of the remote nature of the interviews conducted during this study, it has avoided the risk of restriction to any single region of the United States; interviewees were local to various regions around the US. It is important to note, however, that interviews with queer leaders were naturally limited to locales with sufficient population to have an established, institutional queer movement. As such, rural regions may be underrepresented in the views gathered via interview. This study is of course limited to the United States itself and is centered upon the US Supreme Court. Any conclusions are, therefore, not generalizable to the worldwide institution of national Supreme Courts. This study will only speak regarding the Supreme Court of the United States of America.

Access to expertise and experience was also a necessary limitation. Not all individuals I requested to interview were available, especially academic experts. Furthermore, no original information could be directly gathered from the Supreme Court; justices cannot be expected to provide their personal beliefs and justifications for the sake of an undergraduate thesis study. Instead, previous literature, academic experts, and official Court documents were drawn from for data on the Supreme Court.

Time, of course, is a perpetual restriction. This study was, by requirement, completed over the course of one academic year, and therefore the possible breadth of the study was diminished. This study was also completed from 2021 to 2022, during the global COVID-19 pandemic. This ultimately precluded the possibility of conducting interviews in person, which also limited the interviews which could be completed, even as it allowed me to draw from sources across the country. Finally, the circumstances surrounding the Supreme Court and the queer community alike have changed over time and will change further in the future, and so this study will lose its accuracy regarding the national situation as years proceed. In the future, further research will be required to provide a full and accurate picture of the relationship between these two dynamic and complex entities.

Results

Purpose Versus Reality: Objectivity in the Court

A major recurring theme within every single interview, holding true when interviewing scholars, professionals, and activists alike, was the heavy distinction between the US Supreme Court's *nominal* function, and its *de facto* function. Interviewees near-universally qualified the Court as a lawmaking institution, akin to a form of legislature. Positivist jurisprudence was usually recognized as a jurisprudential mode that would be preferable or even ideal for the

Supreme Court, but one that has not been adopted to any substantial degree. One legal advocate summed the matter up as follows:

> There's what the Court claims to do and there's what it actually does. And what it claims to do is exemplified by Chief Justice Roberts in his confirmation hearing, where he's like, 'I am the umpire, I just call shots as I see them, et cetera, et cetera.' In practice, that is not really how the Supreme Court works. In practice, there is very real lawmaking. There is very real shifting of existing norms quite regularly. (C.P. Hoffman, Feb. 4th, 2022)

Moreover, the Court's function as a lawmaking body was broadly seen to be actively hostile to the queer community. One lawyer stated that "They are using their conservative majority not just to interpret the Constitution but set laws or define laws in a way that has a negative impact on a number of different communities or individuals." That interviewee, as well as other legal professionals, noted repeatedly that current strategies of legal activism included restricting court cases to state and local courts, avoiding escalation to the Supreme Court whenever possible. This is because the Supreme Court is unlikely to rule in favor of the queer community, due in large part to its current political makeup. This dichotomy, in which the Supreme Court claims to make decisions objectively but appears to truly make them under bias and prejudice, could theoretically work in favor of the queer community rather than against them. However, interviewees list several factors which, in practice, have resulted in Court politicization usually harming queer causes.

Justices' lifetime tenure was a particularly substantial factor, as one professional lawyer stated:

> The younger generation of mainly attorneys that are coming up and those that will be on the court tend to skew more liberal and/or personal freedom, you know, understanding that everybody should be treated the same regardless of conservative or liberal views. (Interviewee 1, Jan. 21, 2022)

Lifetime tenure results in a court that can change only incrementally. This helped bring about conditions under which Supreme Court justices are broadly seen as entirely unrepresentative of the American public, which is a view held by almost all those who were interviewed, as that same lawyer outlined:

> I don't think that their opinions represent the majority of US citizens on a wide range of issues. Let's be honest, they're basically going to overturn Roe v. Wade, but 70% of the country doesn't have a problem with abortions. And that's just a statistical example. (Interviewee 1, Jan. 21, 2022)

A second significant, repeating element seemed to be the Supreme Court's independence from the rest of the federal government, or the lack thereof. One activist, when asked what mechanism created a divide between public opinion and the opinions of the justices, bluntly answered: "The court was packed by conservatives and a seat was stolen." They further elaborated: "I wouldn't say that's specifically the justices' fault. That's the fault of the previous administration." This issue of legislative and Presidential interference in the Supreme Court was frequently tied to the problem of the Court's politicization, with the Court being commonly seen as "almost an extension of the administrative sphere," as one scholar put it. This politicization is closely associated with and even attributed to the queer community, as the community is seen as an "easy place to create wedge issues for people."

