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The Increasing Role of Empirical Research in Corporate Law Scholarship

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corporate power *per se* that was objected to but rather the power of corporate executives. In fact, the fear of corporate power was common throughout the nineteenth century. What was new at the beginning of the twentieth century was not only the rapid growth in the size and number of corporations, but also the common person's essential participation in the new behemoths. Corporations were not just external monsters; the people themselves financed them and provided the revenue they used to purchase legislative protection. As the institutional structure of corporations changed, the type of corruption associated with it developed dynamically too. Indeed, the goal of protecting "other people's money" would be reflected in later Progressive era developments, including the Securities and Exchange Acts,[452] which protected investors from unscrupulous management, and the Chandler Act, which reformed federal bankruptcy law.[453] The Tillman Act suggests the historical roots that fed Louis Brandeis's famous muckraking serial on the self-dealing of investment banks, *Other People's Money—And How the Bankers Use It*, published a few years after the federal ban was enacted.[454] "Other people's money" corruption was a theme common among progressive reformers and shaped public understandings of the relationship between corporations (or corporate executives) and electoral politics.

Recognizing that the Progressive era discovered that corporate *executives* corrupt politics much like big business does sheds light on some things—such as the enactment of the Tillman Act and the trajectory of campaign finance law—but it also leaves important questions unanswered and thus points out directions for future study. Does "other people's money" retain salience as a description of corporate political spending at the beginning of the twenty-first century, when shareholders enjoy broad protections from managerial fraud through securities laws and are often thought to be capable of keeping management in check through the capital markets? If all shareholders are "rational investors" then they presumably support corporate politics or they would sell their shares.[455] We might also wonder how an agency costs-based understanding of corporate politics sheds light on the activity and regulation of corporate PACs. Do these entities, which are primarily supported by employee contribu-

452. *See generally* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (analyzing the legislative history of the Securities and Exchange Acts).

453. *See, e.g.*, David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1089–91 (2000) (describing how the Chandler Act replaced the old-line protective committees overseeing corporate receivership—committees that were made up of affiliated bankers interested in generous fees and managers lacking incentive to investigate mismanagement—with independent trustees, precisely to protect individual investors).

454. *See* BRANDEIS, *supra* note 14.

455. At least that is one view. *See* HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION 59–67 (1995); Sitkoff, *supra* note 12 at 1115–17; Winkler, *supra* note 22, at 165–68. This view is vulnerable on the ground that many shareholders are far from the "rational investor" envisioned by theories of efficient capital markets.

tions but run by iron-fisted senior executives, pose threats of "other people's money" corruption despite federal laws that purport to assure voluntariness? Are the protections of federal law sufficient? The political science literature on the effectiveness of corporate PAC contributions presumes that contributions are given to further the interests of the firms that give.[456] Should we expect executives to direct PAC money to candidates promising to further more personal agendas and thus judge the effectiveness of contributions by different metrics?

Finally, we might also ask what the history of the federal corporate contribution ban tells us about campaign finance more generally. Can it ever be effective? Certainly, the corporate contribution ban itself had a mixed history. By the 1920s, it was recognized that executives continued to give to candidates "contributions which to all intents and purposes were contributions of the corporation."[457] *Fortune* magazine reported in 1956 that "as almost everyone knows, corporate money does go to political parties. One board chairman said, "'A lot of corporate presidents just reach in the till and get $25,000 to contribute to political campaigns.'"[458] Not surprising to students of the life insurance scandal, contributions continue to be hidden in ambiguous expense accounts, or individual executives give in their own names with the understanding that "they will get their money back in bonuses."[459] "Other people's money" corruption was one of the main targets of campaign reformers, but it ultimately found ways to re-emerge in the opacity of corporate practices. Whether such an ideal might be more effectively protected by other legislation, and what such legislation might look like, remains to be seen.

456. *See supra* note 10.
457. SIKES, *supra* note 166, at 108.
458. *See* MUTCH, *supra* note 2, at 166 (quoting *Fortune* magazine).
459. *Id.*

Book Reviews

Federal Courts, State Courts and Civil Rights: Judicial Power and Politics

Review of DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW, Cambridge University Press, 2003, pp. 349. $23.00 (Hardcover).

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INTRODUCTION

With *Lawrence v. Texas*,[1] in which the Supreme Court struck down a Texas law prohibiting same-sex sexual acts, and *Goodridge v. Department of Public Health*,[2] in which the Massachusetts Supreme Court ruled that same-sex couples could not be excluded from marriage under that state's constitution, fresh on the books, Daniel Pinello's book, *Gay Rights and American Law*,[3] arrives like a cold shower. Pinello, a lawyer and political scientist, studied every appellate decision in gay rights cases in both federal and state courts—approximately 400 in all—between 1981 and 2000. His analysis—that judicial hostility was pervasive—takes us back to the not so long ago era when *Bowers v. Hardwick*[4] dominated the law of homosexuality and AIDS dominated the culture. Although Pinello's conclusions are not uniformly grim, the data he amassed point to rampant anti-gay prejudice among judges.

The simplistic notion that judges inexorably follow precedent in a noble quest to ascertain and apply the best and truest interpretation of common law principles and statutory text to the case at hand has long since been superseded: by legal realism, by the legal process school, by critical legal theories, by law and economics, by rational choice models, and by cognitive legal studies scholars.[5] Yet it is still true that no challenge strikes closer to the heart of the legal profession than the proposition that the rule of law is nothing more than an artifact of power. Those in the legal academy may wonder what the "jurisprudes" will come up with next. But we implicitly trust that they will come up with something, some new complex theory of judicial decisionmaking more

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1. 539 U.S. 558 (2003).
2. 798 N.E.2d 941 (Mass. 2003).
3. DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003).
4. 478 U.S. 186 (1986) (upholding a Georgia anti-sodomy law).
5. The best overarching description of the various schools of thought is NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995).

intellectually satisfying than the conclusion that, with a few quirky exceptions, judges simply side with the party whose political or policy views they find the most congenial.

What legal scholars seldom consider is whether there is a method to prove or disprove, to verify or falsify, any of these theories. By contrast, the study of law among political scientists such as Pinello has become centered on (or, depending on one's view, mired in) empirical analysis of judicial decisionmaking.[6] Pinello's book is based on the application of methods of statistical analysis to the several hundred cases in his database, and from that he makes two claims of institutional dimension about the politics of the American judiciary, as reflected in gay civil rights cases.

Pinello's first major conclusion is that federal courts not only were less receptive than state courts to gay rights claims, but that they were *systemically* hostile. What Pinello describes as his most surprising finding is that state courts do a better job of protecting gay civil rights than federal courts do, a conclusion that he extrapolates from his data to cover "other beleaguered minorities" as well.[7] In tackling this issue, Pinello takes himself and the reader directly into the longstanding debate on institutional parity: whether state court systems are on par with the federal courts in providing the appropriate level of protection for constitutional rights.

Pinello's second institutional claim is that the personal policy preferences of judges control the outcome of cases almost as much as law does. *Gay Rights and American Law* seeks to build upon what is now a substantial body of empirical literature on the question of whether judges' personal beliefs have a greater impact on judicial decisions than the law does. Pinello's goal is to enrich the political science discussion with consideration of a bigger pool of possible variables that could predict judicial bias. He has chosen to test his model in a field where major principles of law are still a work in progress, where at least one issue being litigated is viewed as dangerous electoral dynamite for both political parties,[8] and where a major point of debate in popular discourse is whether secular principles should even be the primary touchstone in setting society's rules.[9] Surely one can expect gay-rights cases to provide a rich source of decisions upon which to base an assessment of whether law truly governs law.

The book speaks to scholars in three fields: federal courts, empirical legal

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6. For descriptions of the dynamics behind the failure to communicate between legal scholars and political scientists, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) and Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309 (2002). A recent development seeking to bridge the gap is the inauguration of a new journal, the *Journal of Empirical Legal Studies*, published at Cornell Law School.

7. *See* PINELLO, *supra* note 3, at 145.

8. *See* Katharine Q. Seelye & Janet Elder, *Strong Support Is Found for Ban on Gay Marriage*, N.Y. TIMES, Dec. 21, 2003, § 1, at 1.

9. *See* Jim Wallis, *Putting God Back in Politics*, N.Y. TIMES, Dec. 28, 2003, § 4, at 9.

studies, and civil rights. This review addresses the issues raised by the book in that order.

In Part I, I provide the historical context for the parity debate, which is unfortunately missing from the book, and find that Pinello's work makes an important contribution. He demonstrates that federal courts consistently blocked the door for gay and lesbian litigants pressing claims for equal treatment, more so than state courts, even when one controls for subject matter and statutory versus constitutional claims. This pattern is directly traceable to the political party affiliation of the President who appointed the judges in each given case.

Pinello's book adds to the evidence of systematic hostility by Republican appointees to civil rights claims, which has been building for some time. His focus on one subject matter area allows him to consider a host of other possible factors and demonstrate the overwhelming impact of party affiliation. He fails, however, to fully analyze the logical conclusion of his findings: that the politicization of the judicial appointment process has punctured the most important wall shielding the federal courts from partisan infection. The fundamental question raised by all of this work is whether the longstanding belief that, on the whole, the federal judiciary, with its guarantee of lifetime tenure, is less susceptible than state courts to ideological manipulation has been overtaken by political events. If so, what in the past has been an accepted starting point for debates over parity now amounts to a myth of insulation.

Part II of the review tackles the methodology questions, and finds a number of problems, some stemming from the nature of empirical work and others that flow from Pinello's approach. Many of the same factors that make gay rights cases so fertile for investigation of the relationship between law and politics also make them exceedingly difficult to fit into an empirical model. The litigation context may involve abstract principles of constitutional law or the particulars of a custody case or the technicalities of immigration law. It is not even always clear which decisions should count as "gay rights" determinations. Nor is it necessarily obvious whether to code certain cases as wins or losses. Pinello did not create these shortcomings in the method, but unfortunately he also did not entirely succeed in surmounting them. Most significantly, such a study cannot measure the structures of consciousness that shape not only what courts decide, but what lawyers argue, which cases they elect to bring, whether they appeal, and the terms upon which cases are litigated and decided.

In Part III, I explore civil rights issues more broadly, and conclude that *Gay Rights and American Law* consists of questions left both unasked and unanswered, and these are in many ways the most interesting. Questions about the relationship between claims of liberty and equality based on sexual orientation and a series of structural constitutional questions lie just beneath the surface of the book's text. The recent history of gay rights law provides a context not only for a comparison between federal and state courts, but also for an understanding of the evolving relationship between judicial and legislative branches in the development of civil rights laws. How judges interact with legislatures and the

extent to which statutes, rather than case law, dominate the field are both important. Likewise, the tension between the executive and legislative branches over appointments to the federal bench is beginning to intersect with the politics of gay rights, and is likely to do so increasingly in the future, which will lead to heightened debates over the extent to which views on homosexuality affect a candidate's fitness to serve in the judicial branch. Pinello touches on these topics, but because of its empirical approach, the book leaves one wishing for more and deeper analysis.

Sexual orientation issues can no longer be cabined to questions of individual rights. We are poised to enter a period in which the ramifications of sexual orientation law for debates about the capacity and legitimacy of core legal institutions will become manifest. Gay rights has emerged as a litmus test issue for both political parties, and as a focal point for large-scale political mobilization. Sexual orientation discrimination is no longer a trivial or peripheral issue in American politics and law. Whatever its shortcomings, *Gay Rights and American Law* raises important questions about the purpose, function, and vitality of our structures of governance.

I. REVERSE DISPARITY?

A. PARITY

In the 1970s, the Supreme Court began to cut back the jurisdiction of the lower federal courts in those cases, such as habeas corpus, in which lower federal courts have the power to review and reverse a state court's interpretation of federal constitutional law.[10] In so doing, the Court signaled that it was returning to a more passive approach after a period in which federal judges were encouraged to view the outcome of state court proceedings involving assertions of constitutional rights with significant skepticism.[11] The seeming return to a pre-civil-rights-movement philosophy was an early sign of what is by now a full-fledged states' rights jurisprudence.

Disagreement about the proper relationship between the two systems dates from the constitutional convention, when Madison won the power to allow a

10. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 493–94 n.35 (1976) ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."); *see also* Allen v. McCurry, 449 U.S. 90 (1980) (holding that state court decisions on civil rights claims arising under 42 U.S.C. § 1983 have preclusive effect on federal courts); Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that, absent a showing of cause and prejudice, direct review of state court decisions on federal constitutional claims by habeas corpus is barred); Younger v. Harris, 401 U.S. 37 (1971) (holding that federal courts may not enjoin pending state court criminal proceedings).

11. *See, e.g.*, Monroe v. Pape 365 U.S. 167 (1961) (holding that municipal officers who violate state law can be sued as state actors under 42 U.S.C. § 1983); Fay v. Noia, 372 U.S. 391 (1963) (holding that state prison inmates may raise new constitutional issues in federal habeas corpus proceedings); Dombrowski v. Pfister, 380 U.S. 479 (1965) (holding that federal courts may enjoin state court proceedings).

federal body, Congress, to make the final decision about whether any inferior federal courts should exist, against arguments that state courts provided all the capacity necessary for a judiciary, short of one national Supreme Court.[12] Even after Madison's victory, there was no original federal court jurisdiction over claims arising under federal law until 1875.[13] In practice, the assumption of state court parity continued until the shift to skepticism of state courts that occurred in the Warren Court era.[14]

Civil rights lawyers howled in protest over the change in direction in the 1970s. This marked the beginning of the third wave of parity debates. The most influential reaction came from Burt Neuborne, who wrote what became the classic argument that the Supreme Court's new faith in the capacity of state courts was misguided. In *The Myth of Parity*, Neuborne asserted that federal courts were institutionally superior to state courts in protecting individual liberty from infringement by state actors, so much so that deference to state court judgments and fact-finding by federal courts amounted to a retrenchment of constitutional protections.[15]

Neuborne based his argument on three assertions. First, he argued that "a competence gap exists between the state and federal courts,"[16] both because federal judges typically display a "higher level of legal talent" than state court judges and because of the greater resources, such as a higher caliber of judicial clerks, available to federal judges.[17] Second, he argued that federal judges had "a series of psychological and attitudinal characteristics" that produced a greater willingness to enforce constitutional rights vigorously,[18] ranging from elite "socioeducational" backgrounds and a corresponding sense of obligation to uphold the elite traditions of the federal bench, to greater attentiveness to Supreme Court jurisprudence and less contact with the unsympathetic facts presented by some civil liberties plaintiffs.[19] Lastly, Neuborne asserted that the lifetime tenure of federal judges, as compared to the selection processes for many state court judges, rendered them "as insulated from majoritarian pressures as is functionally possible."[20] Neuborne's institutional claim was sweeping: "the only judicial forums in our system capable of enforcing countermajoritarian checks in a sustained, effective manner are the federal

12. *See* Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 212 (1985); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239 (1988); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1153–54 (1988).

13. Judiciary Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

14. *See generally* Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869 (1994).

15. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

16. *Id.* at 1121.

17. *Id.* at 1121–22.

18. *Id.* at 1124.

19. *Id.* at 1124–26.

20. *Id.* at 1127.

courts."[21] The three grounds upon which he based this conclusion became the starting point for the later debate.

Much has changed since then. Most notably, the philosophical complexion of the federal courts has shifted dramatically from the prevailing norm in the 1960s and 1970s, when Neuborne engaged in federal court litigation, the experience that shaped his argument. After Republican control of the Executive Branch for all but four years of the 1970s and 1980s, the protectiveness toward individual liberty that Neuborne associated with federal judges diminished dramatically. Neuborne himself has acknowledged that he would no longer argue that the two appellate court systems lack parity. Neuborne now finds the federal and state appellate courts to be equivalent,[22] although he also has continued to assert that federal trial courts are measurably better than state trial courts.[23] Other scholars have joined in declaring that a presumption favoring federal courts for adjudication of constitutional issues has become questionable.[24]

With the realization that federal courts were becoming increasingly conservative, scholars began to argue over whether there really was an intrinsic difference in quality, or whether perceived quality fluctuated as an artifact of political direction.[25] Central to this question was the threshold question of how quality could be defined: Should quality refer solely to rights-protective outcomes? Would erudite opinions count as quality, even if they repeatedly rejected arguments for expanded individual rights? Was it correct to assume that higher quality would inevitably result from greater competition for the much smaller number of federal judgeships?

These issues raised in the 1980s-to-1990s phase of the parity debate led in turn to questions of measurement. Political scientists began to develop empirical models by which they claimed to measure quality objectively and to be able to compare state and federal court systems. The most significant of these studies, conducted by Solimine and Walker, found little support for the belief that

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21. *Id.* at 1131.

22. Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 801 (1995).

23. *Id.* at 799.

24. *See, e.g.*, Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 594 (1991); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988).

