Civil Legal Aid as a Basic Human Right

Abstract: The fiftieth anniversary of Gideon v. Wainwright (1963) has renewed calls to expand the scope of appointed counsel to civil cases. The “civil Gideon” reform movement has resulted in a growing literature that explores whether civil legal aid is a basic human right because legal representation affects fundamental needs of housing, sustenance, and safety. Critics thus increasingly observe that appointed counsel in civil cases is recognized as a freedom under certain international human rights instruments that are ratified by the United States, such as the International Covenant on Civil and Political Rights; so, they question why it gets limited judicial protection in the United States. Although legal studies assert that civil legal aid ought to be a basic human right in the U.S., the role that U.S. courts play in extending the right of civil legal aid to diverse segments of the population remains a significant but under-explored constitutional and human rights question in political science.

The civil Gideon literature suggests, but has not empirically tested, the proposition that U.S. state courts increasingly use their authority to afford indigents a right to appointed counsel in certain civil litigation contexts, such as landlord-tenant evictions and domestic violence cases. Other human rights studies show that U.S. federal courts are reluctant to adopt international human rights norms in domestic cases. As a result, this study hypothesizes that unlike federal courts, state courts have begun to not only recognize the right but also recast it in human rights terms. Using an original dataset derived from Westlaw and other sources, such as the National Coalition for a Civil Right to Counsel, appellate state court right to appointed counsel decisions are analyzed using logistic regression analysis to determine if the judiciary is supporting or denying the right over time, and in what litigation context. Specifically, the research explores if certain legal or extralegal variables affect judicial outcomes that lead to civil legal aid right recognition. Contrary to expectations, the findings show that U.S. state courts are similar to federal courts by predominately rejecting the human rights principle favoring access to courts by affording civil legal aid as a basic human right. Instead, the results suggest that the main constraints on outcomes in civil right to counsel cases are domestic legal factors, particularly the application of Supreme Court precedent, and less so, political factors, such as judicial ideology.

Christopher P. Banks
Professor, Political Science
Kent State University
Department of Political Science
302-41 Bowman Hall
Kent, Ohio 44242
Tel: (330) 672-0908
Email: cbanks6@kent.edu

Lisa Hager
Kent State University
Department of Political Science
302 Bowman Hall
Kent, Ohio 44242
Email: lhager2@kent.edu

Elsa Barletta Gonzalez
Kent State University
Department of Political Science
Email: ebarlett@kent.edu

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Prepared for the 2015 Annual Meeting of the American Political Science Association
(September 3-6, 2015, San Francisco, California)
I. The Civil Gideon Movement, International Human Rights, and U.S. Courts

The recent fiftieth anniversary of *Gideon v. Wainwright* (1963) has renewed calls to expand the scope of appointed counsel to civil cases (Lidman 2006a, 770). The civil Gideon reform movement asserts that civil legal aid is a basic human right that is built upon principles of fundamental fairness, due process, and equality, all of which are needed to give disadvantaged litigants adequate and reasonable access to courts and justice (McNeal 2014). Advocates say these ideals can only be realized through a meaningful participation in adversarial proceedings, which often drain judicial resources and negatively impact a majority of low and middle class citizens (Keillor, Cohen, and Changwesham 2014).

It is estimated, for example, that only twenty percent of low-income people, and a mere forty percent of those with modest incomes, can retain private counsel (Keillor, Cohen, and Changwesham 2014, 470). Other research from the American Bar Association indicates that over eighty percent of low-income people are deprived of legal aid in complex proceedings involving child custody, housing, domestic violence, health care, and disability law (American Bar Association 2014, 1). The large spike in *pro se* representation, when combined with the strain it puts on judicial resources, is also said to be destructive to not only low-income litigants but also trial courts (American Bar Association, Standing Committee on Legal Aid and Indigent Defendants 2014, 1). These trends have prompted critics to assert that it is the responsibility of courts and the legal profession to narrow or close the civil “justice gap” that fundamentally threatens the legal system’s public legitimacy (Blackburne-Rigsby 2014).

Federal and State Civil Gideon Reform Initiatives

In light of these concerns a variety of interested parties in the United States legal community—agencies, judges, bar associations, lawyers, organized interests, and scholars—have
argued that an incremental and strategic “context-based” right to appointed counsel in civil cases is necessary (Engler 2006). On the federal level, in March 2010 the Department of Justice (DoJ) unveiled its Access to Justice Initiative (AJI).¹ The DoJ’s mission aligns with the commitment of the Legal Services Corporation (LSC), a private, nonprofit federally funded corporation, to provide legal assistance to the poor by distributing federal grants to local legal service delivery organizations in the United States (Donovan 2010, vii). Spurred on by the public advocacy work of the National Coalition for a Civil Right to Counsel, in 2006 the American Bar Association (ABA) adopted a formal resolution (112A) endorsing a right to counsel for low income persons in civil proceedings implicating basic human needs, such as those relating to shelter, sustenance, safety, health, or child custody (American Bar Association 2006; Gardner 2007, 67-68). The ABA’s activism, in turn, led to the creation of the Model Access Act that can be used by the states as a template for enacting civil legal aid legislation in participating jurisdictions (American Bar Association 2010).²