History of the Court and Community

The bias of the Supreme Court and the failure of positivist jurisprudence are broadly seen as having become more pronounced over the past decades, but this view is not universal, nor is it generally agreed upon when or why the Court became more strongly politicized. One scholar referred to a set of conservative legislative organizations which have functioned to institute clerks, litigators and justices who aligned with conservative views, including anti-queer views. They explained that these groups have been active since approximately the 1970s, having been

born out of a backlash to the Kennedy and Johnson agendas. As previously stated, the queer community itself contributed to this politicization, functioning as a "wedge issue" which fostered political divides in the Court and broader political sphere.

Another legal scholar, however, explicitly denied that court politicization was a less serious issue in the past, saying that "There's always this inclination of people to say, 'oh, it was better in the past; it's gotten bad recently.' And I think that's an over-simplistic look at it." They went on to provide an in-depth explanation of where the idea of a better past arises:

> What we really see is an idealization by a lot of people of the Jim Crow era, and the period during which white politicians, from different parties, in different parts of the country, could come together and work on a variety of things because they had racial solidarity between them… [Since then] we saw the tendency towards racial solidarity by white people break down to some extent. And we saw different coalitions form, and we saw multiethnic, multiracial coalitions, and coalitions that included other people who had been traditionally despised by the powers that be, including queer folks. (Interviewee 6, Feb. 15th, 2022)

Other interviewees tended to agree with the idea that the Supreme Court was always political, to one degree or another. One scholar stated that politicization has "ebbed and flowed" over the course of the Supreme Court's history. Another cited John Marshall as an example of court politicization in the very earliest days of the Supreme Court. It seems generally agreed upon that the Court has always been a political entity to some extent, although the details are somewhat controversial.

Queer Thought Regarding the Court

Opinions regarding the Supreme Court within the queer community tend strongly towards fear and animosity, according to those I interviewed. This is due in large part to a strong perception of hostility from the Supreme Court. One community advocate said: "It is past suspicion. The community, especially the legal advocates, are very wary of the Supreme Court right now, and litigating cases up to the Supreme Court, because it is very likely that most cases

will not be ruled in favor of the community." However, this atmosphere goes beyond the current Court makeup. Another scholar explained that a few rulings such as *Romer v. Evans* and *Bostock v. Clayton County* have upheld generalized antidiscrimination law, but have not actively protected queer individuals:

> We have sort of these general rules about how the state can't put its heavy thumb down against queer people. Beyond that, there's not a huge amount of positive stuff from the Supreme Court. Now, we did get the Title VII cases in 2020… but the thing is that's basically what every single lower court had already found… It wasn't as big a win as it would have been as huge of a loss. (Interviewee 5, Feb. 13th, 2022)

Importantly, the queer community's opinions on the Court often mirror, to a degree, the opinions of the public. In that area, it was made clear that the Court has lost a significant amount of public opinion in recent decades. One legal scholar described this process:

> [The Supreme Court] has lost a ridiculous amount of legitimacy over the past 20 years. I cannot underestimate to you the harm done by the *Bush v. Gore case* and other things since. There was a pretense that the court was non-political, that cases over the past 20 years have made clear that it was always a lie. But now it's an obvious lie. (Interviewee 6, Feb. 15th, 2022)

The blocking of Merrick Garland was listed as an additional reason for this loss of legitimacy. Another legal professional tied this phenomenon back into the matter of court politicization, stating:

> [Politicization] is why it has lost a lot of its credibility. And that's not lost on Chief Justice Roberts, which is why he tries to act as sort of the moderate conservative. He understands his legacy as Chief Justice is pretty much ruined at this point, and not because of his own opinions and his own rulings, but just because of the way that the Supreme Court has become so politicized. (Skip Harsch, Jan. 25th, 2022)

Overall, many interviews seemed to indicate that the queer community tended to see the Supreme Court not only as a hostile institution but as an illegitimate one.

Of course, the queer community cannot be thought of as a monolith, as was often pointed out. A queer activist, when asked about the queer community's general opinions, responded that "if you talk about the white cis gays and lesbians, they're going to have a different opinion than trans people and people of color." I was told that transgender individuals and members of intersecting marginalized communities were prone to have more negative opinions toward the Supreme Court. On the other hand, white, cisgender gay men, bisexuals, and lesbians often had fewer problems with the court, especially "with *Obergefell* comfortably in the rear-view mirror."