25. *See, e.g.*, Chemerinsky, *supra* note 24, at 598–99 ("[T]he domination of federal courts by judges appointed by Republican presidents undermines any basis for confidence in the federal bench as a source of systematic protection of individual liberties."); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1309 (1999) ("Ideology or politics is pervasive in the experience and actions of federal judges. . . [J]udges invoke the doctrine selectively to promote policy objectives."); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 642 (1991) ("The modern Supreme Court and the litigants who square off before it on jurisdictional issues take a strongly ideological approach to federal courts law, in which the characteristics of the judge may be central to the decision on the merits.").

federal courts were consistently more rights-protective in adjudicating constitutional claims.[26] In a study of more than 1,000 cases raising claims under the First, Fourth, and Fourteenth Amendments between 1974 and 1980, Solimine and Walker compared litigants' success rates in state and federal courts.[27] They found a success rate of 31.4% in state courts and 41.7% in federal courts, a difference that, while statistically significant (that is, would not happen by chance), was too small to have significant predictive power.[28] Moreover, when broken down by type of claim, several subsets of comparison lacked even statistical significance.[29] They concluded that there was "weak parity" between the two court systems: that state and federal courts were not fungible, but that federal constitutional claims got at least a fair hearing in state courts.[30] Accordingly, "the case for systematic bias simply can't be made."[31]

Erwin Chemerinsky sought to move past these debates by asserting that it was impossible to prove parity or its absence by empirical methods because of the confounding factors that haunt litigation.[32] Moreover, he asserted that parity was the wrong question. Chemerinsky argued that the proper way to resolve the debate, regardless of which political philosophy dominated the federal judiciary at any given moment, was to expand litigant choice.[33] Using the principle of litigant autonomy and prioritizing the right to have federal courts determine the proper application of federal law, he proposed a variety of changes in federal law so that either plaintiff or defendant could, if that party asserted a potentially dispositive issue of federal law, ensure that a federal district court would accept jurisdiction over the case.[34] Such changes would enable all litigants who

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26. MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM (1999).

27. *See id.* at 43–55. Solimine and Walker compared federal district court opinions with state appellate court opinions, because "a study of opinions of state trial courts is virtually impossible [because f]ull written opinions. . . are a rarity, and even the full opinions are rarely reported. *Id.* at 44. The samples are comparable, they argue, because in state courts, "federal constitutional claims will tend to be appealed at a higher-than-average rate, whereas in the federal system federal constitutional claims are likely to be fully litigated" in district courts. *Id.*

28. *Id.* at 48, 61 tbl.3.4.

29. *See id.* at 49.

30. SOLIMINE & WALKER, *supra* note 27, at 58–59.

31. *Id.* at 50. Solimine and Walker cited two additional studies of enforcement of constitutional law in state criminal cases that found no support for a claim of under-enforcement by state courts: Craig M. Bradley, *Are State Courts Enforcing the Fourth Amendment? A Preliminary Study*, 77 GEO. L.J. 251 (1988), and Craig Ducat, Mikel Wyckoff, & Victor Flango, *State Judges and Federal Constitutional Rights*, 4 RES. L. & POL'Y STUD. 155 (1995). *See* SOLIMINE & WALKER, *supra* note 26, at 54 nn.60-61.

32. Chemerinsky assailed the Solimine-Walker studies that formed the basis for their 1999 book, arguing that empirical studies did not, and could not, account for such factors as the impact of the reputation of a court for sensitivity to individual liberties on whether certain cases would be brought, settled or not further appealed. *See* Chemerinsky, *supra* note 24, at 599–600. Martin Redish agreed that parity was impossible to measure empirically. *See* Redish, *supra* note 24, at 331. The dialogue continued with Solimine and Walker's responses to Chemerinsky. *See* SOLIMINE & WALKER, *supra* note 26, at 52–55.

33. Chemerinsky, *supra* note 12, at 300.

34. *See id.* at 302–10.

invoked federal law to, in effect, determine parity for themselves, in light of when and where their case was brought and which particular issues it entailed.

What now seems most striking about the history of the modern parity debate is what is missing: From the beginning, the assumption has been that the only question was whether the federal courts were significantly better, or whether the state courts were sufficiently capable so that both systems gave equivalent levels of consideration to questions of constitutional interpretation. What if the differential cut in the other direction? What if state courts were systemically more sympathetic to individual claims of liberty and equality? Responding to arguments that the parity debate was pointless either because it was unresolvable or because it was really about something else (one's preferences for substantive law outcomes) anyway, Susan Herman suggested that "there might be more interest in a *disparity* debate."[35] Herman argued that if the tables were turned, so that the Supreme Court or Congress began to expand the jurisdiction of the predominantly conservative federal courts, many constitutional law scholars might suddenly decide that it was important to revisit the question of whether state courts were entitled to deference.[36]

The possible reverse of disparity is made all the more salient by another parallel development in rights jurisprudence: the rise of state constitutions as the source of substantive guarantees of individual freedom.[37] The spiraling growth in the importance of state constitutions also dates from the 1970s and 1980s, when state courts began to interpret state constitutional provisions more expansively than the correlative provisions of the U.S. Constitution. Not surprisingly, plaintiffs' lawyers then began relying more on state law, which in turn provided more opportunities for protective rulings, and on it went.[38] In 1977, Justice Brennan heralded the potential of state constitutional law to protect individual rights.[39] In 1986, he identified 250 instances of state courts interpreting the scope of individual rights in their own charters in a more protective fashion than the Supreme Court had interpreted the federal constitution.[40] Thus, on substan-

35. Susan N. Herman, Comment, *Why Parity Matters*, 71 B.U. L. REV. 651, 657 (1991) (emphasis added).

36. *Id.* The context in which Herman wrote included not only the Court's contraction of federal court review of state courts, but also proposals in Congress to enact curbs on the original jurisdiction of the federal courts. *See* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

37. *See generally* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399 (1987); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

38. *See* Harold A. McDougall, *Lawyering and the Public Interest*, 60 FORDHAM L. REV. 1, 43 (1991).

39. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

40. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

tive law grounds, state systems had begun by the end of the century to rival federal courts as the preferred arenas for constitutional adjudication, at least in certain fields.[41]

With the political tables thus turned, the possibility that Herman suggested of attempts to expand rather than retract federal court jurisdiction in order to achieve more conservative policy ends has in fact begun. After decades of conventional wisdom that diversity jurisdiction was a poor use of precious federal judicial resources, Congress has begun to extend the reach of federal district court jurisdiction. In 2002, for example, Congress enacted the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA).[42] The MMTJA grants original federal jurisdiction in cases arising from accidents in which at least seventy-five persons died, subject to a finding of "minimal diversity."[43] Part of the impetus for the expansion of federal jurisdiction to large-scale accidents was Congressional concern over forum-shopping by plaintiffs to select more sympathetic state courts and a perceived need to provide for "an effective one-time determination of punitive damages."[44] Still pending in Congress is the Class Action Fairness Act,[45] which passed the House in June 2003,[46] which would create both original and removal federal jurisdiction over all class actions in which minimal diversity and an enhanced amount in controversy is met.[47] Like other recent bills intended to enlarge federal control over state courts,[48] both pieces of legislation reflect the interests of large corporate defendants.

Has a new reverse disparity supplanted both the myth of parity and the claim of federal superiority? If Pinello's data and conclusions are correct, Herman's half tongue-in-cheek comment was stunningly prescient.

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41. The most prominent field in which state courts have found stronger rights protection than the U.S. Supreme Court has been equal protection claims regarding state expenditures for public school districts. The Supreme Court rejected an argument that state budget allocations failed to satisfy the Equal Protection Clause in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Sixteen state courts took the opposite view in interpreting state constitutions. *See* Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 467 n.31 (1996). Another example is challenges to state sodomy laws from 1986 to 2003. *See infra* text accompanying notes 50–53. In the majority of subject matter areas, however, studies have found that state courts have interpreted the provisions of their state constitutions in the same way that analogous provisions of the U. S. Constitution have been interpreted by the Supreme Court. *SOLIMINE & WALKER*, *supra* note 26, at 89–90, 92–96; James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788–93 (1992); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338–39 (2002).

42. Pub. L. No.107–273, §11020, 116 Stat. (2002) (codifed at 28 U.S.C. § 1369).

43. 28 U.S.C. § 1369(a). "Minimal diversity" is defined as "exist[ing] if any party is a citizen of a State and any adverse party is a citizen of another State" or of a foreign state. 28 U.S.C. 1369(c)(1).

44. H.R. REP. No. 107–685, at 200 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1152.

45. H.R. 1115, 108th Cong. (2003).

46. 149 CONG. REC. H5281, at H5307 (daily ed. Jun. 12, 2003).

47. H.R. 1115, 108th Cong., §§ 4, 5 (2003).

48. *See* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1 (1999).

B. A CASE STUDY IN FEDERAL AND STATE COURTS

Although Pinello may believe that his conclusion regarding state court superiority will surprise gay rights lawyers, in fact they long ago joined the migration to state courts, pushed by the hostility of the Supreme Court in *Bowers v. Hardwick*[49] and lured by the same possibility of more expansive interpretations of state constitutions that had drawn other public interest lawyers. The trend to state fora in gay rights litigation was apparent by the early 1980s,[50] and only accelerated after the *Hardwick* decision in 1986.[51] The results were impressive: nine state court decisions striking down sodomy statutes as unconstitutional on state constitutional grounds,[52] including the Georgia Supreme Court's invalidation of the statute upheld by the U. S. Supreme Court.[53] Of course advocates continued to bring cases in federal court as well; but the recognition of potential advantages in state courts is by now old news.

Despite his misperceptions about the conventional wisdom among gay rights lawyers, Pinello can rightly claim to have made the first attempt to scientifically compare how the two systems have adjudicated this category of claims. To create a database upon which to conduct his analysis, Pinello identified published decisions of state and federal appellate courts between 1981 and 2000 in which the courts ruled on "legal issues having direct impacts on the rights of homosexuals."[54] The mean outcome in what Pinello deemed to be "essential" cases[55] was .503,[56] meaning that the gay rights claim prevailed half the time. His data showed state courts to be substantially more supportive: The mean outcome in "essential cases" in state courts was .572, compared with a mean of .256 in federal courts.[57] Overall, the trend over time was toward stronger rights protection: Pro-gay rulings occurred in 42.4% of the 1980s cases and 53.6% of the 1990s cases.[58] However, no such trend developed in federal court decisions,

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49. 471 U.S. 186 (1986).

50. *See* PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 235 (2000).

51. *See* Christopher R. Leslie, *Standing in the Way of Equality, How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29, 40 (2001).

52. *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 76–78 (2d ed. 2004).

53. *See* Powell v. State, 510 S.E.2d 18 (Ga. 1998).

54. PINELLO, *supra* note 3, at 8. A minor irritant is that Pinello first counts his database as including 468 cases, *id.*, then as 456, *id.* at 10 tbl.1.1, without accounting for the missing dozen cases. Because subsequent calculations are based on the latter figure, I also use it as the total and denominator for purposes of this review. Of the 456, 348 were decided in state courts and 108 in federal courts. *Id.*

55. Pinello excluded some cases as raising claims only tangentially relevant to the overall question of equal treatment for gay people. *See infra* text accompanying notes 148–63. The comparative results for state and federal courts when all cases were included followed the same pattern as for the essential cases: an overall mean of .519 for all cases, of .582 for all state cases, and of 0.315 for all federal cases. *Id.* at 10 tbl.1.1. The computations cited in this review refer to the database of essential cases (which often were the only numbers reported) unless otherwise indicated.

56. *Id.* at 10 tbl.1.1.

57. PINELLO, *supra* note 3, at 10.

58. *Id.* at 13.

where the success rate remained static.[59]

Much of Pinello's analysis concerns the relative impact of legal precedent as compared to various personal characteristics of the judges (race, religion and sex, for example), as well as geographic location. However, there was essentially no difference overall in demographic characteristics between federal and state court judges.[60] Therefore, the variances he found in those factors do not explain the discrepancy between results in the federal and state court systems.

Instead, one factor—the party affiliation of the official who appointed the judges—dominated all others. Among federal judges, this factor produced an impact that dwarfed all other personal characteristics. Appointment by a Democratic president produced a probability impact of 40.5%.[61] The closest comparison was the impact of racial minority status, at approximately half that level.[62] As Pinello described the meaning of this finding, a judge's appointment by a Democratic president determined approximately 40% of "the probability space" between success and failure for a gay rights claim.[63] Pinello found that in cases without binding precedent on point, federal judges appointed by Democrats were 125% more likely to support a gay rights claim than Republican appointees.[64] Tellingly, the story was very different in state courts. Among state court appellate judges with an identifiable party affiliation, Pinello found an incidence of pro-gay votes of 58.9% among judges appointed by Democrats, compared with 47.8% among judges appointed by Republicans.[65] Thus, Democrats were only about 25% more likely to support the gay rights claim in comparable cases.

Pinello tested the federal-state court discrepancy by two further comparisons. First, he identified nineteen federal and twenty-five state court decisions involving federal constitutional questions. He found that state court interpretations of the U. S. Constitution were one and half times more likely than federal court interpretations to produce a pro-gay result.[66] Second, Pinello separated constitutional and statutory claims, since the former often encompass broader, more generic standards than do cases involving interpretation of more precise statutory texts. He found that compared with all nonconstitutional claims in either court system, "the presence of causes of action based on the federal constitution increased the probability of gay people's *losing* by .19."[67]

From these data, Pinello draws extremely broad conclusions as to the superiority of state courts: "*Any* federal court decision was likely to be predisposed against gay rights."[68] "Litigating in federal courts, compared with state fora,

59. *Id.*
60. *Id.* at 153.
61. *Id.* at 114, 151.
62. *Id.* at 87–88.
63. *Id.* at 151.
64. *Id.* at 152.
65. *Id.* at 152 n.5.
66. *Id.* at 110, 111 tbl.4.1.
67. *Id.* at 112 (emphasis in original).
68. *Id.* at 97 (emphasis added).

increased the probability of dispositions *against* lesbian and gay rights claims by the staggering factor of .31."[69] He admonished in dire terms: "[G]ay people who vote for, or otherwise support, Republican candidates engage in acts of self-immolation."[70]

Subtract the hyperbole, and one is left with two questions: Are these conclusions about state court superiority justified by the data? And if they are substantially supported by the data, what are the broader meanings for the parity debate?

C. PROBLEMS OF MEASUREMENT

Recoding the cases and recalculating the numbers is beyond the scope of this review essay. Moreover, because I come to this review as an insider to law but an outsider to political science, I will not attempt recomputations of statistical significance and probabilities. Without engaging in that exercise, however, one can utilize the complete listing of cases that comprise the database, which is contained in Appendix 1.2 of Pinello's book, to assess whether the cases have been fairly counted and whether the comparisons make sense. One significant weakness is the questionable coding of cases as wins or losses; at least two federal cases seem to have been improperly counted as losses.[71]

The second major problem in measurement is that differences in subject matter which are intrinsic to the divide between federal and state court jurisdiction were given little weight. Because federal courts are courts of limited subject matter jurisdiction and state courts are not, the kinds of cases that are adjudicated in the two systems are often different. All but three of the twenty-nine military cases, for example, were heard in federal court.[72] Because of the strong deference courts give to military judgments when personnel policies are challenged,[73] it is no surprise that courts upheld military policies that discriminated on the basis of sexual orientation in virtually every case: twenty-two of the twenty-six federal cases were recorded as losses.[74] This was the only subject matter category of cases that skewed the overall outcome in the federal courts downward. Removing the military cases from the database would have resulted

69. *Id.* at 112 (emphasis in original).

70. *Id.* at 152.

71. The cases are *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reversing dismissal of complaint to allow plaintiff opportunity to show that failure to provide man with loan application because he was not dressed in male clothing constituted sex discrimination), and *Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000) (affirming ruling that settlement of class action lawsuit challenging foster care conditions was fair over objection by sub-class of gay children who asserted inadequate representation). I did not re-analyze the coding of the hundreds of state court cases, but I include several examples of questionable coding below at notes 178–182.

72. PINELLO, *supra* note 3, app. 2.3.

73. *See, e.g.*, Goldman v. Weinberg, 475 U.S. 503 (1986) (review of military regulations challenged on First Amendment grounds is far more deferential than review of similar civilian regulations; holding that Air Force regulation prohibiting wearing of yarmulkes while on duty and in uniform does not infringe upon First Amendment freedom to exercise religious beliefs).

74. *See* PINELLO, *supra* note 3, app. 2.3.

in a total of sixty-one federal court cases rather than eighty-seven, with eighteen rather than twenty-two wins for gay-rights plaintiffs, and forty-three rather than sixty-five losses. The change would have lifted the overall federal court mean from .256 to just under .3, still substantially below the mean for state court cases.

Two subject matter categories were, as a practical matter, as limited to state courts as military cases were to federal courts. Family law disputes accounted for roughly half of all the cases in Pinello's database, mostly consisting of custody, visitation, adoption and foster care ("CVAF") cases.[75] All but four of the 234 family law cases were heard in state court.[76] The second state court dominion was a smaller cluster (twenty-two cases) of challenges to criminal laws, mostly prohibitions on sodomy.[77] After 1986, when the Supreme Court ruled in *Bowers v. Hardwick* that Georgia's sodomy law did not violate substantive due process protections under the U.S. Constitution, litigation of challenges to those laws in federal courts stopped. Thus, for most of the period under study, sodomy law and similar challenges were brought only in state courts and only on state constitutional law grounds.