The federal government and the organized state bars’ efforts have allowed the civil Gideon movement to progress in the states through sponsored conferences, test cases, bar resolutions, access to justice commissions, statewide hearings, and legal scholarship (Pastore 2014, 76, 80). Many states have begun to enact key legislation and pilot civil legal aid programs as well (National Coalition for a Civil Right to Counsel 2015a). With the Sargent Shriver Civil Counsel Act (2009) California initiated pilot projects that provide free legal assistance to low-

¹ AJI is a program committing AJI staffers to work “within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers” (U.S. Department of Justice 2014).
² The Model Act calls for a “state access board” to administer civil legal aid as a matter of right, and not charity, in instances where basic human needs are at stake, using eligibility requirements and limits on assistance (Maxeiner 2011, 67). While it remains unclear if the Model Access Act has been fully implemented in any state, several state bar associations and access to justice commissions in California, Maryland, and New York have used it as a basis to intensify reform efforts (Steinberg 2015, 763-765).
income litigants in civil cases involving basic human needs (McNeal 2014, 362). Other states, including New York, Iowa, Illinois, Massachusetts, Texas, and Washington, have undertaken similar pilot programs (McNeal 2014, 362-364; Pastore 2014, 75; National Coalition for a Civil Right to Counsel 2015a).

International Human Rights Recognition of Civil Legal Aid

Following the ABA’s House of Delegates’ approval of Resolution 112A in 2006, the organization’s President, Michael Greco, hailed it as a “historic” event that facilitates access to justice (Lidman 2006a, 769). Civil Gideon reformers argue that access is an integral characteristic of international human rights law that is firmly entrenched in human rights instruments and foreign court precedents (Davis 2013; Lidman 2006a; Paoletti 2006).

Civil Legal Aid as a Recognized Right under International Human Rights Law

Civil Gideon reformers claim the United States is out of step with much of the rest of the civilized world by not using public funds to extend the right to counsel to those who need it in situations implicating basic human needs (National Coalition for a Civil Right to Counsel 2015b; Davis 2009, 151). Non-U.S. legal jurisdictions routinely afford counsel as a basic human right through constitutional provisions, legislative statutes, executive orders, and judicial opinions (Lidman 2006a, 789). Lidman (2006a, 770-771), for one, has documented that more than fifty countries accept the right in their legal systems, with 49 member countries in the Council of Europe, Canada, and eight other countries (Japan, India, Australia, New Zealand, Zambia, South Africa, Hong Kong, and Brazil) all joining the fold. Across the globe, a variety of legal rationales support right recognition, among them preserving the rule of law, protecting due process and

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3 As an initiative that “targets” the policy space identifying where counsel is most needed, the Shriver Act enables legal assistance to be delivered to low-income litigants in six areas of the law: housing, domestic violence, elder abuse, guardianships, probate conservatorships, and child custody (Pastore 2014, 91-94).
equal protection, and facilitating the access to justice through peaceful means (Lidman 2006a, 771).

Notably, foreign jurisdictions remain variable, but resolute, in how far they extend the right. Individuals are provided representation at both the trial court and appellate level, and even at administrative hearings. Many statutory frameworks base eligibility for legal aid on some sort of merit calculus, ranging from merely stating a claim to other determinations that focus on the likeliness for success in the underlying lawsuit. Still other protections are offered in many countries that supply lawyers to clients by using a sliding needs scale which, in turn, expands coverage to low-income recipients. Within the Council of Europe lawful residents and foreigners who are subject to its jurisdiction are given legal aid—thus an Italian would be entitled to counsel in Sweden in a civil lawsuit involving a landlord-tenant dispute—and immigrants outside of Europe are given lawyers in certain types of litigation, such as asylum cases (Lidman 2006a, 772). Still, several countries, including Hungary, Albania, Georgia, and Moldova, that were assimilated into the Council of Europe after the breakup of the former Soviet Union have been slow to embrace, or do not apply, civil assistance to its legal systems (Lidman 2006a, 778-779).

Civil Legal Aid As Expressed in International Human Rights Instruments

For civil Gideon reformers, appointed counsel in civil cases is a “well-established human right” that is widely accepted across the globe by the international community, regional authorities, and individual nations (American Bar Association, Standing Committee on Legal Aid and Indigent Defendants 2014, 1). State assistance in supplying legal aid is linked to fundamental interests of safeguarding shelter, sustenance, safety, health, and child custody; that is, to basic human needs, and economic and social rights, that are ingrained in “many of the
world’s constitutions and in human rights treaties, but [which] are not explicitly protected by the United States Constitution” (Davis 2009, 155-156). A broad array of international repositories, including United Nations human rights treaties, charters pertaining to the Inter-American system, and miscellaneous human rights or international legal documents and reports, favor civil legal aid recognition (Davis 2009).