Reform Options

The idea of expanding the Supreme Court was met with mixed opinions among interviewees. A few interviewees stated that, while a larger Court body aligned with their politics, they did not believe that it would benefit the queer community in the long run. The terms "dangerous precedent" and "slippery slope" were used, indicating that an expansion of the Supreme Court could make it easier for political elements hostile to the queer community to further expand the Supreme Court. One policy expert said "We also have to think of the intended and unintended consequences. It's the same argument you could make with getting rid of the filibuster." Another professional brought up a modified form of Court expansion, "having a much larger Supreme Court that you have panels selected [from] for any given case." This reform would have the added convenience of not requiring a Constitutional amendment.

The reform option of placing term limits on Supreme Court justices was seen much more favorably. One advocate told me that "There's kind of broad consensus that the easiest practical way to fix the court and to fix issues with it would be to implement term limits… The problem is, while it's a practical fix, it's impractical in the sense that it would require a constitutional amendment, because the Constitution guarantees life tenure." Term limits were generally seen

as a positive, albeit difficult-to-implement reform, which would result in the Supreme Court more accurately reflecting the general population, including the general population's broad approval for queer issues. More than one interviewee referred to a specific policy proposal, wherein Supreme Court justices were granted evenly staggered 18-year terms. Under this policy, each four-year Presidential term could expect to nominate two justices as terms expired.

Discussion

"Past Suspicion": Queer Opinions and Community Atmosphere

Originally, based on literature sources and my own personal experiences, I had hypothesized that views of the Supreme Court within the queer community tended to be very much mixed. I had expected a substantial amount of wariness or suspicion, based on the Court's history and its status as a branch of the American government, which itself had always been an oppressive body. I had also, however, expected a strong note of hope or optimism associated with the Supreme Court, an expectation which I believe was colored by an oversized understanding of the magnitude of *Obergefell v. Hodges.* I had expected there to be a prevailing idea of the Supreme Court as a body that holds the potential for a better future for the queer community.

This hypothesis was solidly mistaken. Virtually all interviews I conducted indicated that the dominant mode of feeling towards the Court was fear and animosity. A particular term that appeared with some frequency was "skepticism," both concerning the Supreme Court as a whole and with regard to the "current makeup" of the Court. As previously quoted, the general feeling surrounding the Court within the queer community is "past suspicion." According to legal advocates, any community members who seek legal protection are under no illusions that the

Supreme Court isn't biased against them, resulting in the current trend of restricting litigation to lower courts and avoiding escalation to the Supreme Court, which might do more harm than good.

Additionally, something of an opinion divide exists between transgender members of the community and cisgender lesbians, gay men, and bisexuals, especially those who are white. LGB Americans, especially those who are white, tend to have a "somewhat more positive, or at least less negative" opinion of the Court, according to one activist source. That interviewee attributes this to the fact that transgender rights have lagged behind rights surrounding same-sex relationships, and as such, the transgender community has a broadly less positive impression of the institutions surrounding said rights.

This is perhaps the broadest pattern regarding how the Supreme Court is seen within the general queer community: as an institution of the United States government. Since approximately 1950, the federal government abandoned its previous policy of ignoring closeted gay personnel in favor of beginning to actively persecute and root them out. In combination with the onset of the Cold War, "perverts" (as queer individuals were identified in press and public) began to be seen as potential traitors or subversive elements, and so began the cultural shift away from simply pretending that queerness did not exist, and towards diligent disenfranchisement (Murdoch and Price, 2001, pp. 34-39.) It is difficult to overstate the degree to which the US federal government's shift in tack devastated the national queer community — in 1948, famous sexologist Alfred Kinsey published a report that a staggering 37% of white male adults had, at some point, had sexual relations with other men to the point of orgasm (Kinsey, 1948.) The government crackdown and subsequent ostracization was, in part, a response to this number, and was an active attempt to curtail any homosexual activity.

Initially, the Supreme Court failed to stand with the rest of the federal government in its anti-queer campaign. The first queer case to face the Court, *ONE inc. v. Olesen,* was quietly resolved in favor of the gay magazine *ONE* in 1958. *Manual v. Day,* in 1962, was likewise decided in favor of Herman L. Womack, publisher of several "physique magazines" targeted at gay men (Murdoch and Prince, 2001, pp. 65-81.) However, both cases were obscenity cases, and the Court rapidly reversed course as soon as they were faced with cases that went beyond First Amendment rights. *Boutilier v. INS* came along in 1967, and the Court took the opportunity to label homosexuality a form of psychopathy, and a deportable offense for immigrants. Moreover, through this period, the Supreme Court regularly turned away appeals brought by queer individuals, regardless of the blatancy of their mistreatment. They turned down a case regarding illegal evidence gathering by way of filming a men's room, and a clear-cut police entrapment case, both within a month of one another in 1966 (Murdoch and Prince, 2001, pp. 136-141.)