Bill Rubenstein has suggested that the jurisdictional difference between state and federal courts, which in turn leads to the differential subject matter patterns in the two systems, may explain why state courts are more receptive than federal courts to gay rights claims.[78] Specifically, he has asserted that the predominance of family law issues among lesbian and gay rights cases makes the assessment of which system is the better protector of individual rights different for gay rights litigators than for other civil rights lawyers.[79] Proposing variations on each of Neuborne's arguments, Rubenstein argued that state court judges have greater technical competence in the subject matter areas most frequently involved in gay rights cases, especially family law;[80] that there is a greater likelihood that state court judges will have dealt with lesbian and gay litigants in all types of cases, providing them with more positive attitudes toward this class of claims;[81] and that because state judges are less insulated from local politics, there is a greater chance that they will respect the need for responsiveness to the political demands of minority groups.[82]

Of Rubenstein's three reasons, only the second—that state court judges come into contact with lesbian and gay litigants more often than federal judges do—would help explain a relatively more open reaction to gay rights claims in state rather than in federal court. His first reason—that state judges have greater

75. *Id.* at 8.
76. *Id.* app. 2.1.
77. *Id.* app. 2.4.
78. *See* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999).
79. *Id.* at 623
80. *Id.* at 612–14.
81. *Id.* at 615–18.
82. *Id.* at 619–21.

competence in family law matters—would tend to explain only the extent to which lesbian and gay parties obtained positive outcomes in the great mass of family cases. It is unclear whether Pinello's study, which found that the mean outcome in state courts in family law cases was approximately .535,[83] only slightly better than 50%, can be said to support this argument. Of course, without the collective experience cited by Rubenstein, the success rate could have been lower. In any event, federal judges' presumed lack of expertise in family law would not seem consequential on the question of technical competence, since federal judges almost never hear family law cases. According to Pinello, Rubenstein's third proposed factor—that state court judges tend to have held other public office—cuts the other way. Pinello found that prior service in an elected position was a significant factor in predicting anti-gay decisions on the bench.[84]

In searching for an appropriate body of cases upon which to base a comparison of state and federal court outcomes, what seems most fair is to find a subject matter area in which there are a reasonable number of cases litigated in each system, one which is not definitionally limited to one system or the other. Applying this criterion leaves the cases that Pinello classifies as raising (non-military) sexual orientation discrimination claims, of which there were thirty-two in federal court and thirty-eight in state court.[85] Examining these cases might reveal patterns of pro- or anti-equality sentiments in federal and state court judges. At least, one might suppose, we wouldn't be comparing apples and oranges.

Or would we? Approximately two-thirds of the state court cases involved interpretations of state statutes prohibiting sexual orientation discrimination. Because there is no such federal statute, none of the federal court decisions did. Although a judge's proclivities could lead her to interpret a civil rights statute narrowly or generously, a state court judge would be starting from a position of deciding how to apply a legislatively determined policy, rather than working under the much more amorphous framework upon which a federal court would draw for constitutional interpretation.

If one pares the cases down further just to constitutional claims, however, the discrepancy between federal and state court systems holds.[86] One methodological question that arises at this point is whether the sample size is sufficiently large to carry the full weight of Pinello's conclusions. Nonetheless, one must acknowledge that the same pattern of federal-state court difference is present both for all cases and for the body of the most directly comparable cases. Moreover, even if the state and federal courts were hearing different kinds of cases, if one looks only at the federal court database, the link between party

83. PINELLO, *supra* note 3, at 10 tbl.1.1.
84. *Id.* at 78 tbl.3.1.
85. *Id.* app. 2.2.
86. *Id.* at 111 tbl.4.1.

affiliation and case outcome is still extreme.

A second way to approach the question of whether subject matters is to ask how Pinello's study compares with other studies of federal and state court outcomes in particular kinds of civil rights cases. Solimine and Walker found virtually no difference in outcome between state and federal courts adjudicating constitutional issues in criminal cases,[87] or equal protection claims in civil cases.[88] The only category of cases where federal courts produced pro-rights rulings with significantly greater frequency were those raising first amendment claims in civil cases.[89]

Solimine and Walker's findings suggest support for a distinction that has emerged in several anecdotal accounts as well. In his own study, Neuborne described the cases with which he was concerned as those "advancing federal constitutional claims against local officials."[90] In finding that "[o]n balance, the Establishment Clause plaintiff continues to be better off in federal court, most of the time,"[91] Doug Rendleman joined Rubenstein in speculating that the reason was that such parties tended to be iconoclasts rather than seekers of equality and fairness, and that federal judges might be more open to claims made by the former, whereas state court judges could be equivalent to federal judges for the latter types of claims.[92] Rubenstein suggested that federal courts might be more receptive to liberty claims and state courts to equality claims, the latter often being more obviously relevant to the needs of daily life.[93] In one real life example, these factors coalesced into a decision by plaintiffs' attorneys in *Romer v. Evans*[94] to challenge an anti-gay amendment to the Colorado constitution in state, rather than federal court.[95]

Despite intuitions like Rubenstein's and Rendleman's, no one has articulated persuasive reasons why state courts would do a better job than federal courts in anti-discrimination or equal protection cases. It is not clear whether federal courts were slower than state courts in recognizing gay equality claims, or whether the two systems were moving in opposite directions. Again, Pinello is not shy: "[S]tate courts did not necessarily become more progressive. Rather, the point of reference [federal courts] migrated far right."[96]

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87. SOLIMINE & WALKER, *supra* note 26, at 49.

88. *Id.* at 51.

89. *Id.* at 61 tbl.3.4.

90. Neuborne, *supra* note 15, at 1115.

91. Doug Rendleman, *Irreparability Resurrected? Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1366 n. 105 (2002).

92. *See id.*, *supra* note 77, at 1366 n.105 (citing Rubenstein).

93. Rubenstein, *supra* note 77, at 623.

94. 517 U.S. 620 (1996).

95. *See* Sharon E. Debbage Alexander, Romer v. Evans *and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261, 284 & n.93 (2002).

96. PINELLO, *supra* note 3, at 154.

D. QUESTIONS OF MEANING

One must consider the possibility that federal court superiority may have been simply a temporarily necessary aberration, which the Supreme Court was correct to jettison at the earliest appropriate moment. A number of scholars have argued that returning to parity as the operating norm was an appropriate course correction, restoring federal jurisdictional principles to the ex ante norm of reliance on state courts for the bulk of constitutional adjudication.[97] Richard Fallon argued that the paradigm for jurisdiction has oscillated between two ideal types—the federalist model privileging state courts and the nationalist model preferring federal courts—producing a fluctuation which has served to foster philosophical debates, but which cannot account for the reality of how the federal and state court systems actually interrelate.[98]

Although these concerns may instill some caution as to Pinello's conclusions about the greater receptiveness of state courts to gay rights claims, they do not refute them. At a minimum, his findings are strong enough that they should cause us to return to the question of whether a new reality of reverse disparity between federal and state courts has developed.

Despite his use of florid rhetoric at other places in the text, Pinello, ironically, understates his most important conclusion relevant to the parity debate: "[N]o one can make a credible argument that appointed, life-tenured federal judges necessarily are institutionally preferable [to state court judges] to resist majoritarian forces opposing minority rights."[99] Later, he adds that the effects of single-party dominance in national elections demonstrate that "federal courts are far more susceptible to ideological manipulation by a single source than is the state bench."[100]

If true, these assertions break down what have been the accepted parameters for parity analysis. All the voices in this debate have accepted that the political independence of the federal judiciary is the starting point for analysis and comparison. That was the Framers' intention: "[I]t may safely be affirmed that, together with the permanent tenure of their [federal judges'] offices, [Article III] affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regards to their own judges."[101] Contemporary scholars who have defended state courts also have conceded that "[t]he superiority of a lifetime appointment in countering majoritarian pressures is rightly praised."[102] There has been a near-universal mantra that lifetime appointment functions as the gold standard and benchmark against which other systems

97. *See, e.g.*, Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1361, 1401 (1953).

98. *See* Fallon, *supra* note 12, at 1151–64.

99. PINELLO, *supra* note 3, at 117.

100. *Id.* at 154.

101. THE FEDERALIST No. 79, at 532 (Alexander Hamilton) (J. Cooke ed., 1961).

102. SOLIMINE & WALKER, *supra* note 26, at 41.

should be judged.[103]

Pinello is making a fundamentally different, and more radical, claim: that the federal courts are *systemically* vulnerable to ideological manipulation; that *as an institution*, federal courts have become weaker guardians of freedom than state courts and may well remain so. This is a serious charge, and the degree of support for it in *Gay Rights and American Law* entitles it to serious consideration.

One possible way to understand the data is to see them as merely reflecting the inevitable direction of constitutional interpretation during a period when single-party dominance of the Executive Branch led to the appointment of generally conservative judges who were usually unreceptive to novel constitutional claims. One may believe that the trend Pinello identifies will be remedied by cycles in American politics, which will produce future eras of more liberal, pro-rights appointees who will push the pendulum back toward greater protection of individual rights. Or one may assume that lesbian and gay rights claims have been so extraordinarily controversial that they are not likely to constitute more than an exception to the rule, an outlier status that is rapidly changing.

Unfortunately, however, other recent studies confirm Pinello's analysis. Based on quantitative analysis of more than 45,000 federal district court opinions between 1933 and 1987, C.K. Rowland and Robert Carp found that not only were district judges appointed by Democrats more likely than those appointed by Republicans to issue a pro-rights ruling in civil rights and liberties cases, but that what had been a minor gap between the two groups in the earlier years of that period widened into a "chasm" starting in 1969.[104] Between 1981 and 1986, the partisan difference in civil rights and liberties cases reached 18%, with Democratic appointees more than twice as likely to take pro-rights positions.[105] A particularly compelling comparison is between Carter and Reagan appointees in race discrimination cases: Carter appointees upheld the position of minority litigants in 78% of the cases, Reagan appointees in 18%.[106]

Although partisan differences do not emerge in every area of law,[107] "an impressive array of empirical studies has tended to confirm that the political

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103. *See, e.g.*, James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 150 (2003) ("[F]ederal judges enjoy a measure of formal independence from electoral. . .pressures pursuant to Article III that is generally not available at the state level."); Kahn, *supra* note 41, at 465 ("State courts are closer to the people than are the federal courts . . . Ironically, closeness to the people weakens, rather than strengthens, a court's performance of the function of judicial review."); *see also* Amar, *supra* note 12, at 230; Chemerinsky, *supra* note 12, *at* 275–76. Paul Bator, however, expressed doubt, noting that the terms of state court judges were usually long enough to provide protection from acute political controversies. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 630 (1981).

104. *See* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 24–25, 31 (1996).

105. *Id.* at 36–37.

106. *Id.* at 49.

107. *See, e.g.*, Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1466 (1998) (finding no significant difference in

party of the appointing president or the judge makes a difference in a number of discrete subject matter areas."[108] Rowland and Carp's findings of partisan predilection, for example, were consistent with Tracey George's analysis of *en banc* voting by judges on the U.S. Court of Appeals for the Fourth Circuit.[109] One subject matter area where some of the sharpest differences have emerged is civil rights, especially cases in which plaintiffs seek to extend the equality principle to new situations.[110] A study of federal appellate decisions beginning in the mid-1990s found that ideology (as defined by political party) consistently predicted a judge's vote in five categories of civil rights cases; the study did not test for voting in gay rights cases.[111]

It is easy to see how the timing of this trend towards anti-civil rights decision making would have had a particularly acute impact on gay rights claims. Unlike race and sex discrimination plaintiffs, those challenging discriminatory actions against lesbians and gay men could not invoke the precedents set during the pro-civil rights era of the Warren Court.[112] Instead, gay rights advocates were in the position of making arguments to establish or extend rights protections in the 1980s, just as a wave of ultraconservative federal judges was beginning to crest.

Although the extent to which President Clinton's appointees moderated the "conservatization" of the federal bench during the 1990s is unclear,[113] one should hesitate before reaching the conclusion that reverse disparity is simply a phase of only momentary import. One must address the possibility that there are deeper ramifications. Consider this less sanguine explanation: Gay rights claims are the canary in the cage, the sentinel marker of a breakdown in one central function of the federal courts. If this is true, it is a signal that the extreme focus on partisanship and ideology in federal judicial appointments for the last thirty-five years has inflicted serious, long-term damage to the integrity of the federal judiciary.

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outcome between Republican and Democratic appointees in challenges to federal sentencing guidelines).

108. Brudney, *supra* note 103, at 162.

109. *See* Tracey E. George, *Developing A Positive Theory of Decision-Making on U. S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1678–86 (1998).

110. *See* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (studying federal district court cases and finding that judges' backgrounds have little influence on outcomes). Such sharp differences may not be manifest in more garden-variety civil rights cases. *See id.* at 281.

111. *See* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004). The five categories were affirmative action, sex discrimination, sexual harassment, racial discrimination, and disability discrimination. *Id.* at 305. Moreover, in abortion and capital punishment cases, ideological voting was so strong that it was unaffected by the presence or absence of disagreement within the panel. *Id.* at 306.

112. On issues related to homosexuality, the Warren Court was itself quite conservative. *See, e.g.*, Boutilier v. INS, 387, U.S. 118 (1967); Griswold v. Connecticut, 381 U. S. 479, 486 (Goldberg, J., concurring), 499 (Harlan, J., concurring) (1965); Kameny v. Brucker, 365 U.S. 843 (1961).

113. Clinton's first term appointees were less liberal than Carter appointees in civil rights cases. *See* Robert A. Carp et al., *President Clinton's District Judges: "Extreme Liberals" or Just Plain Moderates?*, 84 JUDICATURE 282 (2001).

What is truly important here is not whether federal courts are systematically hostile to any particular kind of claim, or even the number of disfavored claims. The fundamental question is whether the wall of judicial independence has been breached in any reliable pattern, sufficient to serve as an invitation for whatever political impulses might produce future assaults.

Whatever happens to the myth of parity, the time has come to bury the myth of insulation. There is no longer any reliable buffer between the federal courts and electoral politics. This loss is a change which has been gradually developing and has now emerged in full force. It upends the basic terms of the debate about the relative value of the federal and state courts because it overthrows virtually the only component of the comparison about which all the parties agreed. Moreover, there is no sign on the horizon of a mitigation in the level of partisanship that produced this result. If nothing else, perhaps *Gay Rights and American Law* will help force a confrontation with this reality.

II. THE EMPIRICISM QUESTION

A. THE LAW, POLITICS AND SCIENCE DEBATE

Two schools of thought collide in the political science literature on law and the courts.[114] The first, generally more familiar to lawyers, is known as the legalist school or legal model. Legalists seek to determine the forces driving judicial decisions through close textual readings that attempt to position judicial texts in various intellectual universes: legal doctrine, jurisprudential philosophy, and institutional role. This interpretive approach produces the vast majority of the law review literature, and saturates the study of law, not only by students, but also by the professoriate. Behavioralists, by contrast, contend that judges act based on their policy preferences, rather than in any attempt to adhere to doctrine or professional norms. To behavioralists, judges are simply political actors in judicial robes, advocates trapped in a neutral's body. They conceive of judicial voting as expressions of preference, and direct their energy to the coding and statistical analysis of those votes rather than to the interpretation of text.

I share the view of legalists that the structure and process of analogical reasoning do not easily disaggregate into measurable markers, which can then be recorded as present or absent in a given case. Precedent and doctrine shape decisions and constrain judges, even while allowing space for nonlegal factors

114. The summary in this section draws on the following sources, in addition to the book under review: LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); SOLIMINE & WALKER, *supra* note 26; Frank B. Cross, *The Justices of Strategy: A Review of The Choices Justices Make*, 48 DUKE L.J. 511 (1998); Cross, *supra* note 6; Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Howard Gillman, *What's Law Got To Do with It? Judicial Behaviorialists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2000); Graber, *supra* note 6; and Michael Heise, *The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002).

to influence decisions, sometimes strongly. Ronald Dworkin, for example, argues that law exerts a "gravitational pull" on judges deciding cases.[115] He describes judicial discretion in tiers: lower when the judge is operating under preset authoritative standards; higher in cases with little applicable precedent.[116]

Further, from the perspective of critical theory, for example, one should focus on the structures of consciousness that shape all legal actors: the deeper cultural and psychic sources of attitudes which operate in the unconscious, as well as what Gillman calls "the structure of legal argumentation associated with particular conflicts at particular times."[117] To critical theorists, only the details of law are determined by the adjudication of lawsuits or the actions of legislatures. The demands of power elites, filtered through deeply embedded structures of legal consciousness, set the parameters of what is or is not possible in the legal system.

Critical theorists combine skepticism toward the rule of law, which is at least as strong as that of the behavioralists, with the legalists' rejection of empirical methods. This approach precludes application of both the false consciousness intrinsic to traditional textual interpretation and the false neutrality of scientific method. Pinello's study, like all quantitative analyses, fails to account for this deeper critique.

Interwoven with the debate over theory are questions of method. Empiricism dominates the field of political science, and it is especially congenial to behaviorialist studies. Behavioralist analysis accepts almost as a given that doctrine and precedent have minimal impact on judicial decisionmaking. Behaviorialist studies typically identify independent variables, such as whether a judge is appointed or elected, and determine whether they are correlated with particular outcomes. Such studies rely on regression analyses to isolate relationships among certain variables and outcomes, and therefore require that those variables and outcomes be defined, coded, and entered into a database. In order to be coded, cases must be sorted into discrete categories, such as whether a judge was appointed by a Democrat or a Republican, or whether a judgment favors a plaintiff or a defendant.