Notably, advocates maintain that even aspirational documents like the Universal Declaration of Human Rights (UDHR) (1948) create enforceable human rights norms (Davis 2009, 149-150). Still, certain documents, such as the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Charter of the Organization of American States (OAS) arguably are the most relevant sources for claiming that the United States is internationally bound to extend the right to counsel in civil matters (e.g., Davis 2009, 156-157).

After signing the ICCPR in October 1977, the United States ratified it as a treaty on June 8, 1992. Adopted by the United Nations General Assembly in December 1966, the ICCPR, and its two Optional Protocols,⁴ constitute part of the so-called International Bill of Rights.⁵ Notably, the ICCPR’s final text only makes reference to procedural fairness and representation rights in criminal trials; hence, it does not explicitly address or establish a right to counsel in civil cases. Rather, Article 14(1) states, in part:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent,

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⁴ Whereas the First Protocol outlines the procedure to file individual complaints for violations of the ICCPR, the Second Protocol abolishes the death penalty. The United States has ratified neither (U.S. Human Rights Network 2015).

⁵ Other elements of the International Bill of Rights include the International Covenant on Economic, Social and Cultural Rights, which has not been ratified by the United States, and the Universal Declaration of Human Rights (Office of the High Commissioner for Human Rights 1996).
independent and impartial tribunal established by law (International Covenant on Civil and Political Rights 1966).

Regardless, advocates say the ICCPR’s drafting history, along with subsequent interpretations and enforcement actions against participating nations by the U.N. Human Rights Committee (HRC) (the monitoring body relating to the ICCPR), strongly suggests that the United States is obliged to supply civil legal aid at public expense (Columbia Law School Human Rights Clinic 2014, 415-420; Davis 2009, 156-168; Lidman 2006a, 783). Under the ICCPR litigants cannot be treated equally, or given procedural fairness at trial, without having the right to counsel in civil cases (Davis 2013, 2275).

After becoming a signatory to CERD in September 1966, the United States ratified it in October 21, 1994. Like the ICCPR, CERD does not contain an explicit reference that creates a duty to afford the right to counsel in civil cases. Reformers reason that CERD’s Article 5—which obliges State parties to prohibit and eliminate racial discrimination by extending “[t]he right to equal treatment before the tribunals and all other organs administering justice”—and Article 6—which requires State parties to give “everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions”—imply that victims can only enforce CERD violations by having access to court and counsel in civil cases implicating racial injustice (Davis 2014, 455-456; Kaufman, Davis, and Wegleitner 2014, 780; Davis 2009, 168-169). For reformers, the actions, commentary, and recommendations of the human rights bodies monitoring CERD compliance register the deep “concern [with] the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities in civil proceedings, [especially in] regard to those proceedings where basic human needs—such as housing, health care, or child custody—are at stake” (Davis 2009, 172-173).
Apart from U.N. based-treaty obligations, the United States participates in the Organization of American States, a regional international legal system governing the political, juridical, and social activities of 35 independent nations of the Americas (American Bar Association, Standing Committee on Legal Aid and Indigent Defendants 2014, 21-22; Davis 2009, 177). By signing the Charter of the Organization of American States (OAS Charter) in 1948, civil Gideon advocates argue that the United States is bound to provide civil legal aid (Davis 2009, 177). The mandate is explicit because the Charter declares that:

> The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: … [a]dequate provision for all persons to have due legal aid in order to secure their rights (Article 45, Charter of the Organization of American States 1948).

Although Article 45 is silent as to its applicability to criminal or civil litigation, Lidman (2006a, 784 n. 118) and other legal advocates (American Bar Association 2014, 22 n. 130; Davis 2009, 178 n. 107) assert that it has been construed to encompass criminal and civil law matters in order to vindicate violations of all human rights through court access.

**Civil Legal Aid as an Established Precedent in Foreign Courts**

Non-U.S. precedents set by foreign courts are a reliable source of civil legal aid advocacy for civil Gideon reformers. Established juridical principles that emphasize the need for governments to promote “equality before the law” and non-preferential access to courts under a social contract theory are a longstanding part of foreign court precedents, especially in Europe (Johnson 2014, 881-884). As Johnson (2014, 884) observes, in 1937 the Swiss Supreme Court’s *Judgment of Oct. 8, 1937* relied upon equality principles in the Swiss federal constitution to require cantons (analogous to U.S. state governments) to supply free legal assistance to indigents in civil cases, a ruling that predated a Swiss Supreme Court decision that extended the right to
criminal cases many years later in 1972. In contrast, in 1973 the German Constitutional Court granted the right to civil counsel in *Entscheidungen des Bundesverfassungsgerichts* by basing its rationale on the need to provide access to courts (Lidman 2006a, 777).