The next decade was dominated by such stories, as queer individuals repeatedly brought cases regarding their wrongful arrests or convictions, and the Court, for its part, repeatedly declined to so much as hear them. As a result, queer sentiment towards the Court was colored less by the Court's own decisions, and in much greater part by its apparent willingness to simply stand by. The Supreme Court is intended to be the ultimate arbiter of justice in the United States, and as one interviewee noted, "when they don't do their job, that's sending a message, it's telling us that they won't — that they aren't willing to defend us." For much of queer history, the state has been a powerful instrument of repression, as police violated rights and made arrests on immorality charges, while broader society ostracized and systematically disadvantaged queer people. The role of the Supreme Court in this has less frequently been to serve as an active tool

of oppression, and far more frequently to simply uphold the bigotry and injustice practiced by society and the other arms of the state.

Then what of *Lawrence?* What of *Obergefell?* What of *ONE, Manual,* and *Windsor?* Why have the queer community's views of the Supreme Court not been lightened by the many cases that the Court has decided in our favor? Are we ignorant of its role, or perhaps ungrateful? Activists are thoroughly aware of the role the Supreme Court has played in securing those rights we enjoy. I repeatedly heard statements along the lines of: "They didn't just hand us a victory and say, 'there you go, you're welcome,'" or "We fought for it, and we fought them for it. They didn't do this; we did this." Those queer rights which are enjoyed at the present were not provided free of charge, and the community is intensely aware of that. *Obergefell,* for instance, is attributed to decades of activism, public support, queer legal advocacy, and the Pride movement. It is not attributed to the Supreme Court, though it may be *of* the Supreme Court. The Court merely caved to pressure brought about by the queer community itself, and the community sees its role in matters as far more significant than the body that executed popular will.

The Umpire's Team: Court Bias

After reviewing the relevant literature, I was thoroughly aware of the Supreme Court's dual role: its de jure function as an impartial interpreter of law, and its material function as an ideologically driven *maker* of law. Nonetheless, I was unprepared for the sheer extent of agreement that the Court functions mainly as a policymaker, and I certainly did not expect every single interviewee, regardless of occupation or position, to take the stance that positivist jurisprudence was, essentially, bunk. Those who belonged to the queer community, and were

directly involved with it, seemed most emphatic on this point, and did not shy away from outright denying the Supreme Court's own narrative of objectivity.

This narrative, consistently promoted by the Court itself as well as many legislators, stands in stark contrast to the seemingly near-universal consensus that the Supreme Court is as much a legislative body as the House or Senate. The advocate who referred to Chief Justice Roberts' confirmation hearing and the idea of a judge as an "umpire" directly contradicted Roberts' statement, painting it as a concept failing to align with any material reality. In the article *Judges as Umpires,* Judge Theodore A. McKee elaborates upon the mentioned metaphor, arguing that:

> The umpire metaphor obscures the reality of personal bias. Getting beyond that bias is extremely difficult even for the most introspective and sincere judge. I submit that we will never get beyond it if we do not allow for the certainty that each of us harbors some bias in some degree, and that our bias may be impacting a given decision in ways in which we are simply not aware. (McKee, 2007)

The apparent conclusion is that judges and justices do not only possess substantial personal and political bias but that that bias is not separable from the political system.

While it may be impossible to prevent the arbiter's partiality altogether, conditions particular to the Supreme Court serve to worsen that bias, and frequently direct it at the queer community especially. As the lawyer who drew the comparison to *Roe v. Wade* noted, the Supreme Court's perception and action regarding political issues often are substantially divorced from public opinion. According to a Pew Research Center poll, public support for same-sex marriage stood at 55% in favor and 39% opposed in 2015, the year of *Obergefell v. Hodges*, while favor first exceeded opposition a full four years prior. The Court did not take action to permit same-sex marriage until it began to be affected by pressure derived from public support.

This phenomenon jibes with Professor Allison's previously mentioned findings regarding *Lawrence v. Texas,* in which the Court was shown to have acted with the explicit intent of alleviating public pressure without pushing in the direction of institutional change, essentially "playing politics" against public opinion. This effect is made exceptionally obvious in the case of Justice O'Connor, who concurred with the court in *Lawrence* but joined the majority as well in *Bowers v. Hardwick,* the court decision that *Lawrence* overturned. This might seem contradictory from a perspective of positivist jurisprudence, and one might ask what had prompted O'Connor to shift her opinion on Constitutional protection of sodomy. However, Justice O'Connor's apparent change in tack aligns perfectly with a view of the Supreme Court motivated by public opinion. As Thomas M. Keck writes, "Where a rights claim has become reasonably well-established in American society and culture, [Justices] O'Connor and Kennedy will generally be willing to defend it, whether it cuts in a liberal or conservative direction." In 1986, for *Bowers v. Hardwick,* the right to same-sex activity was not yet so well-established. Seventeen years later, for *Lawrence v. Texas,* it suddenly was. The effect of general opinion upon Supreme Court decision-making practice is evident, at least insofar as queer cases are concerned.

