

generalizable, they raise a critical question for the book and an important point for understanding democracies in general. In our book, we develop and test elite-led mobilization theory (ELM) to explain the politics of opposition to gay rights both in contemporary politics and over time. Consequently, its generalizability beyond issues relating to the LGBTQ community and the extent to which it is valuable for understanding policy beyond gay rights are important and open questions. To what extent can this theory help us understand opposition to the push for equality by other stigmatized or discriminated against groups?

Although we have not yet seen much research examining ELM in other contexts, we do see significant primary and anecdotal evidence consistent with ELM on issues of immigration, women's rights, and race, as just three examples. Indeed, with respect to immigration, our own research has shown the theory to be robust (Benjamin G. Bishin, Thomas J. Hayes, Matthew B. Incantalupo, and Charles Anthony Smith. 2022. "Immigration and Public Opinion: Will Backlash Impede Immigrants' Policy Progress?" *Social Science Quarterly* 102 [6], 2022). Additionally, as just one example, the American Legislative Exchange Council (ALEC) is an organization funded by right-wing elites and corporations and exists to coordinate state-level legislation on each of these issues. To what extent is opposition to equality for these groups elite-led, rather than mass-led as ELM suggests? The example of Black civil rights may be especially instructive.

A growing body of research shows that opposition to Black civil rights is driven by elites. Perhaps the most prominent development is the rise of the Tea Party, a right-wing reactionary response to the Obama presidency (Christopher S. Parker and Matt A. Baretto, *Change They Can't Believe In: The Tea Party and Reactionary Politics in America*, 2013). Given the reliance by so many Tea Party supporters on the very social programs against which they rail, its origin as a mass-driven movement seems unlikely; instead, evidence suggests that the movement was elite-driven (Michael A. Bailey, Jonathan Mummolo, and Hans Noel, "Tea Party Influence: A Story of Activists and Elites," *American Politics Research* 40 [5], 2012; Anthony DiMaggio, *The Rise of the Tea Party: Political Discontent and Corporate Media in the Age of Obama*, 2011) and instigated by national activists who then mobilized on the local level around traditional conservative issues, an emphasis on American decline, and opposition to the nation's first Black president (e.g., Theda Skocpol and Vanessa Williamson, *The Tea Party and the Remaking of Republican Conservatism*, 2012). The ongoing support by groups like ALEC of legislation initiated and supported by the Tea Party—for instance, limiting voting rights—further reinforces the role that right-wing elites play in opposing Black civil rights.

More recently, we have seen a relatively obscure line of legal thought, critical race theory (CRT), elevated to a hot-button issue in educational policy. The emergence of CRT as a political lightning rod is a direct consequence of a strategy by conservative elites to galvanize voters (see <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>). Even after months of elite discourse and media coverage, many Americans who express concern about the teaching of CRT and topics influenced by the theory in elementary and high schools have a difficult time articulating arguments advanced by CRT scholars. Of course, that this issue has come to the forefront despite the absence of CRT in schools in any meaningful way can be attributed to the persistent elite drumbeat about CRT on Fox News and in other conservative outlets. Once more, we see what appears at first to be a grassroots backlash actually turns out to be the product of an organized and well-funded campaign by political elites to introduce and advance a set of talking points to aid their quest for power.

The evidence for ELM provided here is, by necessity, anecdotal and preliminary. Future research should examine the extent to which the theory of ELM helps us understand opposition to equality for a wide range of social groups.

### Judging Inequality: State Supreme Courts and the Inequality Crisis.

By James L. Gibson and Michael J. Nelson.  
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Despite the occasional foray into high-profile policy arenas like marriage equality, reproductive rights, or the *Bush v. Gore* ruling, in recent decades, the US Supreme Court has steadily and relentlessly withdrawn from the politics of policy. The Court typically decides somewhat more than 50 and far fewer than 100 cases per year, and many of those are on mundane and minute points of statutory law. Despite its shrinking policy footprint, the academy and the agents of popular political culture continue to be more concerned with courts at the federal level, and the Supreme Court in particular, than they are with state courts. A practical reality of this retrenchment from the engagement of policy by the Supreme Court is that state courts have become more frequent courts of last resort. Operating across a wide spectrum of political coalitions throughout each state and created or bounded by 50 different state

constitutions, state courts are an understudied yet critical dimension of our politics and policy. James L. Gibson and Michael J. Nelson set out on an ambitious venture to bring state courts back into our analysis of the politics of policy. They focus their efforts on the “policies made by state high courts that pertain to the seemingly inexorable rise of political, legal, economic, and social inequality in the United States” (p. 3).