In 1979, the unequal disparity of financial resources between civil litigants in an Irish “separate maintenance” action became the focus of a judgment from the European Court of Human Rights (ECHR) interpreting Article 6(1) of the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms. Although Ireland banned divorces, it permitted litigants seeking to end their marriage to sue for financial support through separate maintenance. Mrs. Airey, an indigent, asked for, but was denied, appointed counsel by the Irish trial and Supreme courts. As a result, she argued before the ECHR that she was entitled to an attorney under Article 6(1), which states: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Even though Ireland, like most European countries, did not have a statutory right to civil counsel in certain civil cases, in *Airey v. Ireland* (1979-1980), the ECHR held that principles of equality, fairness, and democracy required that appointed counsel was necessary to preserve the right to a fair hearing and effective access to courts (Johnson 2014, 884-887; Lidman 2006b, 290). The ABA reports that Airey’s “fair hearing” precedent influenced the delivery of civil legal aid to over 41 nations and 400 million people; and, it directly led to the Irish legislature creating Ireland’s first legal aid program, an initiative that now dwarfs the level of subsidies the United States allocates towards civil legal assistance (Report to the House of Delegates 2006, 9).

For civil Gideon reformers, Airey’s underlying precedent was affirmed subsequently by the ECHR’s ruling in *Steel and Morris v. United Kingdom* (2005). There, two Greenpeace
activists were initially denied free public counsel in an English libel action brought by MacDonald Corporation after the activists distributed literature accusing MacDonald’s of polluting the environment. Although MacDonald’s had superior financial resources, experience, and counsel, the defendant activists were not given counsel because England (like many European countries) statutorily exempted the right to appointed counsel in defamation or libel lawsuits. On appeal after losing at the trial court, the ECHR reversed and held that denying counsel to indigents offended an “equality of arms” principle in civil litigation. In other words, it is a matter of procedural fairness that litigants in cases that are factually and legally complex have a chance to present their case effectively before the court by being able to “enjoy equality of arms with the opposing side” (Johnson 2014, 887-889; Lidman 2006b, 292).

Civil Legal Aid in U.S. Federal and State Courts

In general, United States courts have not been receptive to applying human rights norms, practices, instruments, or foreign court precedents to their civil legal aid jurisprudence or other areas of law that advance social, economic, or political rights (Barak 2006, 197-204; Ignatieff 2005, 8). Instead, with its landmark Gideon v. Wainwright (1963) ruling, the U.S. Supreme Court has only set a legal mandate for the right to appointed counsel in criminal cases. In contrast, receiving legal aid or counsel in civil cases has not been interpreted to be an absolute constitutional right because the Sixth Amendment does not apply to civil cases. As a result, the U.S. Supreme Court has only intermittently addressed the issue. Consequently, legal commentators have concluded that federal courts have been reduced to undertaking an ad hoc, and inherently restrictive, due process analysis to determine if and when the right to appointed counsel is constitutionally required (Kaufman, Davis, and Wegleitner 2014, 794).

Arguably, the “high watermark” for gaining limited recognition of the right to civil legal
aid came with *In re Gault* (1967), a Supreme Court ruling declaring that juveniles in delinquency proceedings must be afforded counsel in order to comport with due process (Pollock 2013, 30). Thereafter, more restrictive holdings have become the norm. In *Lassiter v. Department of Social Services* (1981), the Supreme Court refused to appoint counsel in a civil lawsuit involving the termination of parental rights. Instead, the Court created a legal presumption that civil counsel cannot be appointed unless there is a loss of physical liberty at stake if the indigent loses (*Lassiter* 1981, 26-27, 31). In this light, at least three factors of the so-called procedural due process calculus established by *Mathews v. Eldridge* (1975)—the private interest at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions—are typically applied by courts as a controlling legal standard that instructs lower courts when to afford counsel to civil litigants (Martin 2013, 283; Mashaw 1976; *Lassiter* 1981, 31). As noted by the Supreme Court, these considerations aim to strike a balance as to when process is due to certain litigants, ostensibly to bring more fairness to civil proceedings (*Turner v. Rodgers* 2011).

The application of procedural due process to civil legal aid cases has been most recently addressed in *Turner v. Rogers* (2011). In *Turner*, the Supreme Court vacated a civil contempt charge and one-year incarceration sentence against an indigent father who failed to pay child support. Applying *Mathews*, the Court reasoned that the father’s due process rights were violated because the lower state courts did not give him adequate procedural safeguards in protecting his interests, such as alerting him as to the legal consequences of not paying child support and not getting information from him about his financial status. Most significantly, the Court decided that the constitutional right to appointed counsel did not categorically extend to all civil contempt proceedings even if there is a threat of imprisonment, a point that was also conceded by the U.S. government’s *amicus* brief (Davis 2014, 457; *Turner v. Rogers* 2011). For some critics, this latter
principle has been interpreted as an “adverse holding” and a “major blow” to the “core” civil Gideon argument that the right to counsel is a “fundamental right where an indigent, noncustodial parent faces incarceration” (Flanders and Muntges 2014, 28).