Confidently armed with regression analysis, behavioralists seek to reveal exactly which kinds of "external," that is non-legal, factors have the most power to influence court decisions. Among the primary contenders are various rational choice models, which often focus on theories as to whether judges act strategically in their rulings, both to further favored policy goals and to maximize institutional power vis-a-vis legislatures and other government entities. Other frequently studied approaches center on judges' personal characteristics, such as political leanings, demographic characteristics, and indicia of personality or other psychological traits.

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115. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1978).

116. *See id.*

117. Gillman, *supra* note 114, at 493.

Arguments over methodology reverberate in debates over theory, and vice versa. Behavioralists automatically reject arguments that cannot be "proved" in the sense of mathematical analysis and replication. For behavioralists, the sort of textual analysis that permeates law reviews is largely speculative and anecdotal. To legalists, the empirical methodology so appealing to behaviorialists results in a dumbing down of understandings of law. The contrast between empiricism's dominance of political science and the still only budding openness to empirical studies among those in the legal academy explains much of the silence between scholars in the two fields.

A good example of the internal conflict over theory and method among political scientists lies in the long effort to prove whether judges are governed by precedent. Two of the scholars most frequently associated with behavioralism—Harold Spaeth and Jeffrey Segal—published a study in 1999 in which they reviewed 2,425 Supreme Court cases with dissenting opinions to see if the dissenting Justices accepted and applied the ruling of the initial case when similar issues arose in later cases.[118] They found that such shifts occurred only about 12% of the time.[119] Their conclusion presented a dramatic challenge to legalists and the profession generally:

> *Stare decisis* is the lifeblood of the legal model, and the legal model is still the lifeblood of most legal scholars' thinking about law. Yet there has been virtually no real testing of the model. . .[W]e must conclude this book with what the data so strongly suggest: in the realm of *stare decisis*, minority will does not defer to majority rule.[120]

Spaeth and Segal's challenge to legalists—that *stare decisis* was an empty shibboleth with virtually no importance—was then itself attacked on both methodological and conceptual grounds. Attempts to test and replicate its findings produced significantly different results. One study recoded what counted as preferential behavior (behavior not bound by precedent), and reduced the Spaeth-Segal result by almost 20%.[121] Another study singled out four moderate Justices for analysis and found an even greater reduction in the preferential voting of those Justices.[122] Howard Gillman argued that the Spaeth-Segal study had a fatal flaw at its core: the presumption that Justices of the Supreme Court have the same obligation to adhere to precedent that judges in lower courts do.[123] On Gillman's understanding, a Justice who persists in his or her dissenting view can no more be characterized as engaged in preferential voting than

118. *See* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 23–35, 309 (1999).

119. *Id.* at 302.

120. *Id.* at 315.

121. *See* Baum, *supra* note 114, at 73.

122. *Id.*

123. *See* Gillman, *supra* note 114, at 482–83.

the Justices who voted in the initial case to declare what became the majority view.

It is in this debate that *Gay Rights and American Law* seeks to intervene. Pinello's strategy is to attempt a sophisticated synthesis of legalist and behavioralist theories. His goal is to ascertain the extent to which personal, institutional and cultural characteristics drive outcome, without excluding the role of precedent and doctrine. In this world, his conclusion that *stare decisis* and precedent do matter is a challenge to the conventional wisdom.

B. ATTITUDES AND LAW IN GAY RIGHTS DECISIONS

Pinello does not state any particular hypotheses as beginning points for his study, but he does articulate two goals: to analyze the impact of various factors on judicial decision-making in the adjudication of gay rights claims, and to formulate an improved methodology for "the meaningful quantitative empirical study of law."[124] As to the latter, which serves as a path to the former, he aspires to meld the competing legal and attitudinal schools of scholarship in this field, and, by combining the two, produce a result which is greater, that is, more sophisticated, than the sum of its parts. His attempt to ratchet up the complexity and quality of empirical scholarship rests on both the incorporation of a greater number of attitudinal variables and a deeper reading (and presumably understanding) of judicial reasoning.[125]

Pinello found that both legal and attitudinal factors are statistically significant,[126] and concluded that the two models are complementary rather than mutually exclusive.[127] Contrary to the claims of Spaeth and Segal, Pinello found that *stare decisis* matters,[128] but that it matters differently at different levels of the judiciary. Pinello ran separate comparisons for courts of last resort and for intermediate appellate courts of four clusters of variables: legal, attitudinal, environmental and institutional. Not surprisingly, legal variables were the most important determinants of outcome in intermediate appellate courts, and the least important in courts of last resort.[129] At the highest level of appeals, environmental and attitudinal factors yielded the greatest predictive capacity.[130] The impact of attitudinal factors was greatest, and the impact of law lowest, in the family law cases.[131]

The category of attitudinal variables included a broad range of characteristics of the judges themselves, and the particular attitudinal variables that Pinello found to be most salient will surprise no one. More than any factor except party

124. PINELLO, *supra* note 3, at 7.
125. *See id.* at 5–6.
126. *Id.* at 79.
127. *Id.* at 155.
128. *See id.* at 1–2, 143.
129. *See id.* at 82.
130. *Id.* at 82, 154.
131. *Id.* at 84.

affiliation,[132] racial diversity on the bench helped those litigants pressing civil rights claims for lesbians and gay men.[133] The second most significant factor was the presence of Jewish judges.[134] To a lesser extent, the presence of women judges was also significant, especially in the CVAF cases.[135] The statistical power of gender as a factor in producing pro-gay-rights results was roughly equaled by the statistical significance of a Roman Catholic religious affiliation in producing negative results.[136] Prior service in elective office (other than as a judge) correlated strongly with negative outcomes.[137] Age almost, but not quite, met the criteria for statistical significance.[138]

Of the remaining factors studied, Pinello found that environmental ideology had the strongest predictive value. He scored states on the degree of political liberalism or conservatism that dominated each state's political culture based on an earlier political science study that measured "citizen and government ideology," primarily by election results.[139] Similarly, Pinello found that statutory law—either the (positive) presence of an antidiscrimination law or the (negative) presence of a sodomy law—correlated with outcome in the whole range of gay rights cases.[140] Examining institutional factors, i.e. the attributes of the court systems, produced mixed and confusing results. Overall, appointed judges were not more liberal than judges subject to election, although that outcome shifted with term length and environmental ideology.[141] For the most part, a longer term length correlated with more pro-gay outcomes, although that was not true for merit-selected judges.[142]

The patterns become somewhat more interesting when one examines which factors are significant at different levels of appeal or in different categories of cases. For example, the presence of judges of color and Jewish judges was significant at both levels of appeal,[143] while the presence of female judges registered such an impact only in courts of last resort, and age and Catholicism mattered at the level of statistical significance only in intermediate courts.[144] All five of those characteristics carried statistical significance in the CVAF category of cases, including at the appellate level.[145] In the broader category of all family cases, however, Catholicism was not a significantly predictive characteristic,[146]

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132. *See supra* text accompanying notes 65–69.
133. PINELLO, *supra* note 4, at 78, 87–88.
134. *Id.* at 87.
135. *Id.* at 88.
136. *Id.* at 78.
137. *Id.* at 91.
138. *Id.*
139. *Id.* at 33.
140. *See id.* at 2.
141. *Id.* at 91–92.
142. *Id.* at 92.
143. *Id.* at 80 tbl.3.2, 81 tbl.3.3.
144. *Id.*
145. *Id.* at 85 tbl.3.7.
146. *Id.* at 83 tbl.3.5.

although it reappeared as such in the non-family law category.[147]

What does all this mean, and does it mean anything more than what most readers would consider to be statements of the obvious? Lawyers will be surprised neither that precedent carries the most weight in predicting the outcome of litigation, nor that a judge's personal characteristics will often incline her to rule for or against certain types of claims. In family law, where greater discretion attaches to judicial decisionmaking in part because of broad standards such as the best interests of the child, a judge's life experiences and sense of proper norms are likely to carry more weight than in most other matters.

As Pinello states, his findings translate into statements of probabilities; the many exceptions that spring to mind do not disprove the degree of probability.[148] In the end, Pinello's claim is rather modest: that his models "predict case outcomes with reasonable degrees of accuracy."[149] He measured his own system by calculating the probability for the outcome of each case, based on the statistical models, and found that for 48.3% of the cases, the outcome was essentially too close to call.[150] The models accurately predicted the outcome for 41.4% of the cases, and got it wrong 10.3% of the time.[151]

Perhaps the most significant conclusion in the book is the unpredictability of gay rights cases in the time period that Pinello studied. For almost half of the cases, Pinello found that there was, in essence, a 50-50 chance of success or failure.[152] Not even his complex array of variables could produce a prediction for half of the gay rights litigation efforts in the United States at the end of the twentieth century.

C. A CRITIQUE OF DEFINITIONS

One of the recurring confusions at the heart of Pinello's study is the relationship between party and claim. Pinello describes his study as one of claims—how the courts adjudicated claims of lesbian and gay rights. It does not purport to be a study of how the courts treated parties—litigants known for some reason to be lesbian or gay who were involved in any and all manner of disputes that made their way into the court system. Yet the confusion between the two is evident in Pinello's own description of what was being studied:

I coded court decisions as 1 if decided in favor of *the lesbian or gay claim asserted or defended* and 0 if against. For most cases, the coding process was forthright, in that *a homosexual litigant* clearly won or lost. However, when

147. *Id.* at 83 tbl.3.6.

148. *See id.* at 101.

149. *Id.* at 104.

150. *Id.* at 103 tbl.3.11.

151. *Id.* The models were markedly weak in predicting federal court decisions favoring gay rights: For that category, the statistical result was inconsistent with the real world result for 16.7% of the cases, not much different from the frequency at which it was consistent (25%). *Id.*

152. *See id.* at 104.

there was no such litigant, but a decision nonetheless affected *the rights of gay people as a class*, the coding rule became *whether the court treated homosexuals as the legal equal of heterosexuals*."[153]

Obviously types of claims and types of litigants can merge in many instances. A lesbian mother fighting for custody, for example, may assert that the best interests of the child require placement with her, yet consideration of the impact of her sexuality becomes inextricably bound up with the assessment of best interests. Such a case does not involve assertion of a gay rights "claim" in the narrow sense of how a cause of action is framed, in the way that a case challenging a firing based on sexual orientation would. Yet the custody case is as relevant to a study of anti-gay judicial bias as the employment case. Thus one can understand how Pinello had to consider facts, law, and party identity in determining which cases met the definition for inclusion.

Although the answers to this conundrum are not easy, unfortunately Pinello seems to have resolved it in ways that are sometimes both simplistic and inconsistent. Beyond the basic subject matter categories, Pinello injected his own assessment of the importance of various kinds of cases. He considered certain cases to be essential and others nonessential. All of his conclusions are based upon a sample of only the "essential" cases.[154] The issue of which legal disputes are essential to the treatment of gay rights claims cuts to the core of a deeper definition: what it is that Pinello's study is designed to investigate. Pinello's decision to treat same-sex harassment cases as nonessential illustrates how easily cases with important ramifications for changing the law's regulation of homosexuality can be missed if neither the cause of action nor the plaintiff is identified as gay.

The largest set of cases excluded as nonessential was a set of thirty-one same-sex sexual harassment cases. In this kind of lawsuit, a plaintiff sues complaining of harassment "because of sex" by a person or persons of the same sex as the plaintiff. These cases can be a fascinating window into legal and social understandings of gender and discrimination, and they are winnable. Same-sex sexual harassment cases had the highest (the most pro-gay) mean outcome (.742) of any other specific subject matter category.[155] Moreover, they are the fastest-growing category of cases related to sexuality; a comprehensive listing of 107 such cases in federal courts reveals that there were virtually none prior to 1990.[156]

Why were the same-sex sexual harassment cases excluded? Pinello asserts that "this area of the law evolved in large measure to protect heterosexual males from being solicited by gay men."[157] He then notes that "virtually all targets of the alleged harassment are either explicitly described as heterosexual or presump-

153. *Id.* at 9 (emphases added).
154. *Id.* at 8.
155. *Id.* at 10 tbl.1.1.
156. Elizabeth Williams, *Same-Sex Sexual Harassment Under Title VII*, 135 A.L.R. FED. 307 (2000).
157. PINELLO, *supra* note 3, at 68.

tively so."[158] He concludes that the high mean outcome provides evidence that "clearly" judges viewed this body of law as a penalty for gay men soliciting heterosexual men, and not as an extension of civil rights protection for sexual minorities.[159] Pinello points to one case in which the Fourth Circuit interpreted "because of sex" to mean that male-male harassment claims would be cognizable only when the harasser was gay.[160] No other federal court adopted that interpretation, however, and the Supreme Court rejected it, in another case included in Pinello's database.[161]

Pinello's characterization seriously misreads the sexual harassment cases. Many of the cases that Pinello excludes involve efforts to protect men from harassment, often including assault, by other men who use the accusation of homosexuality or effeminacy as a means to persecute their targets.[162] Some of the plaintiffs assert their heterosexuality; and for others, the record on this point is fuzzy. What is politically important about these cases is that they provide an opening for pressing the connection between degrading women because they are female and degrading men who are perceived as in some way un-masculine.

It is true that in quid pro quo harassment cases, in which the harasser is seeking to pressure the target into having sexual relations, the typical same-sex case would fall into the scenario that Pinello describes: A male seeking to pressure another male into a sexual encounter would likely be gay, and the target might be straight. But in hostile environment harassment, harassers often operate in groups and are not seeking sex, but are attempting to use some form of sexualized abusiveness to drive the target out of the workplace. The dynamic is the opposite of sexual attraction; it is intimidation that can border on terrorism. Many of the cases in Pinello's sample fall into that category of hostile environment cases in which verbal or physical abuse drew on anti-gay hatred.

The men in those cases, whether straight or gay or of ambiguous orientation, are suing to broaden the scope of sex discrimination so that it includes discrimination based on gender stereotypes. Using the principles of sex discrimination law to challenge anti-gay policies has become a major theme in sexual orientation law, a strategy that began before the time period of the study.[163] Thus excluding this entire body of cases signifies a mechanistic and fairly narrow

158. *Id.*

159. *Id.* at 69.

160. Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1996).

161. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 79–80 (1998); *see* Scott v. Norfolk Southern Corp., 1153 F.3d 722 (4th Cir. 1998).

162. *See, e.g.*, Schmedding v. Tnemec Co., Inc., 187 F.3d 862 (8th Cir. 1999); Oncale, 523 U.S. 75; Johnson v. Hondo, Inc., 125 F.3d 408 (7th Cir. 1997); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997); Mayo v. Kiwest Corp., 94 F.3d 641 (4th Cir. 1996); Quick v. Donaldson Co., Inc., 90 F.3d 1372 (8th Cir. 1996); McWilliams v. Fairfax County Bd. Of Supervisors, 72 F.3d 1191 (4th Cir. 1996); Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994); Yukoweic v. Int. Bus. Machines, Inc., 643 N.Y.S. 2d 747 (N.Y. App. Div. 1996).

163. *See, e.g.*, DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) ("[Appellants] claim that in prohibiting certain employment discrimination on the basis of 'sex,' Congress meant to include discrimination on the basis of sexual orientation.").

conception of what the study sought to capture.

Defamation cases provide another example of oversimplification of the range of cases that might be classed as discrimination cases. Defamation cases were also excluded by Pinello as nonessential because most involved plaintiffs asserting harm because of a false attribution to them of homosexuality. Admittedly, these cases are complex; most of the plaintiffs are seeking to renounce any association with homosexuality. Pinello codes them as victories for gay rights if the court rejects the principle that false "accusations" of homosexuality are slander per se, that is, considered defamatory without proof of special damages. Yet he excludes them from the database upon which his findings are based, a coding which overlooks the deeper meaning of the cases. Rulings that rejected the common law defamation per se approach required judges to accept that they "should not classify homosexuals with those miscreants who have engaged in actions that deserve the reprobation and scorn which is implicitly a part of the slander/libel per se classifications."[164] Pinello, however, concludes that "the bulk of decisions . . . involve heterosexuals concerned about false accusations of homosexuality. Again, this isn't a lesbian and gay rights category."[165]

In other instances, however, plaintiffs asserting no connection with homosexuality were counted as presenting essential gay rights claims. *Powell v. State*, in which the Georgia Supreme Court struck down the state's sodomy law, is such a case.[166] *Powell* arose from the criminal prosecution of a man accused of rape and sodomy; the victim was a woman.[167] There is no suggestion of homosexuality, nor does the theory of the case suggest an objection to the social codes of gender. The constitutionality of the sodomy law was before the court because the defendant was acquitted of rape but convicted of sodomy, a crime for which consent was no defense.[168] Because the statute covered acts by homosexuals as well as by heterosexuals, its invalidation eliminated prosecutions of gay people as well.

Powell was one of a series of sodomy and related criminal law challenges, almost all of which did involve gay litigants who asserted recognizably gay rights claims. I do not fault Pinello for including *Powell*; an analysis of sodomy law challenges during this period would be incomplete without it. It is equally true, however, that if one is seeking to measure the degree of hostility or openness to assertions of gay equality, such a study is also incomplete if it excludes cases ruling on whether men tormented as "fags" could bring antidiscrimination claims.