That equality, or rather inequality, is their analytical point of interest makes this volume not only timely from an academic point of view but also important from a policy point of view. After sorting through about 6,000 cases, the authors determined that about half the time courts promoted policies that favored greater equality, and about half the time the courts promoted policies that favored greater inequality. Note that this set of about 6,000 cases include more than 37,000 votes cast by over 900 state supreme court judges. One of their more provocative, yet persuasive, conclusions is that courts do in fact fulfill the minoritarian function generally attributed to them by democratic theory, but with the uncomfortable twist that the minority protected by the courts is actually the economic elite. That is, Gibson and Nelson make a compelling argument that the courts privilege the interests of the already privileged in society.

The book has four sections over nine chapters. The first chapter not only introduces the project but is also a master class in presenting germane literature in a compelling way. After the authors properly situate their project and present the path forward in chapter 1, in chapter 2 they explain how they compiled their data set of roughly 6,000 state supreme court cases. This chapter includes brief doctrinal analyses for each of the various substantive areas they consider. In chapters 3 and 4, the authors begin to examine their central theme. Chapter 3 assesses whether the available resources of litigants can be linked to their substantive positions in the litigation. Like other studies before theirs, the authors find that resources are aligned with success; that is, the more resources you have at your disposal, the more likely you are to prevail in a state supreme court. Unlike previous studies, however, they find resources to be a relatively weak predictor of success. Moreover, breaking with the corollary received wisdom, Gibson and Nelson find that often the privileged party is actually seeking to promote equality in some way. Having determined that there is more to the story than just resources, they turn in chapter 4 to the familiar concept of the backgrounds and ideologies of the judges. The empirical heft of this chapter could have justified a stand-alone book. Suffice it to say that chapter 4 is thorough and presents a comprehensive view of how to think about the ideology of state supreme court justices. More importantly, it lays the foundation for the balance of the book and for its primary objective: to assess the connection between

judicial ideology and judicial behavior at the state supreme court level.

Chapter 5 explains the judicial institutions across the states. Like the other chapters, this one is rich in data and contains some surprising conclusions. In particular, it firmly undermines the argument made by some reformers that judicial elections are preferable to judicial appointments. The authors demonstrate that there are no large or meaningful differences between justices who are initially elected and those who are either formally or informally appointed. They do show, however, that judges are much more likely to take public opinion into account (for better or worse) if they face either partisan or nonpartisan retention elections. This robust analysis leads into chapter 6, which explains how the state-level political coalitions capture state judiciaries. They find that, generally speaking, state judiciaries follow the ideological sensibilities of the state’s governing coalition. The method of selection or retention of the judges can affect the manner in which the governing coalition seeks control over the judiciary. This finding sets the stage for the next chapter and final section of the book, which explore the relationship between attitudes and behavior or votes and discuss the implications of their findings.

This is an appropriate point to discuss the presentation of data in the book. The authors have taken complex and voluminous data and managed to present it throughout the book in ways that capture the complexity and nuance of the endeavor while never veering from a readily interpretable presentation style. Given the way in which each chapter has been woven together into a coherent whole, the graphs and charts all stand alone while speaking to each other. The authors have been relentless in their transparency and thoroughly explained the rationale for each choice they made in building this truly impressive dataset. This work was supported by both the National Science Foundation and the Russell Sage Foundation, and each might credibly point to this book as an exemplar of what they expect from their investments in research and knowledge creation.

Chapter 7 brings the analysis full circle by demonstrating the connection between elite control of the judiciary and the votes of the judges to promote or inhibit equality. They demonstrate that judges follow the dominant political coalition and, just as importantly, the dominant public opinion in their states. That is, judges are more likely to cast pro-equality votes in states where the public is collectively more liberal. This suggests a dynamic that is also seen with respect to the federal courts: the courts are, for the most part, not too far out of step with the public. Note, however, that the judicial responsiveness to public opinion found by Gibson and Nelson is driven almost completely by those judges who face some sort of retention or reelection process. For judges who face no possibility of removal from office by the voters, they find no relationship

between the liberalism of the public and the probability of pro-equality votes. One interesting implication is that the structure of accountability that a state implements for its state judges will have a more profound impact on judicial behavior than previously understood.