For civil legal aid advocates, the Supreme Court’s precedents have resulted in uneven federal and state responses that some commentators deride as affording rights on a piecemeal basis that relies upon an assortment of confusing statutory frameworks, geographical or jurisdictional contingencies, or pure luck (Columbia Law School Human Rights Clinic 2014, 433). With little encouragement or leadership from the Supreme Court, reformers conclude that the legal issue has been relegated to states or individual judges, which, in turn, has produced an incoherent “patchwork of approaches” (Davis 2009, 152). Even so, for some reformers the “[s]tate courts and legislatures may provide the best opportunity to put the ABA resolution into practice” (Lidman 2006a, 773). Reformer John Pollock (2012, 29) of the National Coalition for a Civil Right to Counsel likewise observes that a discernible “trend has emerged that explains why advocates have focused their efforts more on state constitutions than on the U.S. Constitution.” As a result, reform initiatives have been concentrated on achieving success through state court litigation (Pollock 2012, 30).

Juxtaposed against the reformers’ perspectives is the argument made by scholars and judges that state courts, in particular, have demonstrated that they have a keen interest in becoming a part of the global conversation by sharing citations and borrowing from foreign sources of law in developing their own domestic jurisprudence (Slaughter 2004b; Abrahamson and Fischer 1997). For example, in State v. Roper (2003), the Missouri Supreme Court cited to the Convention on the Rights of the Child as a basis to rule that applying the death penalty to a juvenile is contrary to international human rights principles. Or, in Pauley v. Kelly (1979), the
West Virginia Supreme Court of Appeals cited to the Universal Declaration of Human Rights to hold that the state’s funding formula in public education violated the state constitution’s education clause. The state courts’ receptivity and acceptance of foreign law jurisprudence stands in stark contrast to the traditional posture assumed by the U.S. Supreme Court and other federal courts (Tushnet 2006, 45-47; Zaring 2006).

II. Hypotheses

The civil Gideon movement explores whether civil legal aid is a basic human right because legal representation is needed to safeguard the fundamental interests of housing, sustenance, safety, and child custody (Davis 2009; McNeal 2014). Most studies, though, are descriptive and/or limited to a specific time period, state, or region (e.g., DeLaquil 2006; Davis 2009, 2014; Lidman 2006a; McNeal 2014; Pastore 2006, 2009, 2014). In order to determine the impact of the civil legal aid movement on state courts, this study empirically tests whether appellate courts are adopting human rights standards in decisions addressing a civil right to counsel. The analysis is directed at determining if certain legal and extralegal variables, which draw their inspiration from human right instruments and foreign court precedent, affect judicial outcomes and lead to state appellate courts recognizing a right to civil legal aid.

As noted above, legal scholars observe that civil counsel is widely recognized as a fundamental human right by the international community in various sources of foreign law (see American Bar Association, Standing Committee on Legal Aid and Indigent Defendants 2014; Davis 2009, 2013; Lidman 2006a; Paoletti 2006; Pollock 2013). Moreover, civil Gideon reform has been directed primarily at state courts and legislatures (e.g., Martin 2013); thus, state courts and assemblies are encouraged to cite foreign sources of law that declare or embody a right to civil counsel, such as international human rights treaties (e.g., ICCPR and CERD), case
precedent (e.g., *Airey v. Ireland* [1979]), and regional authorities (e.g., OAS) (e.g., Pollock 2006; Davis 2006, 2013). These human rights standards highlight the importance of increasing access to the courts, reducing bias within the civil justice system, and increasing equality or fundamental fairness (Davis 2013; Johnson 2014; Kaufman, Davis, and Wegleitner 2014; Lidman 2006b; McNeal 2014). These ideals are embodied in state constitutional amendments, statutes, and pilot programs that appoint counsel to litigants meeting eligibility requirements involved in certain types of civil proceedings (Pastore 2006). Since state courts are more willing than federal courts to cite foreign law and reference human rights standards (Banks and Carbonell 2013; DeLaquil 2006; Kaufman, Davis, and Wegleitner 2014), litigants should be granted appointed counsel in civil proceedings when the case is cast in human rights terms. This possibility is tested through several hypotheses suggested by the civil Gideon literature:

*H1:* *State courts that refer to foreign precedent, international human rights instruments, and regional authorities will be more likely to rule in favor of the appointment of counsel in civil cases.*

*H2:* *State court decisions addressing issues of equality are more likely to grant appointed counsel.*

*H3:* *State courts will be more likely to afford indigents a right to appointed counsel in civil cases concerning basic human needs (shelter, sustenance, health, safety, and child custody), in contrast to other civil matters.*