The Court's politically sourced anti-queer sentiment seems far from restricted to a few major cases such as *Lawrence* and *Obergefell;* its overall politicization consistently harms queer interests far more than it is resolved in the community's favor. Advocate C.P. Hoffman explained why this is, stating that "something that we struggle with in queer rights right now is dealing with legislators and a public that are largely in our favor but are much more passively so, while combating an opposition that may be a minority but is very, very passionate about it." According to this view, a difference in character between the major political parties is

responsible for the fact that court politicization tends to break towards anti-queer interests. They went on to elaborate on this:

> The left largely takes the view of, 'well, we've got queer rights now. It's all okay.' And meanwhile, the right focuses so much of their efforts on making sure those are taken away, and they care much more about them being taken away than many on the left care about keeping them around, because most people on the left, queer people are part of our coalition, and so we fought for them and yay. But actual queer people on the left, we're not the whole coalition. And so, it can be tough getting everyone else's attention, whereas on the right, like, evangelical and conservative religious thought is a much more dominant thing. (C.P. Hoffman, Feb. 6th, 2022)

As the general political sphere, then, is biased against the queer community, so too is the Supreme Court *by* its politicization. The justice appointment process heavily incorporates political whims into the Supreme Court, from both Congressional and Presidential sources. Congress makes its political influence over the court known largely through the process of confirmation hearings, while the President exercises influence via nomination. As we have seen, Justice Kagan's confirmation hearing saw her criticized on political grounds, including the fear of Supreme Court support for same-sex marriage rights. This pattern can be seen through history: During Justice Kennedy's confirmation process, he was opposed, in part, due to the mere *idea* that he might be friendly toward gay concerns. Kennedy had, in his past as appellate judge, made anti-gay rulings no fewer than five times, yet the mere fact that he even entertained questions of gay rights warranted conservative opposition, even while queer and other minority lobbying groups opposed him for just the opposite reason (Murdoch and Price, 2001, pp. 377-380.) All the while, these criticisms are presented not as the political appeals they are, but as concerns that the judge in question will be the political one. The blocked confirmation of Merrick Garland, too, serves as a prime example of Senatorial politically motivated interference with the Supreme Court, which several interviewees commented upon.

Justice Kagan's 63-37 confirmation, or Garland's blocked confirmation, may be compared to Justice Stevens' 98-0 confirmation in 1975, as analyzed by Michael A. Kahn. Kahn argues against the assumption that Justice Stevens' non-controversial confirmation was apolitical in nature, instead affirming that "Stevens' success in the Senate was proof of the political acumen of his political sponsors, President Ford and Attorney General Levi. Ford and Levi set out to select a non-controversial, preferably unknown, middle-aged Republican male, preferably from the Midwest and with judicial experience." In this case, the appointment of a justice was no less political for its lack of contest in the Senate. It was instead performed to bolster the sitting President's image.

Supreme Court politicization is uniquely harmful to the queer community. However, depoliticization is an exceptionally fraught concept. A legal advocate outright stated, "I do not think that there is any means by which one could depoliticize the Supreme Court as it exists," and several other interviewees voiced similar concerns. The policy implications are that the queer community's Supreme Court prospects may be improved to some degree by depoliticization efforts, but any effective measures will need to go beyond depoliticization. If the Court is difficult or impossible to fully divorce from its political influencers, then circumstances could instead be shifted such that politicization works in favor of the queer community, rather than against it. As seen, however, this has its challenges; the overarching political character of the dominant American parties is the reason for politicization being so harmful to the community. Shifting that paradigm would require a massive political revolution.

Beyond Obergefell*: Queer Politics in the Modern and Future Court*

When I asked what queer issues were of greatest legal concern at the present juncture, the first answer was near-unanimous: transgender rights. As previously alluded to, many LGB

members of the queer community have a more positive opinion of the Supreme Court than transgender and nonbinary individuals do. Sociologists Jackson and Kristopher Shultz commented on the matter, writing in the aftermath of *Obergefell* that "There is fear, real fear, that now that these accommodationist LGBT victories have been secured, trans and nonbinary communities will lose the allies we had in LGB communities" (Shultz and Shultz, 2016.) This comes because of a span of decades in which gay advocates have celebrated a string of successive victories: a mere twelve years passed between *Lawrence v. Texas* ruling sodomy laws unconstitutional and *Obergefell v. Hodges* securing the right to marry.