Another borderline set of cases involved challenges to municipal laws granting partner benefits to city employees. Often after such a law was passed, a

164. *See* Hayes v. Smith, 832 P.2d 1022, 1025 (Colo. Ct. App. 1991).
165. PINELLO, *supra* note 3, at 70.
166. 510 S.E.2d 18 (Ga. 1998).
167. *See id.* at 20.
168. *See id.* at 21.

group of conservatives sued the city to challenge its validity on the ground that state insurance law preempted it. Such lawsuits were brought in seven states during the time period of this study, and all are included in the database as essential lesbian and gay rights claims, under the category of family law.[169] Here, the underlying subject matter concerned issues of equality for gay employees, but neither the identity of the litigants nor the legal claims and defenses directly implicated sexual orientation per se. One can justify the inclusion on the ground that assessing a court's adjudication of these lawsuits unavoidably involved the context of gay political action. Yet there is something strange in coding a court's decision as essential to gay rights, at least under Pinello's definition, when its text discusses only issues of home rule and preemption.[170]

The complexities of how the state has regulated homosexuality make definitional questions quite difficult. They also may make this area of law an especially problematic one for empirical studies in which each case must be coded into either-or categories—either a "real" gay rights claim or not, either a victory or not. Pinello's efforts at categorization do not overcome problems inherent in the methodology. Moreover, with no explanation, Pinello excluded all AIDS cases,[171] and does not mention transgender cases. After reading *Gay Rights and American Law*, one is left with the intriguing question of whether one can even confidently identify which judicial texts comprise America's law on sexual orientation.

D. A CRITIQUE OF APPLICATIONS

Statistical proof of the saliency of nonlegal variables such as race, gender, religion, age or environmental ideology demonstrates patterns in the relationship between case outcomes and the particular variables. Sufficiently strong correlations yield probabilities, and form the basis for a model that can predict the outcomes of cases with "reasonable accuracy." To most lawyers, this amounts to a lot of proof for conventional wisdom about who would constitute a tough bench for a gay rights lawyer. But most lawyers would expect that, except in rare cases, even a tough bench would not ignore the law.

Pinello attempts to account for the power of precedent by coding some cases as controlled by precedent; he concludes, as noted earlier, that stare decisis is the single most important factor influencing decisions, especially in intermediate appellate courts. But as any lawyer knows, precedent is not a binary game—there are degrees of precedent. Unfortunately, the study makes no

169. *See* PINELLO, *supra* note 3, app. 2.1, at 186.

170. The cases are *Schaefer v. City and County of Denver*, 973 P.2d 717 (Colo. Ct. App. 1998); *Lowe v. Broward County*, 766 So.2d 1199 (Fla. Dist. Ct. App. 2000); *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997); *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999); *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999); *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995); *Slattery v. City of New York*, 686 N.Y.S.2d 683 (N.Y. 1999); and *Arlington County v. White*, 259 Va. 708, 528 S.E.2d 706 (Va. 2000).

171. PINELLO, *supra* note 3, at 9.

attempt to distinguish cases on that basis. As a result, statements about causation in many cases leap from a threshold finding that the court was not limited by binding precedent to conclusions that characteristics of the judges must surely explain the outcome.

These logical gaps occur because Pinello's definitions of legal variables are seriously impoverished. Unlike the Spaeth-Segal study, this book does not pinpoint particular decisions and then examine whether judges in later cases applied the precedent established by those particular holdings. Rather, Pinello identifies a particular outcome—the vindication or rejection of gay rights claims—and seeks to assess why those outcomes occurred. Even assuming a correct assessment of what the outcome in each case was in those terms, this method will not capture the role of particular cases in the creation of legal doctrines which may be applied elsewhere.

In *Gay Rights and American Law*, the variables which mark the impact of the law, as opposed to characteristics of the judges or of their environment or of the particular judicial system, take account only of whether "the same or higher court decided comparable facts authoritatively."[172] Pinello supplies a list of "cases decided under the influence of controlling precedent";[173] he apparently simply accepted each court's declaration as to what was "controlling precedent."[174] He then used six codes for precedent: negative or positive from a higher court, negative or positive from the same court, and negative or positive from another district.[175]

As a result of this methodology, and as is evident from his list of "controlling precedents," the only precedents that counted were other gay rights cases. Apparently, only cases involving homosexuality were thought to involve "comparable facts." It would have been considerably more interesting had Pinello looked beneath the surface of what each court declared was controlling precedent to offer an analysis of how legitimately controlling it was. Here, even more than in the assignment of cases to the essential or nonessential categories, a narrow view of analogy drains the study of much of its potential value. Under such an approach, the very structure of the study points to an over-registering of attitudes toward homosexuality. Pinello concludes that "[j]udicial awareness of the political, religious, and social imperatives surrounding rights claims by lesbians and gay men in late-twentieth-century America transcended the discrete subject matters" of the cases.[176] In other words, the reader is instructed to

172. PINELLO, *supra* note 3, at 216.

173. *Id.* app. 5.2, at 303.

174. Pinello accepts at face value that *Bowers v. Hardwick*, 478 U.S. 186 (1986), which ruled that a state sodomy law did not violate the Due Process Clause, was in fact the controlling precedent in challenges based on the Equal Protection Clause in twelve military cases in the federal courts, as well as in six cases involving civilian employment and one case in which prisoners challenged a policy of segregating gay inmates. *See* PINELLO, *supra* note 3, app. 5.2, at 304-05.

175. *See* PINELLO, *supra* note 3, app. 5.1, at 301.

176. *Id.* at 75.

assume that anti-gay or pro-gay judges brought often decisive attitudes to the adjudication of the entire variety of disputes in the study.

No doubt there are instances where such attitudes did determine the outcome, especially in cases where the controlling doctrine was as malleable as the "best interests of the child" principle. But without consideration of the full range of precedent with which courts were dealing, in addition to prior gay rights cases, some of Pinello's conclusions seem absurd. For example, Pinello compares two cases involving gay partners. In *Posik v. Layton*,[177] a lesbian couple split up and one partner sought to enforce a written contract that promised her $2,500 a month for life—in essence, alimony—if the other partner breached the terms of the contract, which she did. The Florida appellate court enforced the contract. In *Matter of Cooper*,[178] a New York court refused to treat the surviving partner in a gay couple as entitled to the statutory share of the decedent's estate to which a surviving spouse would have been entitled.

Pinello's analysis begins with what most lawyers would consider to be more than a rhetorical question: "Was the fact that Emma Posik documented her relationship with Nancy Layton by means of a written contract—and Ernest Chin did not do the same regarding his with William Cooper—the dispositive issue causing Posik to win and Chin to lose?"[179] Quite possibly yes, you might think, or perhaps the outcome turned on the fact that the New York court would have had to interpret the statutory phrase "surviving spouse"[180] to include the gay partner, while the Florida court had only to enforce a contract.

Pinello's analysis of this case, however, does not even bother to answer the question he posed. He supplements the question by noting that environmental ideology factors—the dominant political gestalt in New York versus that in Florida, plus the fact that Florida had a sodomy law and New York did not—would lead one to expect the reverse pair of outcomes: a gay rights win in New York and a loss in Florida. He then explains the anomaly as follows:

> What happened?
>
> Attitudinal forces most likely overcame the environmental context. The four New York appellate judges denying Chin's claim were Roman Catholic, while the Florida jurists acknowledging the worth of Posik's relationship with Layton were Episcopalian and Presbyterian. Catholic Church dogma is less tolerant of gays than the policies of liberal Protestant denominations such as the Episcopal and Presbyterian churches. In short, the attitudinal force of religion apparently played a decisive role in determining these domestic partners' legal rights.

177. 695 So. 2d 759 (Fla. Dist. Ct. App. 1997).

178. 592 N.Y.S.2d 797 (N.Y. App. Div. 1993).

179. PINELLO, *supra* note 3, at 37.

180. N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a) (McKinney 2004) ("A husband or wife is a surviving spouse . . . .").

> What is more, three of the four New York judges served in prior non-judicial elective office, while none of the Florida jurists did.[181]

The book is peppered with other examples of the author's apparent rush to reach certain conclusions. His analysis of *Commonwealth v. Wasson*,[182] for example, is presented as self-evident when it is far from persuasive. In *Wasson*, the Supreme Court of Kentucky ruled that the state's sodomy law was unconstitutional under both the due process and the equal protection provisions of the state constitution.[183] Like the five-four split in the United States Supreme Court in *Hardwick*, there was a one-vote margin in the Kentucky Supreme Court, but in the opposite direction: four to invalidate, three to uphold.[184] Three of the court's Democratic appointees together with one Republican were in the majority; two Democrats and one Republican dissented. Pinello points out that the majority consisted of one Jewish judge and three Protestants (labeled as "moderate" and "liberal," based on their denominations); the dissenters included two Catholics and one "fundamentalist" Protestant.[185] To Pinello, the reason for the outcome is clear: "Religion offers the only interpretive prism to understand *Wasson*'s split result."[186]

One obvious way to test for the plausibility of these explanations would be to inquire whether the same judges ruled differently in other cases involving gay rights claims. Inconsistency in outcomes reached by an individual judge would suggest that some variable associated with the particular case had a decisive impact as well, as calling into question what variables should be counted as decisive. There is no attempt in *Gay Rights and American Law* to test for this. Although re-analyzing the results of more than 400 cases is beyond the scope of this review, some examples stand out. Presumably without changing their biases or personal characteristics, judges do vote inconsistently—both pro- and anti-gay—a reality that a model such as Pinello's cannot explain. Thus, Judge Flaum in the United States Court of Appeals for the Seventh Circuit is seemingly engaged in schizoid jurisprudence,[187] as are Judges Foley[188] and Forsberg,[189] of

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181. PINELLO, *supra* note 3, at 37–38.

182. 842 S.W.2d 487 (Ky. 1992).

183. *Id.* at 491–92.

184. *See id.* at 502 (majority), 503 (dissent), 509 (dissent).

185. *See* PINELLO, *supra* note 3, at 90–91.

186. *Id.* at 91. For the reader searching for a similar explanation of *Hardwick*, the mystery remains unsolved: Justice White's vote could not be included in the database because of incomplete personal information about him. *See id.* at 97 n.28.

187. Flaum voted both pro-gay in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding that a school's failure to protect a student from extreme harassment by classmates could constitute a violation of the student's Fourteenth Amendment right to equal protection by discriminating against him based on gender or sexual orientation), and anti-gay in *Scott v. Commissioner*, 226 F.3d 871 (7th Cir. 2000) (upholding tax court decision ruling that the surviving partner in a long-term lesbian relationship had no ownership interest in the house her late partner owned).

188. Judge Foley's anti-gay vote in *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995) (holding that the city of Minneapolis did not have the power to grant health insurance benefits to

the Minnesota Court of Appeals; Judge Crawford of the Tennessee Court of Appeals;[190] and Judge Kennedy of the Washington Court of Appeals.[191]

Selection bias and coding errors come with the territory of this kind of empirical study.[192] Large numbers of unremarkable cases that could shed light on judicial attitudes, such as prosecutions for solicitation, are missing from the database because they were defined out of the category of gay rights claims. Per curiam rulings or judicial decisions to deny review escaped consideration because votes by individual Justices were not identifiable.[193] Coding—even when done correctly —eliminates the capacity to consider highly suggestive changes in the tone of a court's analysis, such as the contrast between the contemptuous language of the Supreme Court in *Bowers v. Hardwick*[194] and the respectful tone of *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,[195] because both were losses. This difference, however, sent a signal

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domestic partners of city employees) is inconsistent with his pro-gay votes in *Hanke v. Safari Hair Adventure*, 512 N.W.2d 614 (Minn. Ct. App. 1994) (holding that former employee is not disqualified from receiving unemployment benefits where the employee quit in response to harassment on the basis of his sexual orientation), and *Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784 (Minn. Ct. App. 1985) (Foley, J., concurring in part, dissenting in part) (concurring in the result—affirming sanctions on health club that was found to have terminated a membership on the basis of sexual orientation in violation of Minneapolis ordinance).

189. Judge Forsberg's anti-gay vote in *Dignity Twin Cities v. Newman Center and Chapel*, 472 N.W.2d 355 (Minn. Ct. App. 1991) (holding that a city human rights commission order requiring a property owner to lease space to a gay Catholic group violated the property owner's free exercise rights) is inconsistent with his "pro-gay" votes in *In re Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) (holding that lesbian partner should be awarded guardianship of her disabled partner), *McKay v. Johnson*, No. C6-95-1626, 1996 WL 12658 (Minn. Ct. App. Jan. 16, 1996) (reversing trial court restriction on visitation between lesbian mother and children), and *In re G.A.S.*, 583 N.W.2d 296 (Minn Ct. App. 1998) (upholding placement of child with gay foster parents despite the biological mother's objections on religious grounds).

190. Judge Crawford registered two pro-gay votes in *In re Parsons*, 914 S.W.2d 889 (Tenn. Ct. App. 1995) (affirming custody decision placing child with his lesbian mother and her live-in lover), and *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (affirming lower court decision holding that the Tennessee Homosexual Practices Act, which criminalized consensual non-commercial same-sex sexual activity, violated the state constitutional right to privacy), and two anti-gay votes in *Price v. Price*, No. 02A01-9609-CH-00228, 1997 WL 338588 (Tenn. Ct. App. June 20, 1998) (reversing physical child custody award to lesbian mother, citing mother's past emotional instability and unresponsiveness to court orders) and *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (holding that nonparents do not have standing to seek visitation because there is no statutory right or proceeding for nonparental visitation).

191. Kennedy's anti-gay vote in *Webb v. Puget Sound Broadcasting Company*, 93 Wash. App. 1042 (Wash. Ct. App. 1998) (affirming dismissal of wrongful discharge claim by employee being fired because of his sexual orientation, who sought to establish a public policy exception to the terminable-at-will doctrine), is inconsistent with her pro-gay vote in *In re Wicklund*, 932 P.2d 652 (Wash. Ct. App. 1996) (reversing sexual-orientation based restrictions on gay father's conduct while his children are in his custody).

192. *See, e.g.*, George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); see also *supra* notes 6 and 114.

193. Examples would include the denials of certiorari in *Shahar v. Bowers*, 522 U.S. 1049 (1998), and *People v. Onofre*, 451 U.S. 987 (1981).

194. 478 U.S. 186 (1986).

195. 515 U.S. 557 (1995).

that made *Romer v. Evans*[196] much more predictable than Pinello's system would suggest.[197]

The book's strength is its insistence that a rich mix of variables lies behind the construction of social rules—the law—on important political matters. Ironically, however, despite its elaborate statistical analyses, it fails to capture the complexity of law.

III. JUDICIAL POWER AND POLITICS

As with most studies, the contribution of *Gay Rights and American Law* will not be to answer with certitude the questions which it addresses. Nor will it end the debates, such as that over parity between federal and state courts, which others have sought unsuccessfully to terminate. Rather, its primary value will lie in whether it moves the study of judicial power and politics to new or different or more refined questions.

A. THE POLITICS AND NORMS OF JUDICIAL SELECTION

In Part I of the Review, I examined Pinello's assertion that partisan politics has distorted the process of selecting federal judges to the point of greatly weakening, if not extinguishing, what has long been a cardinal principle of our judiciary: that the structural safeguards afforded federal judges effectively insulate the federal bench from majoritarian pressures. In Part II, I analyzed the claim that, in both the state and federal systems, judges' policy preferences and their immediate (geographic) political environments drove their decisionmaking as much as legal doctrine and, in courts of last resort, more than legal doctrine. If the claim examined in Part II is correct, is the allegation described in Part I inevitable and unfixable?

If the non-law factors that Pinello found had the most statistical explanatory power do determine the outcomes of cases, then it is hardly any wonder that political leaders have intuited the same conclusion and acted accordingly. Perhaps what most legal scholars would regard as vulgar partisanship is in fact only pragmatic policymaking. If so, then we might need to consider developing a new process for federal judicial appointments, and begin arguing for a constitutional amendment to enact it. Or, less grandly, perhaps we should rethink what factors we should accept as the significant attributes for Presidents to consider in nominating and for the Senate to consider in confirming judicial nominees.

For example, judicial nominees could be asked to disclose if they belong to any clubs or other entities that exclude gay people, as they are now asked to

196. 517 U.S. 620 (1996).

197. Pinello identifies *Romer v. Evans* as the only Supreme Court case in the study that his model failed to predict. PINELLO, *supra* note 4, at 97.

disclose whether they belong to clubs that exclude women, persons of color, or members of religious minorities. Simply asking the question would be an enormous step forward, and would signal to lawyers hoping for such nominations that sexual orientation would be treated in at least some ways as on a par with other bases for bias, regardless of the source, religious or otherwise, of nominees' anti-gay beliefs. More powerful would be the addition of sexual orientation to anti-discrimination clauses in all judicial codes of ethics.[198] Although direct enforcement of such codes seldom occurs, they serve an important educative function.

What is problematic about *Gay Rights and American Law* is not that it would help to puncture the hypocrisy of current political discourse about judicial nominations, in which Republicans and Democrats trade mutual accusations that the other allows ideology to dictate their positions on federal judgeships, while using coded terms such as "judicial activists" and "mainstream" to promise key constituency groups that only those with politically agreeable philosophies will be considered for nomination or accepted through confirmation. Rather, the risk is that the book could invite even more stereotyping by conflating too completely ideology and demographics. Although Pinello fully acknowledges that there are many individual exceptions to his statistical averages, the zeal with which he attacks certain backgrounds as predictive of bias is somewhat disturbing.