*H4:* *State courts in states with pilot programs (i.e., California, New York, Texas, Iowa, etc.) or other mechanisms (e.g., constitutional amendments, statutes, or court rules) for providing litigants with civil counsel are more likely to recognize the right to legal aid in civil cases and grant appointed counsel.*
In the United States, civil legal aid is generally not afforded judicial recognition. In *Lassiter v. Department of Social Services* (1981), the Supreme Court held that civil counsel is only appointed to litigants who risk losing their physical liberty—as dictated by the procedural due process calculus established in *Mathews v. Eldridge* (1975)—if the case is not decided in their favor. As recently as 2011, in *Turner v. Rogers* the Court reiterated through the use of the so-called due process calculus that the Sixth Amendment’s right to counsel did not apply to most civil proceedings, including those with the threat of imprisonment. As a result, the civil Gideon literature observes that federal and state courts execute due process analyses on an irregular basis and make inconsistent decisions in cases addressing a civil right to counsel (e.g., Davis 2009). The proposition that state courts appear to be constrained by Supreme Court precedent when reviewing cases requesting appointed civil counsel will be tested through the following hypotheses:

*H5*: Citations to Lassiter, Mathews, and Turner decrease the likelihood of decisions granting the right to appointed counsel.

*H6*: The application of the procedural due process calculus leads to outcomes denying the right to civil counsel.

*H7*: Cases mentioning the physical liberty presumption are less likely to provide litigants with appointed counsel.

The civil Gideon literature does not acknowledge the possibility that state court decision-making is influenced by political factors such as interest group participation in cases, concerns relating to judicial retention, and the ideological policy preferences of judges. Interest groups commonly attempt to influence judicial decision-making by filing amicus briefs. Thus it is probable that such a tactic is used by organizations like the American Bar Association (ABA).
and the National Coalition for the Right to Civil Counsel (NCRCC). Since amicus briefs filed in support of a litigant have been found to increase the likelihood of a positive outcome (Songer and Kuersten 1995), it is plausible that briefs filed by civil Gideon reformers also have their intended effect on courts reviewing civil right to counsel cases. In short:

**H8: State courts are more likely to grant appointed counsel in cases with amicus briefs.**

In addition to amicus briefs, interest groups, legislators, and even the public can attempt to manipulate judicial decision-making through the politics surrounding judicial selection and retention. States utilize one of three judicial selection systems: election, appointment, or merit. The method deemed less political is the merit plan in which nominating commissions recommend three candidates for gubernatorial appointment (e.g., Iowa) (Banks and O'Brien 2015). Partisan or non-partisan election (e.g., Ohio) and appointment systems (e.g., South Carolina) are much more political because voters, in the case of the former, and governors or state legislators, for the latter, choose judges. Retention can also be highly politicized as elected and appointed judges must be re-elected or sometimes re-appointed and judges chosen by merit plans must face nonpartisan, noncompetitive general elections (Banks and O'Brien 2015). The political nature of judicial selection and retention has influenced judicial decision-making, particularly for elected judges but also for judges facing retention elections (Brace, Hall, and Langer 1998; Canes-Wrone, Clark, and Park 2012; Emmert and Traut 1994; Gordon and Huber 2007; Hall 1992; Hall and Brace 1996; Huber and Gordon 2004; Langer 1997; Traut and Emmert 1998). Furthermore, judges—even those that are appointed—are concerned about the

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6 Although state court rules can limit the filing of amicus briefs (e.g., identify interest(s), requirements and deadlines, include a motion, choose a side, etc.), this has not accounted for the variation in interest group participation in litigation across states because participation continues to increase (Brace and Butler 2001; Corbally, Bross, and Flango 2004; Epstein 1994).

7 For a more detailed discussion of state court judicial selection systems and retention, see Banks and O'Brien (2015, 100-105).
policy preferences of the governor, state politicians, and the public and seek to avoid political
criticism (Benesh and Martinek 2002; Canes-Wrone, Clark, and Kelly 2014; Langer 2002).

As a result, judicial selection and retention methods should have the most impact on
politically salient issues. The civil Gideon movement has become more salient due to advocacy
efforts of the ABA and the NCRCC. Despite the variety of arguments supporting the right to
counsel, the primary argument against providing the right to counsel is the cost (Martin 2013).
Legislators are hesitant to enact legislation and implement pilot programs that would pass the
cost onto taxpayers because it is unclear in which types of cases that the lack of counsel
decreases fairness and biases decisions (Martin 2013). Similarly, it is hypothesized that state
court judges may also be reluctant to grant counsel in civil cases for these same reasons,
especially in states in which judges face re-election or retention elections and can be held
electorally accountable. In short:

\[ H9: \text{Courts in states that select judges using elections or merit plans are less likely to hand down} \]
\[ \text{decisions supporting the right to civil counsel than courts in states that appoint judges.} \]

Although state court decision-making is influenced by a host of political actors through
amicus briefs and the politics surrounding judicial selection and retention, the policy preferences
of judges also dictate case outcomes (e.g., Emmert and Traut 1994; Flemming, Holian, and
Mezey 1998). The civil Gideon movement is premised on principles derived from foreign
sources of law, such as regional authorities, human rights treaties, and case precedent.
Preferences regarding the appropriateness of courts citing foreign law follow traditional liberal-
conservative divides in which this behavior is supported by liberals and disliked by conservatives
(e.g., Farber 2007). These attitudes are most prominent at the federal level; however, the practice
is still relatively rare and findings show that both liberals and conservatives use foreign law to
support their opinions (Black et al. 2014; O’Brien 2006; Zaring 2006). State courts are more receptive to citing foreign law, especially when interpreting state constitutions and legislation (DeLaquil 2006); however, it is still expected that prominent liberal views towards the use of foreign law will influence state court behavior. As a result, it is hypothesized that:

\( H_{10} \): Liberal courts will be more likely to grant the right to appointed counsel than conservative courts.