Meanwhile, transgender rights have lagged. The Court has almost entirely declined to hear transgender-related cases, with the only real exception being *Bostock v. Clayton County* and the cases heard alongside it. Legal advocates were clear that refusal to hear cases was the desired outcome, as they were under the impression that the Supreme Court would typically rule against transgender interests. As one such advocate mentioned, this belief is drawn from the overarching political narrative surrounding transgender people:

> But by and large, even Conservatives recognize that they can't just be outright — they can't just do a straight up homophobia in their decision. They have to couch it in some sort of, like, 'well, but we're balancing rights.' And you see that a lot with things now with, like, the sports cases, et cetera, where it's like, 'well, this isn't about taking rights away from trans people. It's about bolstering the rights of cis girls.' (Interviewee 3, Jan. 29, 2022)

This general political phenomenon of "couching" transphobic politics in feminist language, as mentioned in previous sections, directly feeds into the highly politicized Supreme Court. According to the interviewee, there is a fear of the Supreme Court using this "faux feminism" to block transgender rights.

While the long-term, institutional relationship between the Supreme Court and the queer community has already been discussed, this issue specifically relates to the immediate future,

and the consequences of the Supreme Court as it presently exists. The interviewee just quoted informed me specifically that "Whatever I tell you now is going to be dated in, like, three years." A second interviewee elaborated on the shorter-term results of the modern political situation within the Court, saying:

> It's difficult to say that the Supreme Court is going to become more hostile towards the LGBTQ+ community. I don't think that that's the image that they want to have, but I think that that's going to be the unintended consequence of a lot of the rulings that come out of this conservative majority. (Skip Harsch, Jan. 25, 2022)

While the Supreme Court, institutionally speaking, may be partially beholden to public opinion, justices are also influenced by the government bodies which appointed them. As such, the Supreme Court's politicization is currently pulling it in two different directions: high public support for queer causes influences the Court in favor of queer rights, while the justices' personal biases and political leanings tend to oppose those rights. The present circumstances, then, are complex and nuanced, but in no way rooted in any semblance of "objective" justice. I will explore how this phenomenon may potentially be combatted and how the Supreme Court may be reformed to benefit the queer community.

Policy Recommendations

Court Expansion

In my research efforts, both with the examination of literature and in the interview process, I focused upon three general policy reform measures which are being politically explored, albeit primarily in the theoretical sphere. The first of these is also the most politically partisan in nature: the idea of expanding the number of seats on the Supreme Court. This could be implemented with the intent of democratizing the Court, making it more representative of the public than any small, nine-justice body could possibly be. It would also serve to offset the

"legacy" effect of the Supreme Court by packing it with modern justices. As it stands, justices often were appointed by a government of years or decades ago, which may no longer be representative of public interests such as queer rights.

This measure, though no doubt extreme, is not unprecedented. There have been court-expansion schemes on several occasions throughout history. President Lincoln, during the Civil War, undertook more than one court-manipulation endeavor, including the temporary addition of a tenth justice, whereafter the Court dipped back down to seven justices before President Grant restored it to nine. Particularly well-known is President Roosevelt's attempt to pack the Court to pave the way for New Deal legislation. Under Roosevelt's plan, for each justice who does not take the opportunity to retire from the court at the age of 70, a new, younger justice could be appointed. While eventually defeated, the plan was intended to allow Roosevelt to enact more easily sweeping economic reform; that is, it was a court-packing plan done for political reasons, and popular ones at that. As such, it serves as a precedent for the Court to potentially be expanded for political reasons at a future date. In recent years, the question of court-packing has once again arisen; progressive legislators, most notably Alexandria Ocasio-Cortez and Ilhan Omar, have stated outright that seats should be added to the Supreme Court in pursuit of making it a more democratic body. In 2021, a short-lived bill was introduced to the House which would have added four new justices to the Court. While it remains a radical proposal, it is perhaps more conceivable now than at any time since Roosevelt.

One notable benefit that court expansion might have within the sphere of queer rights is its allowance for better representation. One legal scholar stated in an interview that:

> I think that making the court more representative of the public and of queer individuals would help to some degree. That said, it's also a body of nine people, so there are limits to how diverse you can make it. (Interviewee 6, Feb. 15th, 2022)

However, a larger court would not necessarily guarantee this representation. Small bodies, such as the Supreme Court, and even an expanded Court, have wildly varying degrees of representation, as that same scholar illustrated: “We’ve never had more than like, three women on the court at the same time, but we frequently have had, like, by just quirk of nominations, there have been like five or six Catholics at a time or something like that.”