A case in point is the manner in which he describes Roman Catholic judges. Although religious background is only slightly more powerful than gender in predicting a judge's votes, Pinello himself lapses into what seems like significant hostility in how he describes this factor: "antihomosexual church dogma filtered into Catholic judges' official action";[199] "these data provide striking evidence of Catholic judges' hostility to lesbian and gay rights";[200] "Roman Catholic judges were some of the most hostile to the civil rights of homosexuals";[201] "Catholic judges deciding civil rights cases . . . may have acted on their church's antipathy to lesbians and gays."[202]

His repetition and choice of language is unfortunate, because it obscures an important and legitimate question about the impact of religion on judging. In

198. *See* Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN . L. REV. 363 (2000). The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has proposed revising Canon 3 prohibiting membership in discriminatory organizations to include discrimination based on sexual orientation. *See* American Bar Association, July 2004 Preliminary Draft, § 3.03, *available at* http://www.abanet.org/judicialethics/draft_canon3_071904.pdf.

199. PINELLO, *supra* note 3, at 88 (emphasis omitted).

200. *Id.* at 90 (emphasis omitted).

201. *Id.* at 151.

202. *Id.* at 219 (citation omitted).

one of the most interesting chapters in the book, Pinello describes the controversy that erupted when he sought to obtain information about the religious affiliation of some judges for whom there was no public documentation.[203] To his credit, Pinello reprints extensive comments by colleagues both attacking and supporting him. What is most dramatic is how opposite the reactions are of political scientists and legal scholars. Pinello sent the names of twenty-five judges for whom he lacked a religious identification to a listserve of political science professors, requesting assistance in obtaining personal information about any of the judges. Not one of the political scientists who responded criticized Pinello for seeking the information. He then sent the same request to a listserve of law professors. The second request triggered a lengthy back-and-forth as to whether Pinello was attempting to invade the privacy of the judges or was violating professional or cultural norms in even suggesting that religious affiliation could shape a judge's decisions on matters of law.

The exchange is fascinating for what it tells us about the sharpness of disciplinary differences in norms and beliefs about what information constitutes legitimate knowledge. This gap probably reflects the contrast between assumptions common to empiricists oriented to pursuing whatever variables might logically be expected to produce greater than random variations in results, as opposed to the assumptions of interpretivists who find empirical approaches inherently reductionist. But the difference in reactions to Pinello's inquiry may also suggest a hesitancy to ascribe public and professional actions to private religious philosophy.

Of course Pinello was not suggesting that Roman Catholic judicial nominees should be disqualified on account of their religion. Nor, given the intensive individualized scrutiny that such nominees receive, does there seem to be a genuine risk that a blanket presumption of bias will attach to Catholic nominees. If there is any detailed and intensive "whole person" examination of candidates for any position, it is surely the process which has evolved for federal judicial nominations.

But the question of whether a nominee's religion should *be* a question raises a host of discomforting secondary issues. If it is not an invasion of privacy to attempt to learn the religious affiliation of a candidate for a lifetime appointment to the federal bench (who has chosen not to list one publicly), on the theory that one's religious philosophy should be considered a legitimate factor to include in the public knowledge about that candidate, why would it be wrong to inquire as to sexual orientation? Shouldn't the same principle control both? David Richards has drawn an extended analogy between sexual orientation and religion, arguing that gay rights claims are best understood as expressions of a right to conscience.[204]

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203. *Id.* at 155–161.

204. DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS 84–170 (1999).

In *Lawrence v. Texas*,[205] the Supreme Court removed the last vestige of criminality from homosexuality. Currently anti-gay stigma is still strong, and other legal disabilities short of criminal penalties attach, such as the exclusion from marriage. As those diminish further, however, sexual orientation will become just another characteristic like religion, as suitable for coding, counting, and statistical analysis as race or gender.

B. OF JUDGES AND LEGISLATURES

Gay Rights and American Law is a study of courts and judicial decision-making, seen through the prism of gay rights cases. As I suggested in Part I, however, it may well make its biggest mark as a contribution to the literature offering comparative assessments of federal and state courts. However, its coverage of "American law" is incomplete; to be correct, the title should read "American case law." What is missing is coverage of the role of legislatures and of statutory law. The impassioned advocate battling over constitutional rights in major test-case litigation may be the traditional image of the civil rights lawyer, but any analysis of contemporary law-reform campaigns is seriously lacking unless it accounts not only for the shift of a significant amount of litigation from federal to state courts, but also for the change in venue, for many breakthroughs, from courtrooms to legislatures.

The relationship between the judicial and legislative branches forms a critical part of the story, as much as the relationship between federal and state systems. This is true both in the process of change and in the role of different products of change. The process by which laws change, especially in controversial areas of liberty and equality, often involves a back-and-forth between judicial and legislative action, a dance which shapes the strategies of all participants—judges, legislators, litigators and legislative advocates. Statutes, as products of parts of that dance, have a profound impact on litigation. This interbranch dynamic has probably been more important in the campaign for gay civil rights than it was in any prior civil rights movement.

Studies such as Pinello's miss the process point by depicting judges as both powerful enough to impose their policy preferences and as strangely passive, acting in the thrall of attitudes and biases that overwhelm rational arguments. Yet judges are also strategic agents, not just in securing particular policy outcomes, but also in the more sophisticated ways that actors in complex institutions shape their behavior in order to provide incentives for other actors to behave in certain ways. Judges can, and perhaps should, be alert to the actions and reactions of legislatures.

Judges may need to engage in statesmanship, as well as interpretive dexterity, to ensure that the ultimate outcome in public law will be what they determine to

205. 539 U.S. 558 (2003).

be the legally proper one. Ironically, it is difficult to think of a more salient example of judicial statesmanship vis-a-vis the legislature than *Baker v. Vermont*,[206] the challenge to that state's exclusion of same-sex couples from marriage, and one of the cases which fell within the boundaries of Pinello's database. In *Baker*, the court in effect "remanded" the case to the legislature, by suspending its judgment to give the legislative branch time to enact a civil union law.[207] Yet the extraordinary story of the debate between the justices on Vermont's supreme court and their consciousness of the legislature cannot be reduced to empirical variables, and thus its richness is lost in what purports to be a definitive study of gay rights law during this period.

Although Pinello documents that whether a state has an antidiscrimination statute covering sexual orientation or a criminal law prohibiting sodomy has an impact on judicial decisions,[208] his methodology does not capture the full import of this factor. To his credit, deciding to measure it at all signals a much deeper understanding of the extent to which contemporary law is dominated by statutes than shown by other analyses of judicial decisions. Even the comprehensive Spaeth-Segal study acknowledged this factor only by dividing its sample of cases into those interpreting the Constitution and those interpreting statutes.[209]

The assumption that test-case litigation which produces invalidation of discriminatory government policies operates as the leading edge of a law-reform effort applies much more accurately to race and gender civil rights movements than to the gay rights movement. In part because anti-discrimination statutes were enacted throughout the United States during the race and gender movements, it was often easier for gay rights advocates to secure amendments of those already-existing statutes than to secure positive interpretations of constitutional guarantees in the courts.[210] Thus, much more so than for race or gender issues, statutory protection against discrimination based on sexual orientation often *preceded* constitutional protection.

Lastly, study of the institutional dimensions of civil rights law should not overlook the role of local government. Advocacy of gay equality incubated in legislatures, especially at the municipal level.[211] This history demonstrates that a majoritarian municipal body can function as a counter-majoritarian institution

206. 744 A.2d 864 (Vt. 1999).

207. *See id.* at 886–87.

208. Holding other factors equal, states with antidiscrimination statutes covering sexual orientation have relatively more pro-gay decisions, and states with criminal prohibitions on sodomy have relatively fewer. *See* PINELLO, *supra* note 4, at 2, 92.

209. *See* SPAETH & SEGAL, *supra* note 118, at 310.

210. From 1963 to 1993, Congress enacted eleven statutes designed to protect the rights of employees; it has enacted none since then. William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 91–92 (2003).

211. *See generally* JAMES W. BUTTON, ET AL., PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES (1997).

vis-a-vis the state, similar in some respects to the dynamic between legislatures and courts.

Gay rights cases provide a fertile context for scholars to probe even further into how actions of the separate branches, as well as of the different levels in the federal system, affect the development of new individual rights that later come to be seen as fundamental.

C. THE *LAWRENCE* QUESTION: A PARADIGM SHIFT?

Lastly, one might ask whether this study of gay rights law, and especially its gloomy conclusions about federal court supineness, continues to hold water after the Supreme Court's decision in *Lawrence v. Texas*.[212] It is too soon to know what the full ramifications of *Lawrence* will be. To date, the only courts to interpret it have done so narrowly.[213] No one can yet confidently assert whether *Lawrence* will make the "dis-parity" analysis of Part I obsolete, but there are reasons to doubt that it will.

Historically, the Supreme Court has not functioned as the leading edge of individual freedom. Even during the Warren Court era, the Court was never far out of sync with popular opinion.[214] Most of the Court's most radical opinions—on school desegregation[215] and interracial marriage,[216] for example—were truly radical for their social consequences only in the South, where they inflicted body blows to a legal system organized around racial apartheid. The Court functioned in these cases to eliminate anachronisms, laws that had lost their claim to legitimacy after a long period of social and legal change.

Lawrence can be understood as having performed the same function. In 1986, when the Court decided *Bowers v. Hardwick*, twenty-four states and the District of Columbia had sodomy laws.[217] By the time *Lawrence* was decided, that number was cut in half, to thirteen.[218] When Brown was decided in 1954, the number of states that had *de jure* segregated public school systems was only slightly higher, and they were concentrated in one region.[219] Indeed, in 2003 almost as many states had laws that prohibited sexual orientation discrimination

212. 539 U.S. 558 (2003).

213. *See, e.g.*, Lofton v. Sec'y. of Dep't of Children & Family Serv., 358 F. 3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275); Standhardt v. Superior Court, 77 P.3d 451 (Ariz. App. Div. 1, 2003); State v. Limon, 83 P.3d 229 (Kan. App. 2004).

214. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 449–54 (2004); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker*, J. PUB. LAW 279, 291 (1957).

215. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

216. Loving v. Virginia, 388 U.S. 1 (1967).

217. *Bowers*, 478 U.S. at 193–94.

218. *Lawrence*, 539 U.S. at 559.

219. ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW 6 (1957).

as had sodomy laws.[220] In 1986, Georgia's sodomy law was not an outlier; in 2003, Texas's sodomy law was.

My sense is that the Supreme Court engages in transformative instances of judicial review only after there has been a political tipping point, a signal from some other center of state power that a particular counter-majoritarian claim has achieved a critical mass of political support. I think that there is critical significance in the fact that the signal emanates from a separate institution of government, and not merely from the cumulative impact of developments within the same institution, such as a trend in lower federal court opinions. Following this instinct, I would identify President Truman's Executive Order in 1948 desegregating the armed forces[221] as the institutional tipping point that enabled the Court's decision in *Brown*; and Congressional passage of the Equal Rights Amendment[222] as the tipping point that presaged *Roe v. Wade*.[223] Assuming at least for the moment that *Lawrence* is entitled to inclusion in the list of major judicial paradigm shifts, what served as the tipping point? There is no federal statute that prohibits sexual orientation discrimination; President Clinton's attempt to end the exclusion of openly gay and lesbian service members failed dramatically.

As I look back over the period that led to *Lawrence*, the same period under study in *Gay Rights and American Law*, I would locate the tipping point in the system that Pinello rightly, if perhaps overheatedly, praises: the state courts. The remarkable series of state supreme court rulings overturning sodomy laws—including decisions by the courts in such conservative bastions as Arkansas, Georgia, Kentucky, Montana, and Tennessee—put the U.S. Supreme Court in the embarrassing position of itself seeming like the outlier, the holdout against an ever louder claim for individual freedom.

Having rectified this aberration in *Lawrence*, however, the Supreme Court, together with the lower federal courts, may or may not continue to expand the principle of equality for lesbian and gay Americans. It is depressingly obvious that the federal courts reflect a markedly different perspective on civil rights today than they did in the years after *Brown* or even in the first years after *Roe*. Many federal court judges in the South during the 1950s and 1960s placed their allegiance to the Constitution above more parochial concerns. My own sad guess is that many federal judges of our era, in ruling on this equality claim, will not rise to the occasion, and may well continue instead to trail behind members of the state judiciary, even in their home jurisdictions.

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220. ESKRIDGE & HUNTER, *supra* note 52, at 865.

221. Exec. Order No. 9,981, 13 Fed. Reg. 4,313 (July 26, 1948).

222. The Equal Rights Amendment was passed by the House of Representatives as H.R.J. Res. 208 on October 12, 1971, 117 CONG. REC. 35815, and then by the Senate on March 22, 1972, 118 CONG. REC. 9598. On March 23, 1972, an enrolled version was signed by both the Speaker and the President Pro Tempore and presented to the states for ratification, 118 CONG. REC. 9907.

223. 410 U.S. 113 (1973).

IV. CONCLUSION

Gay Rights and American Law is both useful and disappointing. It entailed an enormous documentation project, and it makes a definite contribution to our understanding of judicial reactions to lesbian and gay rights claims during the 1980s and 1990s. In the end, however, the book offers an interpretation lacking the analytic bite that such a dynamic area of law demands.

The Increasing Role of Empirical Research in Corporate Law Scholarship

POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT. By Mark Roe, Oxford University Press, 2003. Pp. 248. $44.50 (Hardcover).

RANDALL S. THOMAS*

Mark Roe is one of the leading American corporate law theorists. His intellectual contributions are widely regarded as changing the way scholars think about corporate governance,[1] regulatory competition,[2] bankruptcy,[3] and other subjects.[4] In his latest book, *Political Determinants of Corporate Governance* (hereinafter *Political Determinants*),[5] Professor Roe continues his important theoretical contributions, but also adds another dimension to his scholarship—an empirical one—that reflects both his own development as a scholar and, more broadly, a shift in the nature of scholarship in the corporate field.

For many years, modern corporate law scholarship has been split into two broad categories, theoretical and empirical, with little overlap between them. Scholars employing a wide range of theoretical approaches, including contractarians,[6] communitarians,[7] team production advocates,[8] director primacy proponents,[9] and many others, have employed different perspectives to try to generalize about the origins, current state, and future of corporate law. These pieces are provocative and illuminating, but they rarely seek to test the theories developed

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1. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994).

2. *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).

3. *See* Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527 (1983); Mark J. Roe, *Commentary on "On the Nature of Bankruptcy": Bankruptcy, Priority and Economics*, 75 VA. L. REV. 219 (1989).

4. *See, e.g.*, Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217 (1998) (exploring political disruption of markets); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996) (applying mathematical and biological theories to law and economics).

5. MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2003).

6. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). This is the classic book expounding the contractarian view of corporate law, although numerous other scholars have made significant contributions in this area.

7. *See, e.g.*, PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992).

8. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

9. *See, e.g.*, Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1 (2002).

against empirical evidence. Legal empiricists, on the other hand, have generally eschewed "big theory" and focused their efforts on narrower, testable hypotheses. Their articles look more like those published in economics and finance journals, and that is often where they are found.[10]

In recent years, however, there has been an explosion in the number of theoretical articles that combine theoretical and empirical elements. Younger scholars such as John Coates,[11] Guhan Subramanian,[12] Rob Daines,[13] and Steve Choi,[14] as well as more senior authors like Roberta Romano,[15] Bernard Black,[16] and Robert Thompson,[17] have published major pieces of scholarship both developing and empirically testing theories. Roe's *Political Determinants* moves him into this growing group of empirically oriented corporate law theorists.

Yet Roe's move is not without peril. Quantitative legal scholars must be conscious that they are tilling well-plowed ground. The legal academy's sometimes whimsical march into empirical research has attracted strong criticism by some academics[18] and equally impassioned defenses by others.[19] While these

10. *See, e.g.*, Kenneth J. Martin & Randall S. Thomas, *When Is Enough, Enough? Market Reaction to Highly Dilutive Stock Option Plans and the Subsequent Impact on CEO Compensation*, 13 J. CORP. FIN. — (forthcoming).

11. *See, e.g.*, Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy*, 54 STAN. L. REV. 887 (2002); John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301 (2001).

12. *See, e.g.*, GUHAN SUBRAMANIAN, THE DISAPPEARING DELAWARE EFFECT (Harv. John M. Olin Discussion Paper Series, Discussion Paper No. 391, 2002), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/391.pdf; Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the 'Race' Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795 (2002).

13. *See, e.g.*, Robert M. Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001); ROBERT M. DAINES & MICHAEL KLAUSNER, DO IPO CHARTERS MAXIMIZE FIRM VALUE? ANTITAKEOVER PROVISIONS IN IPOS (Berkeley Olin Program in L. & Econ. Working Paper Series, Paper 18, 1999), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1017&context=blewp.

14. *See, e.g.*, Stephen J. Choi, *Proxy Issue Proposals: Impact of the 1992 SEC Proxy Reforms*, 16 J.L. ECON. & ORG. 233 (2000); Stephen J. Choi, *The Unfounded Fear of Regulation S: Empirical Evidence on Offshore Securities Offerings*, 50 DUKE L. J. 663 (2000).

15. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993); Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part I: Technique and Corporate Litigation*, 4 AM. L. & ECON. REV. 141 (2002); Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part II: Empirical Studies of Corporate Law*, 4 AM. L. & ECON. REV. 380 (2002).

16. *See, e.g.*, Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231 (2002); Sanjai Bhagat, Bernard Black & Margaret Blair, *Relational Investing and Firm Performance*, 27 J. FIN. RES. (forthcoming 2004), *available at* http://leeds-faculty.colorado.edu/bhagat (last visited Aug. 24, 2004).

17. *See, e.g.*, Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133.

18. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6 (2002) (claiming that "the current state of empirical legal scholarship is deeply flawed" because the legal literature pays little attention to "the rules of inference that guide empirical research in the social and natural sciences").

19. *See* Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002) (criticizing Epstein and King's methodology and portrayal of empirical legal scholarship); Jack

battles have largely ignored corporate law scholarship, it behooves corporate scholars to reflect on our empirical work to avoid some of the pitfalls identified.[20] A legitimate argument can be made that corporate law scholarship needs better methodology and better testing of its theories before claiming to have succeeded in proving (or disproving) anything.

In this regard, it is illuminating to compare Professor Roe's analysis in *Political Determinants* with that employed by Professors La Porta, Lopez-de-Silanes, Shleifer, and Vishny (hereinafter LLSV). These four well-known economists have developed a major competing theory about the determinants of corporate governance.[21] Consistent with the methodology of economics scholarship, LLSV seek to validate their theory by thorough empirical testing with a well-specified model and lots of data. Roe is quite critical of LLSV's work on a number of persuasive theoretical grounds, and for their unsophisticated understanding of legal institutions. Roe also claims that their empirical results do not support their theoretical conclusions. But LLSV could easily turn the tables on Professor Roe and attack him for failing to rigorously test his hypotheses.

Herein lies the problem for the new empirical corporate law scholarship: Once we begin to claim that we are empiricists, we will be held up to the methodological standards for empirical research that have been developed by generations of social science researchers, at least when our work is read by academics in those fields. In this regard, LLSV's empirical methodology is a reasonable benchmark against which legal scholars can measure their work.

At the same time, what legal scholars can bring to the party that other disciplines lack is our rich understanding of the economic, political, and social forces that shape law, and law's effect on them. This deep background should permit legally trained empiricists to formulate hypotheses that take into account more of the factors that affect the creation of law and its effects and to define richer variable that do a better job of capturing law's impact. When we add to this deep theoretical skill set a rigorous quantitative orientation, then our research will carry much more weight—not only in legal circles, but elsewhere in the academy as well.

This book review seeks to accomplish two goals. First, in Part I, it summarizes the theoretical arguments made in *Political Determinants* and critiques the empirical support marshaled by Professor Roe in support of them. Then, in Part II, it develops an alternative model that could be used to test both Professor Roe

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Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002) (questioning whether Epstein and King's prescriptions are uncontroversial even within political science).

20. *See* Frank Cross et al., *Above The Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002) (stressing the value of paying greater attention to methodology in empirical work).

21. Among the numerous articles LLSV have published, a few are particularly relevant here. *See, e.g.*, Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998) [hereinafter La Porta et al., *Law and Finance*]; Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

and LLSV's theories about the determinants of corporate governance. Finally, it offers a few concluding remarks about the future of empirical legal scholarship.

I. THE "POLITICS MATTERS" THEORY

The basic thesis of *Political Determinants* is that politics matters in determining how a country's corporate governance structure evolves over time. The "politics matters" thesis can be simply stated as follows: Social democracies,[22] such as those in continental Europe, pressure corporate managers to protect workers by expanding employment levels, avoiding downsizing, and being overly risk-averse in their investment strategies.[23] At the same time, these countries "denigrate the modern pro-shareholder tools—such as incentive compensation, hostile takeovers, shareholder wealth maximization norms, etc.—because it is not their policy to promote purely shareholder values."[24] Owners of capital respond by concentrating ownership to ensure that managers act in the interests of the firm's owners rather than give away the store to workers.[25]

A. THE BASIC THEORY

This simple summary of the theory, however, obscures the real depth of analysis in *Political Determinants*. The initial portion of the book explores the claim that "strong social democracies widen the gap between managers and distant shareholders, and impede firms from developing the tools that would close up that gap."[26] Roe begins by noting that in a modern economy, a political predicate for large-scale production is sufficient social peace for firms to produce and sell their products. To understand how countries have achieved such peace, he argues, we must examine the deal cut among capital, labor, and managers.[27]

In any democratic society, Roe asserts, the government will be pressured by voters to protect labor against the effects of unbridled shareholder wealth maximization. In some countries, notably the European social democracies, Roe claims that the state has sided with employees in order to resolve social conflicts. These social democracies have pushed firms to stabilize employment, expand firm size, and avoid changes that would adversely affect the quality of the workplace.[28] But these goals, Roe observes, are similar to those of self-interested managers acting without concern for shareholder interests. In effect, the political pressures from a social democracy reinforce managerial tendencies

22. Roe defines social democracies as those "nations committed to private property but whose governments play a large role in the economy, emphasize distributional considerations, and favor employees over capital-owners when the two conflict." ROE, *supra* note 5, at 24.

23. *See id.* at 2, 14.

24. *Id.* at 4–5 (emphasis omitted).

25. *See id.* at 6.

26. *Id.* at 49.

27. *See id.* at 11–12.

28. *See id.* at 4, 24.

to act in a self-interested way, thereby increasing managerial agency costs for shareholders.[29]

This leads owners of capital to seek ways of reducing these agency costs. In particular, Roe claims that outside the United States, owners of capital have concentrated their ownership of securities in order to protect capital's share of the pie and permit shareholders to monitor managers closely, thus limiting their discretion. Roe believes that some of the other alternatives for aligning shareholder and manager interests, such as those employed today in the United States, were rejected in these social democracies because they conflicted with labor groups', and sometimes managers' interests. For example, incentive compensation was slow to develop in Europe because labor viewed it both as creating unfair and inequitable compensation differentials between workers and managers, and as tying managers too closely to owners.[30] Shareholder wealth maximization norms were supplanted by a stakeholder orientation through pressure exerted on managers by governments. Transparent accounting was not valued by owners, who preferred that employees not get a full picture of the firm's finances so that the firm could avoid having to pay them more money when it was doing well. Nor did governments push for better corporate disclosure rules because, although such rules might help labor, they might also lead to the development of a shareholder-oriented culture. Similarly, governments blocked hostile takeovers to protect employees from losing their jobs, even though capital owners might reap tremendous gains from them.[31]

By comparison, Roe argues, these social democratic pressures were weaker in the United States, and the agency costs that they created were smaller. Managers faced less pressure to protect labor's interests. Markets were also bigger and more competitive, so that rents evaporated more quickly.[32] These factors constrained managers' ability to shirk their duties to shareholders. Furthermore, the large size of the American market led to the creation of larger firms with far bigger capital needs than could be satisfied by individual families, however wealthy. Securities markets developed to meet these capital demands, and other institutions and norms[33] arose to tie owners and managers together. As a result, Roe claims, the United States has a relatively small percentage of public firms in which individual shareholders control large blocks of stock.[34]

In Roe's view, the political constraints imposed on managerial actions by

29. *See id.* at 36–37.

30. *See id.* at 42–43.

31. *See id.* at 43.

32. Rents can be "thought of as a return to the scarce factor [of production] that makes the monopoly possible—i.e., the factor that serves as a barrier to entry." HAL R. VARIAN, MICROECONOMIC ANALYSIS 92 (2d ed. 1984).

33. Examples include the shareholder wealth maximization norm, incentive pay for managers, transparent accounting, and hostile takeovers.

34. *See* ROE, *supra* note 5, at 17, 50 tbl.6.2.

social democracies were more powerful and easier to implement when markets were smaller and more localized. In such conditions, monopoly power and the rents it generated were easier to maintain. When rents were high, Roe argues, managers had difficulty resisting pressures to divert some of them to labor. Today, Roe believes, globalization and the integration of the European Union have led to competitive capital, product and labor markets that will over time reduce the social democracies' political pressure on managers to favor labor interests.[35] Shrinking rents will leave managers with less discretionary income to share with workers. Thus, in Roe's view it is not surprising that we see movement in the social democracies toward less protection of labor's interests, a weakening of control block ownership and the nascent development of alternative methods of tying shareholders and managers together.[36]

In Part III of his book, Professor Roe tests his theory by running some simple regressions.[37] Drawing on the political science and finance literature for data, he takes different indices for measuring national politics and regresses them for individual countries against measures of ownership dispersion in those countries. For instance, Roe regresses an index of left-right political placement for sixteen industrialized Western countries against each country's percentage of mid-sized public firms without a twenty percent blockholder, and finds a statistically significant correlation between the two variables.[38] Substituting a variety of different measures for the strength of a social democracy, such as the degree of employment protection or of income inequality, or the percentage of gross domestic product that is government spending, does not diminish this correlation. Similarly, strong correlations exist between measures of social democracy and alternative measures of ownership concentration, including the size of each nation's stock market in proportion to its economy or the percentage of large firms without substantial block holders.[39]

This statistical evidence, Roe claims, creates a "prima-facie case" that politics affects ownership structure.[40] To his credit, he does not overstate the importance of these results. A variety of other statistical issues would need to be

35. *See id.* at 36.

36. *See id.* at 140–41.

37. For a good introduction to regression analysis for non-quantitatively oriented readers, see ALAN O. SYKES, AN INTRODUCTION TO REGRESSION ANALYSIS (Univ. of Chi. Law Sch. John M. Olin Program in Law & Econ., 2d Ser., Working Paper No. 20, 1993), *at* http://www.law.uchicago.edu/Lawecon/WkngPprs_01-25/20.Sykes.Regression.pdf. Professor Sykes begins his discussion with a good description of what regression analysis is: "Regression analysis is a statistical tool for the investigation of relationships between variables. Usually, the investigator seeks to ascertain the causal effect of one variable upon another . . . . To explore such issues, the investigator assembles data on the underlying variables of interest and employs regression to estimate the quantitative effect of the causal variables upon the variable that they influence. The investigator also typically assesses the 'statistical significance' of the estimated relationships, that is, the degree of confidence that the true relationship is close to the estimated relationship." *Id.* at 1.

38. *See* ROE, *supra* note 5, at 51, graph 6.1.

39. *See id.* at 56–61.

40. *See id.* at 56.

addressed before his theory could be claimed to have been empirically validated, some of which he discusses briefly at various points in the book. For example, he notes that the causal relationships between ownership concentration and social democracy may be interactive, so that each one brings about changes in the other.[41] Econometrically, this suggests that we need to deploy more sophisticated modeling techniques, such as specifying and estimating a simultaneous equations model, in order to capture accurately these interactive effects.[42] Even if the causal link runs only from politics to corporate concentration, however, a careful statistician would need to specify all the possible independent variables that would affect ownership levels, and include them in a multivariate analysis. Selecting an appropriate model would depend on the shape of the relationship between the variables: The simple regression model that Roe deploys assumes a linear relationship between the variables, but that might not be the case.[43] Furthermore, some of the independent variables could have lagged effects, so that, for example, employment protections five or ten years ago would have an effect on ownership concentration today.[44] Finally, even once such a model was specified, the fact that there are only sixteen observations in Roe's sample might make it impossible to estimate, as Roe notes. Generating additional data could take a lot of time and effort, if it were even possible. For all of these reasons, we are left at the end of Part III (and ultimately at the end of Roe's book) with empirical results that suggest a relationship, but do not provide conclusive proof.

To buttress his empirical evidence, Professor Roe goes on in Part IV of the book to discuss how his theory applies in seven different countries: France, Germany, Italy, Japan, Sweden, the United Kingdom, and the United States. His discussions of Germany and Japan are particularly good illustrations of his thesis that social democratic policies lead to concentrated ownership.

Under the German co-determination system, labor in larger firms gets half of the seats on the firms' supervisory boards. Labor's strong presence on the supervisory boards leads owners of capital, who fear that labor may divert the firm's resources to itself, to try to limit these boards' powers. As a result,

41. Both Roe and LLSV use linear regression techniques in their work, but neither has stated why, as a theoretical matter, it is the proper form of equation for these purposes.

42. When economic models involve a set of relationships between several endogenous variables that are simultaneously determined, then single-equation estimation techniques yield incorrect (or, technically speaking, inconsistent) results. It is therefore necessary to model these relationships using several equations in which the behavior of the variables is jointly determined. These models are called simultaneous equation models. For a technical discussion of these models, see Multi-Equation Simulation Models, P. 2 *of* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, ECONOMETRIC MODELS AND ECONOMIC FORECASTS (2d ed. 1981). Roe does note that simultaneity is a problem with unpacking the influences of different institutions on one another in theorizing about the determinants of corporate governance. ROE, *supra* note 5, at 152–53.

43. *See id.* at 51.

44. *See id.* at 53, 150.

German company boards have been made weak.[45] A weak board makes it hard for dispersed shareholders to effectively monitor managers and ensure that they are not giving labor too large a share of the firm's rents.[46]

Large block ownership acts as an effective counterweight to labor's pressure on managers: Capital uses alternative methods of getting information from managers, such as informal discussions, control over the board chairmanship, meeting with managers outside of the boardroom, and holding both debt and equity in the firm. The combination of concentrated ownership and alternative information channels reduces managerial agency costs.[47]

In the case of Japan, Roe's analysis focuses on the political rationale for that country's system of lifetime employment. He claims that lifetime employment arose in the wake of vicious labor strife in post–World War II Japan as an attempt to maintain morale in the factories after management crushed an aggressive worker movement.[48] Lifetime employment can therefore be seen as a political compromise that helped to buy social peace, but it also shaped developing corporate governance structures. Lifetime employment eliminated workers' fear of losing their jobs, creating a need for different methods to encourage workers to maintain their productivity.[49] Japanese firms' ownership structure grew in a way that complemented the lifetime employment system's aversion to rapid change and risk. Instead of aggressive American-style shareholders, Japanese shareholders were normally creditors of the company as well.[50] Such "banker-shareholders," Roe claims, could monitor managers to some degree, but without threatening to overturn the implicit contracts inherent in a lifetime employment system.[51]

B. THE IMPORTANCE OF PRODUCT MARKET RENTS

Having set forth his basic theory and presented supporting evidence, Professor Roe turns to the effect of product market rents on corporate governance. Roe claims that greater monopoly profits should result in higher potential management agency costs for firms because such rents create a bigger pot of

45. Roe claims that boards are too big to function effectively, they meet infrequently, they are poorly informed, and the shareholder directors on them are unwilling to criticize management in front of the labor directors. *Id.* at 72–74.

46. *See id.* at 73–76.

47. *See id.* at 77. The combination also led to an absence of diffuse ownership and weak securities markets. Prospective stock purchasers discounted the value of stock offered by controlling shareholders to adjust for the higher agency costs that would arise if capital owners (the controlling shareholders) were less able to monitor managers closely. Controlling shareholders were thus less likely to offer stock at all, and prospective purchasers would fully value stock only if they could acquire large blocks. These constraints on the workings of supply and demand meant little need for liquid securities markets.*Id.* at 76–77.

48. *See id.* at 89.

49. *Id.* at 90. Roe argues that internal labor markets adjusted in several ways. In some instances, internal promotional tournaments developed, offering seats on large corporate boards as top prizes for the best employees at the end of their careers of exemplary service. *Id.*

50. *See id.* at 93.

51. *Id.*

assets that managers can divert for their own purposes.[52] Higher profits will also lead employees to seek higher compensation, improved working conditions, and perhaps a greater voice in corporate governance. At least some of labor's goals are consistent with managers' self-interested predisposition and may therefore encounter little managerial resistance when profits are high.[53]

Politics also enters into the equation when social democratic institutions insist that labor receive a fair share of the monopoly profits. Faced with this threat to their investment returns, shareholders may lobby vigorously for such things as tighter fiduciary duties, incentive compensation, a shareholder primacy norm, and improved disclosures, in order to tie managers more closely to the interests of owners. At the same time, shareholders may also increase the level of their ownership or family control, to tighten their grip on the firm's management.[54]

Strong product market competition, perhaps stemming from globalization of markets, Roe argues, will constrain these costs.[55] Managers will have a smaller pie to divide, and they may fear losing their jobs if profits shrink too much. As managers' ability and interest in diverting value away from shareholders drops, shareholders will no longer need to invest so heavily in constraining managerial agency costs; therefore, they can reduce their block size and enjoy the benefits of greater liquidity and better diversification of their portfolios.[56] Similarly, Roe claims, workers have less to gain from investing in political institutions that seek to increase labor's share of a smaller pie. This weakens social democratic parties, resulting in a shift to the right in social democracies, making it politically possible to create some of the institutions (incentive compensation, for example) that shareholders use to bind managers more closely to their cause.[57]

Roe then proceeds to test some of these claims using simple regression techniques. First, he examines whether the degree of ownership concentration is correlated with the amount of pressure that social democracies put on managers to protect labor's share of the pie (as measured by an index of national employment protection). He finds that the degree of employment protection is a good predictor of the level of ownership concentration.[58] Second, he uses a measure of monopoly profits as a predictor of ownership concentration, and finds a strong correlation between these variables.[59] Roe concludes in each case

52. *Id.* at 126.
53. *Id.* at 131.
54. *Id.* at 132.
55. *See id.* at 136.
56. *Id.*
57. *Id.*
58. *See id.* at 137–39. For example, Table 19.1 displays data on the level of employment protection in sixteen industrialized countries as well as the portion of mid-sized public firms without a twenty percent stockholder. *Id.* at 137. Figure 19.1 illustrates the strong correlation between these two measures. *Id.* at 138.
59. *Id.* at 149 graph 20.1.

that this is crude evidence in support of his thesis.