In order to fully understand the influence that various factors have on state court behavior and decision-making, the context in which state courts operate is important (e.g., Hall and Brace 1999). Of particular interest for this study is how judicial selection and retention methods condition the impact of ideological preferences on the decision to grant appointed counsel in civil cases. Liberal courts have been predicted to be associated with the willingness to grant appointed counsel; however, such a decision typically means passing costs onto taxpayers so whether judges can be held electorally accountable likely factors into their decision-making calculus. Consequently, this leads to the following hypothesis:

\( H_{11} \): The effect of ideology on the likelihood of granting appointed counsel is decreased in states with election and merit systems that require judges to be re-elected or retained by voters.

III. Data and Methods

Data Set

The present study utilizes an original dataset of cases decided after the United States ratified the International Covenant on Civil and Political Rights (ICCPR) on June 8, 1992 through the end of 2014. This time period is ideal because prior to this date, it is unlikely state courts would have cast cases requesting counsel in human rights terms as the ICCPR is the first international treaty ratified by the United States that civil Gideon reformers identify as
recognizing a right to civil counsel. Using Westlaw, cases are selected if a state appellate court addressed a request for appointed counsel in a civil case. A total of 454 cases are identified; but, due to the inherent limitations of the search, some cases may have been missed. After consulting additional sources, 17 additional cases are added from Pastore (2006) for a total of 471 cases. Despite the dataset’s limitations, it remains a representative sample of cases addressing the civil right to counsel.

**Dependent Variable**

The empirical analysis examines when state appellate courts grant the right to appointed counsel in civil cases. Therefore, the dependent variable is a dichotomous indicator measuring the state court’s decision regarding appointment of counsel. If the court grants appointed counsel, the case is coded as one and zero otherwise. In most cases it is clear whether the court grants the right to counsel as the opinion specifically states that the litigant is entitled to counsel and the case is remanded to the lower court with directions to appoint counsel for the litigant as it is a requirement per the court’s decision or a state statute or constitutional provision.

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8 In Westlaw, right to appointed counsel cases are identified by searching state court decisions for “right to appointed counsel” after June 8, 1992 and selecting the civil case option. Cases that are excluded are those decided by state trial courts, decided by courts in Washington, D.C. or U.S. territories, addressed the criminal right to counsel, challenged the effectiveness of retained or appointed counsel, and did not request or raise an argument related to appointed counsel. It is important to note that sometimes requests for appointed counsel are not direct and apart of appeals filed regarding meaningful access to the courts, due process violations, the outcome of the case, and/or the litigant’s ability to proceed through the appeals process, As long as the case requested or raised an argument relating to appointed counsel, the case is included in the dataset.

9 If at any point in the discussion of variable operationalization it is mentioned that searches in Westlaw are performed to code cases, it is worth noting that the same search terms and/or methods are utilized in separate searches of each of these cases.

10 In some instances it is not apparent whether the court’s opinion could be read as providing a right to appointed counsel in civil cases. First, there are cases in which the court mentions the litigant had the right to counsel but either did not reverse the lower court’s decision or provide specific instructions requiring the appointment of counsel when stating the case was remanded to the lower court (e.g., Burton v. Caudill [2010]). These cases are still coded as one as the court is recognizing the right to counsel in both instances, and in the case of the latter, the opinion implies that the litigant should receive appointed counsel from the lower court. Second, some decisions rule that lower courts erred in not informing litigants of their right to counsel (e.g., In re Atkins [2001]). Although the appellate court did not instruct trial courts to appoint counsel, these cases are coded as one because the judges are recognizing the litigant had a right to appointed counsel in the case. However, cases are coded as zero if the appellate court remands the issue of whether the litigant is entitled to counsel to the lower court because the judges chose not to make a
Independent Variables

Human Rights Legal Factors

Human Rights Instruments, Foreign Precedent, and Regional Authorities. These independent variables measure whether judges refer to human rights instruments, foreign precedent, and regional authorities in decisions granting appointed counsel in civil cases. In order to determine whether state courts discuss the sources of foreign law identified by the civil Gideon literature, majority opinions are searched in Westlaw. The results reveal that there are no citations to any of the treaties, cases, or agreements (see footnote 11) in the majority opinion of cases addressing the right to appointed counsel. This finding refutes the hypothesis that state courts are more likely to cite international law or human rights instruments for the basis of granting appointed counsel in civil litigation. These variables, although of normative importance, cannot be tested in the empirical model. This is not entirely surprising because, as mentioned by DeLaquil (2006, 698), contemporary state courts do not usually make reference to foreign law, unless it is needed to make decisions with respect to domestic law.