Moreover, even queer representation on the Court itself might not materially aid queer interests. It is widely believed that the Court has already had its first gay or bisexual justice: Frank Murphy, who held a seat from 1940 to 1949. Unlike many other public figures, allegations of Murphy’s homosexuality go beyond rumor; the justice’s biographer, Sidney Fine, found a letter addressed to him from a former male lover, and Murdoch and Price argue that “a gay reading of Fine’s work suggests that Murphy’s homosexuality was hiding in plain sight” (Murdoch and Price, 2001.) However, Justice Murphy’s time on the Court saw no advancements in queer rights whatsoever, even on the smallest of scales, and Murphy’s tenure immediately preceded the 1950 shift towards active persecution by the US federal government. In addition, a great number of Supreme Court clerks have been queer, definitively and without a doubt. Murdoch and Price go so far as to describe the late 1980s as involving “a sea of gay clerks” (Murdoch and Price, 2001, p. 271,) and as of 2001 they found a total of twenty-two clerks confirmed to have been gay, lesbian, or bisexual, some as early as the 1950s (Murdoch and Price, 2001.) Presumably, there were many more who remained closeted. However, these queer individuals in positions of influence had little tangible impact on policy adopted by the Supreme Court — indeed, these clerks were often victims. It seems, then, that representation on the individual level may not have the hoped-for effect upon Supreme Court behavior, and court expansion should not be pursued on that basis.

In addition, there is no guarantee that court expansion would serve any long-term benefit. Several interviewees gave statements to this effect, with one lawyer saying "...I think there are probably really good arguments for not packing the Supreme Court right now, even though I personally would love it. I think that it's a dangerous precedent." That lawyer compared court-packing to the idea of abolishing the filibuster, identifying it as an act that would function as a double-edged sword. Another advocate argued that expanding the Supreme Court might even end up counter-productive in the long term, cautioning that it "would likely be very politically toxic in the short term because of how much it would be — how easy it would be for the other political party to portray it as power-grabbing." It is entirely possible that expanding the Supreme Court now simply prepares the ground for the Court to be expanded again in the future, perhaps by an administration actively hostile to queer rights and causes. This could result in a Court permanently out of balance, see-sawing between positions as administrations come and go, and even more stringently tied to political issues than it already is.

Overall, it seems that a court-expansion scheme would likely have, at best, a neutral effect on queer rights. In the long term, there is also a worrying potential for unforeseen results, and phenomena such as court politicization, which have been shown to disproportionately harm queer causes, may even be worsened. The pursuit of Court representation, and even the seemingly tempting possibility of a queer judge, is likely less beneficial than one might assume. I do not rule out the possibility that, under certain circumstances, Supreme Court expansion may effectively politically serve a pro-queer administration and be beneficial in that manner. Nonetheless, I am comfortable stating that, if the court is to be packed, it is disingenuous to do so in the name of queer rights.

Court Term Limits

Perhaps the most well-known of the reform ideas I explored was the concept of establishing term limits for justices who sit on the Supreme Court. This is a proposal that has been floated many times in the past decades, to little avail. The most common proposal involves the establishment of an eighteen-year term limit, staggered such that one of the nine court seats will become empty every two years. This would allow each four-year presidential administration to expect to appoint two justices over its course, thus eliminating the problem of a single president appointing a disproportionate number of justices.

The central problem with this proposal, of course, is that it would require a constitutional amendment. The Constitution dictates that judges "shall hold their Offices during good Behaviour," which is near-universally interpreted to mean that the Constitution guarantees lifetime tenure, should a justice desire it. This alone renders it necessary to pass an amendment to institute term limits, and as such, ensures that term limits are seen as a radical measure — the last constitutional amendment was passed some three decades ago. That said, it is a radical measure with bipartisan support. Republican governor Rick Perry publicly advocated the eighteen-year plan in the run-up to the 2012 elections (Chemerinsky, 2014,) while a bill introduced in 2020 which would functionally enact that same reform was submitted by Representative Rohit Khanna, a Californian Democrat, and co-sponsored by ten other Democrats (H.R.8424, 116th Congress.) Interestingly, this bill sidestepped the issue of a constitutional amendment by, rather than wholly removing justices from the Court when their terms expire, instead relegating them to the position of "Senior Justice." One law professional, however, stated in an interview that such methods of getting around the Constitution are, in their way, just as politically fraught as the establishment of a new amendment.

Establishing term limits for Supreme Court justices would also help contend with a perceived "gerontocracy" on the Court. Roger C. Cramton found that the average age of appointment was fifty-three years from the Court's establishment through to 1970, while the average tenure has been approximately fifteen years. From 1970 through 2007, when Cramton wrote, however, the average age of appointment has remained roughly static while average tenure has risen to twenty-six years. Cramton argues that excessively long tenures result in a Court that fails to adequately reflect modern circumstances (Cramton, 2007.) Chemerinsky agreed, writing that "Eighteen years is long enough to allow a justice to master the job, but not so long as to risk a Court that reflects political choices from decades earlier" (Chemerinsky, 2014.)