What should we make of these regressions? As Roe himself admits, not too much.[60] Once again, simultaneity rears its ugly head: If the two sets of variables are interactive, and both affect each other, then we need to estimate a model that can take these interactive effects into account. We cannot sort out the direction of the effects if we only look at one side of the interaction.[61] Moreover, we again have the problem of specification: There are a wide variety of variables that need to be factored into the calculus, and these equations only examine a few of them at a time.[62] Finally, as Roe acknowledges, there is the problem of changes over time. Political parties change over time, which should lead, probably with some lag, to changes in ownership patterns. We would need time series data to examine these effects, and at present, such data do not exist.[63]

Professor Roe concludes this section with a short set of empirical tests that are designed to show that, even when we include measures of the quality of a nation's corporate laws, politics still affects corporate governance. Roe makes the point that adding different measures of politics as explanatory variables increases the power of simple models that try to explain ownership separation as a function of corporate law variables. Using first a correlation matrix, and then some single and two-variable regression models, Roe finds support for this claim.[64]

Here again it bears repeating that much more would need to be done to test this claim rigorously. Correlation matrices provide a general overview of the degree of correlation between different variables and are widely used as a means of detecting variables that exhibit a high degree of multicollinearity.[65] Here the correlation matrix is used for the much simpler task of illustrating the likely explanatory value of different measures of politics and corporate law quality as predictors of ownership concentration. Furthermore, the regression models estimated are incomplete versions of a well-specified model for either the "politics matters" or the "quality of corporate law" theory. A full-blown test of either theory, or of their relative merits, would require adding many additional independent variables and addressing the issue of the direction of causality more completely.

C. ROE'S COMPETITOR: THE QUALITY OF CORPORATE LAW HYPOTHESIS

In the concluding section of the book, Professor Roe engages in a critical comparison of the "politics matters" thesis with LLSV's "quality of corporate

60. *See id.* at 155 (characterizing tests as "suggestive").

61. *See id.* at 152–53.

62. As we will see in Part II, economists typically use multivariate models in making this analysis.

63. *See* ROE, *supra* note 5, at 150.

64. *See id.* at 155–58.

65. Multicollinearity is a problem that can adversely affect the predictive power of the affected variables, forcing researchers to use more sophisticated estimation techniques. See SYKES, *supra* note 38, at 28–31, for a nontechnical discussion of this problem.

law" theory. LLSV postulate that good corporate law is the critical precondition to the development of modern securities markets. Once such a corporate law is in place in wealthy countries, ownership of stock will become diffuse and large corporations will prosper. This influential theory is one of the principal competitors to the "politics matters" thesis.[66]

Roe criticizes the application of this theory to modern industrialized countries. First, he notes that there are several rich European countries that have had very good corporate law for many years yet continue to have concentrated ownership patterns.[67] The explanation for this is that good corporate law does little to control the costs of managers dissipating shareholder value—it only stops managers from diverting assets to themselves.[68] Only concentrated ownership can police these costs, as capital owners step in to make the crucial decisions that affect the firm's future. Thus, the first limitation on the "quality of corporate law" thesis is that "a good core of corporate law—that attacks and destroys insider thievery—is not enough to induce separation."[69]

The second problem with the "quality of corporate law" thesis, Roe claims, is that the effects of good corporate law on ownership concentration are indeterminate.[70] In companies where controlling shareholders own large blocks of stock, good corporate law can protect minority shareholders from blockholder diversions. When minority investors are protected by good corporate law they will be willing to pay more for their shares in the market, which makes it possible for the controlling shareholder to sell its block into the market and get full value for it. The "quality of corporate law" thesis maintains that this will lead to greater separation of ownership and control. However, this effect does not unambiguously lead to greater dispersion of stock ownership. Good corporate law could also result in increased concentration if it leads controlling shareholders to engage in better monitoring of managers to increase information flows from the firm to the shareholders, and to make implicit contracts with other stakeholders when they are efficient. All of these activities increase the value of the firm. In short, if corporate law becomes good, it could reduce the amount that blockholders steal from minority shareholders. Therefore, the value of the firm may rise with an improvement of corporate law, which could lead blockholders to want to increase their holdings.

Professor Roe formalizes his insights into a simple model, which illustrates the point that better corporate law will not necessarily lead to more diffuse ownership.[71] This model explicitly incorporates the observation that corporate law affects managerial stealing, not bad decision-making. Roe also factors in the point that controlling shareholders are likely to have better incentives to

66. See *supra* note 21 for citations to some of this work.
67. ROE, *supra* note 5, at 162.
68. *Id.* at 162–63.
69. *Id.* at 163.
70. *See id.* at 164.
71. *See id.* at 169–71.

make business decisions because they bear more of the costs of bad decisions than would professional managers who own little, if any, of the company's stock. In the end, what the model and several examples (especially Table 24.2) show is that the effects of good corporate law on shareholder dispersion are ambiguous.[72]

This result leads Roe to discuss the data problems that affect tests of the "quality of corporate law" theory. The first is the obvious question of how to define and measure "good" corporate law. Finance economists have come up with indices, but none of them make a lot of sense to lawyers.[73] Assuming that we can resolve that issue, a second major problem Roe identifies is that, by several measures of the quality of corporate law, such as the size of the premium for control blocks and voting premium for dual class stock, many countries that have concentrated ownership also have good corporate law.[74] These data are consistent with anecdotal evidence to the same effect.[75] In short, the "quality of corporate law" thesis fails to explain why, in many countries with high quality corporate law, ownership remains highly concentrated.

Professor Roe concludes his argument by stating that high-quality corporate law is good for society because it helps to prevent managerial diversions of wealth from the firm. Having high quality corporate law is a precondition for the separation of ownership and control, and helps to lowers the agency costs arising in large firms. Yet it is in Roe's eyes only a tool for building these enterprises, not their foundation. Rather, it is politics that determines whether ownership remains concentrated, as in Europe, or becomes diffuse, as in the United States.

II. EMPIRICALLY TESTING THE "POLITICS MATTERS" THESIS

A trenchant if somewhat unfair way of comparing legal scholarship to that in the social sciences is that while lawyers tell stories,[76] social scientists test hypotheses.[77] Thus, while legal scholars sometimes illustrate their articles with pictures, graphs, and tables, their work looks little like the equation-laden pieces published by economists, political scientists, and finance professors. For the most part, this is not a problem—social scientists have a different audience and objectives than we do, and our differing methodologies reflect that.[78] Moreover,

72. *See id.* at 180–81. Table 24.2, *id.* at 181, is especially representative of this point.

73. *See* James D. Cox, Finding Law in the Convergence of Corporate Norms Debate (Apr. 26, 2001) (unpublished working paper) (on file with author).

74. *See* ROE, *supra* note 5, at 186–90.

75. *See id.* at 190.

76. The clearest example of this in the legal academy comes out of critical race theory. See, for example, P. II *of* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995), for an extensive set of readings. However, a plausible argument has been made that courts, such as the Delaware Supreme Court, use judicial opinions to tell stories in the corporate arena. *See, e.g.*, Edward Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997).

77. For a discussion of hypothesis testing, see PINDYCK & RUBINFELD, *supra* note 42, at 36–39.

78. *See* Goldsmith & Vermeule, *supra* note 19, at 153–54.

our approach has at least one great virtue in that we are free to theorize about the way the world works using a broad variety of techniques drawn from every field of study from anthropology[79] to zoology.[80] The end result is that a thousand flowers can blossom. Over time, the strongest claims rise to the top. But when we start to claim that we are proving or disproving these theories based on limited, and sometimes flawed, quantitative evidence, then the fur begins to fly.

Lee Epstein and Gary King have been the most aggressive in attacking empirical legal research. Their scathing critique has already been the subject of numerous articles, to which I have no wish to add.[81] The main point that I draw from that debate is that legal scholars doing quantitative scholarship should carefully consider the methodologies employed in other disciplines, especially the social sciences, in designing their own empirical studies. For sure, there may be good reasons to reject certain aspects of those methodologies in some cases, but they should nevertheless inform our use of empirical techniques.

If we take that point and apply it to empirical corporate law scholarship, and more particularly to testing theories about the determinants of corporate governance, then what should we use as a model? One convenient choice is that used by LLSV in testing their theories. For example, in one of their many papers in the area, they test the claim that "companies in countries with poor investor protection have more concentrated ownership of their shares."[82] They theorize that this effect may arise from two sources: first, in countries with poor investor protections, large shareholders will need to own more shares to exercise their control rights and prevent managers from expropriating resources from the firm; and second, in these same countries, small investors will be unwilling to buy the company's stock except at such low prices that it is unattractive for firms to sell new stock to the public.[83] To test their claim, they assemble data for forty-five countries on ownership concentration levels at domestic nonfinancial publicly traded firms without government ownership to create their dependent variable, ownership concentration. They then collect data on gross national product (GNP) per capita, total GNP, and Gini coefficients,[84] plus several variables on the origins of each country's legal system to use as control variables. Finally, they gather data and construct several different measures of legal protections for

79. *See, e.g.*, WILLIAM M. O'BARR & JOHN M. CONLEY, FORTUNE AND FOLLY: THE WEALTH AND POWER OF INSTITUTIONAL INVESTING (1992).

80. Professor Owen Jones's work on behavioral biology may be the best example. *See* Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001).

81. *See, e.g.*, Lee Epstein & Gary King, *Exchange: Empirical Research and the Goals of Legal Scholarship*, 69 U. CHI. L. REV. 1 (2002).

82. La Porta et al., *Law and Finance*, *supra* note 21, at 1145.

83. *Id.*

84. *Id.* at 1148. "The Gini coefficient of national income inequality roughly quantifies the richest nations' relative tolerance for inequality and, hence, the relative strength of social democracy." ROE, *supra* note 5, at 54.

investors to include as additional explanatory variables. They then use a multivariate regression analysis to try and sort out the effects of these different independent variables on ownership concentration. This is a well-accepted economists' approach to hypothesis testing.

Are there good reasons for Professor Roe to deviate from LLSV's approach to testing theories about the determinants of corporate governance? Roe's main reason for limiting his statistical analysis is lack of data. For instance, Roe states that "a sample of the world's sixteen richest nations is not big enough to readily test out the comparative power of other explanations. But we cannot extend the sample, because the poorer nations are not economically 'ripe' for large public firms."[85] Later, Professor Roe again stresses that his quantitative analyses are limited by the lack of data because "the number of nations we have to deal with is so small that our discussion must be qualitative."[86]

Could he overcome these data deficiencies? For some aspects of his theory, Professor Roe says that it is conceivable that additional data could be gathered, but that this could take years as such data is not currently available in an aggregated form.[87] Yet the principal problem remains that his sample in its entirety will, for the foreseeable future, remain small because he excludes developing countries and countries without well-developed securities markets from his consideration. In short, Roe claims that his theory only has explanatory value for Europe, Japan, and the United States, and this automatically limits his data set.

Perhaps there is a way for Professor Roe to test his theory using a larger number of countries. In this regard, it is important to note that while Professor Roe criticizes LLSV's theory as an explanation of corporate governance in the highly developed economies of Europe, Japan and the United States, he acknowledges that the LLSV model may offer a good explanation of what happens in less economically developed countries.[88] This suggests that the relationship between ownership concentration and politics changes as a country moves up the developmental path. At low levels of economic activity, strong corporate law is a necessary condition to permit the creation of securities markets and diffuse ownership. However, as economic activity expands, good corporate law is not enough to explain why ownership does or does not separate from control; rather, we need to add in political factors in order to model what happens.

Suppose we can articulate when that shift should occur from a theoretical perspective, and that we can model the causal connection as running only in one

85. ROE, *supra* note 5, at 55 (emphasis omitted).

86. *Id.* at 156.

87. ROE, *supra* note 5, at 55, 106–07.

88. *Id.* at 159 ("Surely, when an economically-weak society lacks regularity—a gap manifested by weak or poorly-enforced corporate law—that lack of regularity and that lack of economic strength preclude complex institutions like securities markets and diffusely-owned public firms.").

direction, from politics to corporate governance.[89] Assume that there are two measurable variables, A and B, that theory tells us are critical in determining the level of ownership concentration (which we will call Y). Variable A matters a lot for highly developed economies (say the level of social democracy), and only a little bit for other countries, while variable B is the critical variable influencing ownership concentration in less wealthy economies (for instance, a measure of the quality of corporate law) but has minimal effects for the European countries, the United States, and Japan. We should be able to specify a model to run with the pooled sample of all countries which will allow us to sort out the different effects of A and B among the two different types of countries with the help of some dummy variables. In particular, we could estimate the following model:

$$Y = \alpha + \beta A + \gamma B + d(G \times A) + \eta(G \times B) + e, \qquad (1)$$

where G is a dummy variable that has a value of zero for less wealthy countries and one for the highly developed countries.

When we estimate this model using data from all of the countries for which there is data, we get the following results. For less wealthy countries, this reduces to equation (2):

$$Y = \alpha + \beta A + \gamma B, \qquad (2)$$

because $G = 0$ and the other terms drop out. For Europe, Japan, and the United States, we wind up with estimates of equation (3):

$$Y = a + (\beta + d)A + (\gamma + \eta)B, \qquad (3)$$

because when $G = 1$ the effect of A (social democracy) on Y is measured by the sum of the coefficients β and d, while the effect of B (quality of corporate law) on Y is measured by the sum of the coefficients γ and η.

If there is a difference in the size of these effects for the two different groups of countries, then we should be able to measure it by comparing the coefficients in these two estimates.[90] If, as Roe believes, the quality of corporate law matters only for less wealthy countries, then we should find that the β coefficient in equation (2) is insignificant while the γ coefficient is significant. However, the result for developed countries as shown by equation (3) should be the opposite—

89. If the causality runs in both directions, we would need to use a simultaneous equations approach to model it. This would complicate the discussion in the text, but would not change the basic point.

90. The individual coefficient attached to an independent variable can be thought of as a measure of the estimated effect of that variable on the dependent variable. For example, in equation (2), the B regression coefficient will measure the effect that variable A (the level of social democracy) has on the dependent variable Y (the level of ownership concentration).See PINDYCK & RUBINFELD, *supra* note 42, at 75–78, for a technical discussion of the interpretation of regression coefficients.

the joint coefficient $(\beta + d)$ should be significant, while the joint coefficient $(\gamma + \eta)$ should be insignificant. If, on the other hand, LLSV are correct, and their theory explains the determinants of corporate governance at all levels of development, then the patterns shown in the two equations should be the same—the joint coefficient $(\beta + d)$ shown in equation (3) should be insignificant, as should the β coefficient in equation (2). By contrast, the joint coefficient $(\gamma + \eta)$ in equation (3) and the γ coefficient in equation (2) should both be significant.

This approach would represent a significant improvement over the approach used by Roe in *Political Determinants*, and by LLSV in their series of papers, as it would allow researchers to test the joint theory and to use a larger data set. This larger data set, in turn, would permit the inclusion of more explanatory variables in the model.

This approach does not, however, completely free us from data constraints. Suppose, for example, that we can only measure the effects of the quality of corporate law if we use two distinct variables. If we believe that these variables are independent factors, then we need to add a third explanatory variable C to equation (1) as well as at least one more dummy variable $(G \times C)$ to our equation (1).[91] In other words, our theory may lead us to increase the number of potential explanatory variables, which will multiply the number of alternative effects we need to consider. As a practical matter, this creates a potential problem: We will need to increase the number of explanatory variables at least twice as fast as the factors that theory tells us to incorporate, quickly leading to strenuous data demands.

Furthermore, there is almost certainly a set of other influences that we need to hold constant. For instance, LLSV look in one of their studies at the determinants of ownership concentration using GNP per capita, total GNP, and the Gini coefficient as independent explanatory variables in an effort to eliminate other important influences on corporate ownership concentration levels.[92] Adding these terms into our equation, while necessary, will again increase the amount of data we need in order to estimate the model.

It seems likely that these adjustments could be made to the model without exceeding the available information. LLSV, for instance, generated complete data on forty-five countries to estimate their model. Assembling the needed information undoubtedly would require substantial work, but using this model should allow us to test directly Roe's claim that the determinants of existing corporate governance structures vary across the level of economic development.

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91. More complex theoretical relationships would require a more sophisticated model to capture the expected effects. However, the basic point would be the same.

92. La Porta et al., *Law and Finance*, *supra* note 21, at 1148–49. LLSV use the logarithm of GNP per capita to control for potential differences in ownership levels among richer countries; the logarithm of total GNP to control for larger economies' having larger firms, and therefore lower concentration; and the Gini coefficient to control for whether societies with more unequal income levels have a higher ownership concentration.