In chapter 8, the authors move from individual judge votes to an aggregation and assessment of circumstances under which pro-equality litigants prevail in the litigation. That is, in this chapter they take us beyond the judges and assess when courts as a collective advance equality. This chapter will surprise no one who has read the previous chapters. The ideological propensity of the state high court is a fairly reliable predictor of whether the rulings promote or inhibit equality. Courts of conservatives make anti-equality-promoting policy, whereas courts of liberals make policy that pushes equality. In the concluding chapter, the authors pull together the themes of the book and demonstrate how state courts are often instruments of the political and policy elites in their states. If there are popular elections, the courts may be responsive to public opinion, but that only promotes equality to the extent that the public in a given state supports equality as a policy, not just a concept. The state courts serve the privileged minorities, but even in the space that exists for the courts to move toward more equality at the expense of that privileged minority, the courts are unlikely to do so unless there is broad and salient public support.

One concern pertains to the authors' argument that judicial elections may help ameliorate the issues they raise. Specifically, they will help hold the state judges more accountable. It seems, however, that elections may be a double-edged sword. Well-organized and wealthy elites and the interest groups they support—particularly those opposed to equality on issues like women's reproductive rights and LGBTQ rights—in at least some cases can easily dominate these judicial elections because of the low salience of judicial elections for most voters. Even in high-salience elections, judges advocating equality for unpopular groups, like Muslims, or the rights of prisoners and criminal defendants might be defeated by appealing to the popular will of mobilized subconstituencies. Consequently, this wisp of optimism—that accountability mechanisms grounded in voting may help ensure equality—may not be warranted. We are reminded, for example, of the 2010 Iowa judicial retention elections after the marriage equality rulings where a handful of elites manipulated the outcome to defeat the pro-equality justices. Once the elites abandoned the issue and their effort to change the makeup of the court, the remaining pro-equality justices were retained. In Alaska, in 2010, Justice Dana Fabe was narrowly retained despite a half-hearted challenge by conservative religious elites over her support for abortion rights (Bishin et al., "Elite Mobilization Theory: A Theory Explaining Opposition to Gay Rights,"

*Law & Society Review*, 2020). And perhaps most famously, California Chief Justice Rose Bird was defeated because of her rulings on the death penalty. In short, these examples lead us to wonder about the extent to which judicial elections are equality enhancing is contextual rather than absolute.

This book should be required reading for any undergraduate or graduate student interested in public law, public policy, institutions, or how equality manifests in our political system. Exposure to this outstanding work should not however, be limited to those who find the subject matter interesting. This book is also an impressive example of how to construct a dataset, how to use data to understand a problem, and—perhaps most importantly—how to present data in a compelling, complex, yet consumable way.

**Response to Benjamin G. Bishin, Thomas J. Hayes, Matthew B. Incantalupo, and Charles Anthony Smith's Review of *Judging Inequality: State Supreme Courts and the Inequality Crisis***

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— Michael J. Nelson   
— James L. Gibson

We are so thankful to Benjamin G. Bishin, Thomas J. Hayes, Matthew B. Incantalupo, and Charles Anthony Smith for their generous review of *Judging Inequality*. We tried to write a book that covers a lot of ground both empirically (the backgrounds of judges, the composition of courts, and the position of the judiciary in state politics) and theoretically (judicial behavior, democratic theory, the role of partisanship in policy making). Their exceedingly kind review of our book does a deft and efficient job of summarizing our arguments and conclusions while also giving us—and we hope others!—something to think about moving forward.

The biggest point for consideration relates to the role of judicial elections in democratic policy making. We share Bishin and coauthors' skepticism that judicial elections uniformly enhance accountability (just as no elections for any offices uniformly enhance accountability). On the one hand, we find in *Judging Inequality* that there is a tighter connection between public opinion and the votes of judges when those judges face both the electorate and the specter of a challenger to keep their seat on the bench. When judges run in uncompetitive retention elections or merely face reappointment, we find no statistically significant relationship between public opinion and judges' decisions to cast a vote in favor of equality. In this way, our results provide some glimmer of hope that judicial elections might help translate the public's preferences into enacted legal policy concerning