But will term limits be beneficial for queer causes? Though they often shied away from making definite affirmative statements, many interviewees were hopeful. One legal professional stated:

> I can't say with certainty that it would have a negative or a positive effect on LGBTQ+ community. I would hope, I would think that it would have a positive effect because the younger generation of mainly attorneys that are coming up and those that will be on the court tend to skew more liberal and/or personal freedom, you know, understanding that everybody should be treated the same regardless of conservative or liberal views. (Interviewee 1, Jan. 21, 2022)

It is broadly seen that the "gerontocracy" issue, that is, the fact that Supreme Court justices are gradually serving longer and longer tenures, does particularly harm the queer community. Some community advocates and activists alluded to the fact that, statistically, older individuals tended to be less friendly to the queer community, as well as the issue of particularly long-serving justices who might represent beliefs that are no longer representative of the country. Of the four justices who dissented with *Obergefell,* three remain on the court; those three occupy three out of the four longest-serving seats. As for the politicization of the Court, term limits may not reduce political maneuvering, but they may well control it. By assigning the duty of appointing two

justices to each Presidential administration, confirmation is rendered regular and predictable. As one expert stated:

> There wouldn't necessarily be the gamesmanship that we see currently with people hanging on to the last minute to try to resign during the next administration, Senates acting very poorly in order to keep seats open, et cetera, et cetera, or fill seats as quickly as possible. I think that you'd get away from a lot of that. (Skip Harsch, Jan. 25, 2022)

This "gamesmanship," as discussed, disproportionately negatively affects queer rights.

It seems that the establishment of an eighteen-year term limit strikes an effective balance between benefits to queer-rights causes and the potential to be implemented. It would eliminate the issue of exceptionally old or long-serving justices effectively diverting political power to the past, rather than serving those of the present. Moreover, it would help lower the impact of court polarization and politicization. While a significant shift in the status quo, its nonpartisan nature may allow it to be realistically considered in Washington. As Chemerinsky noted, "No other major countries give life tenure to their high-court justices. Neither do any of the fifty states… if Rick Perry and I agree, likely many others will, too" (Chemerinsky, 2014.)

Conclusion

The pursuit of queer rights is unlikely to justify sweeping judicial reform and even constitutional amendments on its own. Nevertheless, it has a role to play. The evidence shows that the Supreme Court is far from objective — this is especially true regarding the queer community, but also goes well beyond that example. The Court's justices are subject to their own biases and prejudices, the Court's overall makeup is ruled by the rest of the political world, including the Presidency and Congress, and the Court is also beholden to the needs and desires of the American public. These politicizing features have, both independently and in conjunction with one another, caused the Supreme Court to make many decisions (including inaction) over

the past seven decades which have done immense harm to the queer community. This, in turn, has hardened the hearts of much of the community towards the Court, and community members often see the Court as an adversary in the battle for equal rights. Not only are queer individuals often severely harmed by Court decisions, but the Court's already-suffering credibility and reputation are further damaged as well.

The Supreme Court, it is manifest, must be reformed, for its own sake as well as for the sake of others. As it happens, the most mainstream proposal for reform is likely to benefit this situation. Instituting term limits for Supreme Court justices will ensure that "gamesmanship" is sharply limited, reducing the impact of politicization on court outcomes. Elections will affect the Supreme Court, regardless of reform; term limits will allow elections to have even, regular, and predictable effects upon the Court, eliminating outliers such as Reagan, who dictated the makeup of the Supreme Court for decades after his presidency. Finally, term limits will prevent justices from serving the interests of an America of decades ago, to the detriment of the America of *now*. Avoiding politicization in the Supreme Court is impossible, but with effective reform, politicization may be controlled, managed, and leveraged to stop prejudiced and anti-queer outcomes.

I do not pretend that the benefits to the queer community are likely to account for sweeping Constitutional reform on their own. Rather, my intent in this study is to use queer rights as a lens or microcosm through which the Supreme Court may be analyzed. It is quite clear that establishing a system of term limits would result in a fairer and more just Court for queer individuals. Future research should work to determine whether this principle is more broadly applicable and whether other areas of human rights would also benefit from reform. At the very least, queer rights constitute *a* reason that term limits should be established in the Court,

and that other reforms should also be pursued; if other evidence supports the same course of action, the queer community should stand behind any push to change the Court's broken paradigm.

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