Equality. The civil Gideon movement commonly references principles of equality or the idea that litigants without counsel in cases implicating basic human rights are at a significant disadvantage, especially when the other party has legal representation (e.g., Davis 2013; McNeal

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2014). Furthermore, the idea of equality has been used as a justification for granting appointed counsel in civil cases in European courts (Johnson 2014; Lidman 2006b). In order to determine whether state appellate courts discuss principles of equality in decisions granting appointed counsel in a civil proceeding, Westlaw searches are run using phrases commonly discussed in the civil Gideon literature, such as “equality of arms” and “equality before the law” (see Johnson 2014; Lidman 2006b). As a result, a dichotomous variable is constructed in which cases with majority opinions mentioning principles of equality are coded as one, and all other cases as zero.

**Case Type.** This set of independent variables measure the type of case in accordance with the following categories provided by the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants (2014): shelter, sustenance, health and safety, child custody, and miscellaneous. Dichotomous variables are constructed for each of the aforementioned categories in which state courts reviewing cases involving these issues should be more likely to grant litigants with appointed counsel. Case summaries are consulted from Westlaw to code cases as one on the variable corresponding to the topic of the case and zero on all others. For example, a case with a litigant requesting counsel for a landlord-tenant dispute would be classified as a shelter case. In initial models, the dichotomous variable representing shelter cases was found to predict failure perfectly and was dropped from the model. In other words, courts did not grant counsel in any of the six shelter cases. As a result, and since the shelter, sustenance, and health

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12 In Westlaw, majority opinions are searched for the following terms: “EQUALITY” “EQUALITY BEFORE THE LAW” “EQUALITY PRINCIPLES” and “EQUALITY OF ARMS”. It is worth noting that the only search term that returned any results was that of “EQUALITY”. Thus, again, it does not appear that sources of foreign law or the topics discussed therein influence state appellate courts in the United States very much.

13 The following are the types of issues at stake in cases that typically appear in each category. Shelter: housing loans and mortgages, homeowner insurance claims, and landlord-tenant disputes. Sustenance: unemployment benefits, employment discrimination, public assistance, workers’ compensation, and revocation of trade licenses. Health and Safety: domestic violence protective orders, restraining orders, access to medical care, and guardianship or conservatorship for mentally ill individuals. Child Custody: termination of parental rights, child custody, adoption, dependency, visitation, guardianship, and child neglect or deprivation. Miscellaneous: child support, paternity, contempt, divorce, civil damages, civil forfeiture, prisoner civil rights claims, legal malpractice, attorney discipline, unpaid legal fines, wrongful death, personal injury, and medical malpractice.
and safety cases comprise less than 10% of all the cases, these three dichotomous variables are collapsed into a single dichotomous indicator representing all other basic human needs. Thus, case type has been reduced to three categories: child custody, other basic human needs, or miscellaneous.

**Pilot Civil Legal Aid Program.** Data on whether a state has established a pilot civil legal aid program is obtained from the National Coalition for a Civil Right to Counsel (2015a). In addition to California’s pilot program instituted through the Shriver Act, New York, Iowa, Illinois, Massachusetts, Texas, and Washington also have civil legal aid programs (National Coalition for a Civil Right to Counsel 2015a). In an effort to determine if pilot programs increase the likelihood of litigants receiving counsel, a dichotomous variable is constructed in which courts located in the aforementioned states are coded as one, and courts in all other states are coded as zero.

**State Legislation, Court Rule or Litigation Providing a Right to Counsel.** The National Coalition for a Civil Right to Counsel (NCCRC) provides data on whether a state has legislation, a court rule, or case precedent that supplies litigants with appointed counsel in civil cases relating to all basic human needs. The NCCRC classifies states into one of three categories: no right to counsel, the right to counsel or discretionary appointment of counsel is qualified (e.g., New Jersey allows courts to appoint counsel for litigants who are active military members [N.J. Stat. Ann. § 38:23C-6, 1980]), and the appointment of counsel is discretionary (e.g., any court in Texas can appoint counsel in any civil case [Tex. Gov’t Code Ann. § 24.016 [1985]]. Courts located in states in which the right to counsel or appointment of counsel is qualified or

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14 See the NCCRC’s website Right to Counsel Status by State page and select the subject area of all basic human needs (http://civilrighttocounsel.org/map). This website was accessed on July 2, 2015 for the data used in this analysis. This website does not provide the effective date for state legislation and court rules or decision dates for litigation providing a right to counsel; thus, this information is obtained from Westlaw.
discretionary should be more likely to provide litigants with civil legal aid. Accordingly, these courts are coded as one on this dichotomous variable and courts located in states with no right to counsel are coded as zero.\textsuperscript{15}

\textit{Domestic Legal Factors}

\textbf{U.S. Supreme Court Precedent.} In order to determine whether state courts are constrained by Supreme Court precedent in opinions addressing the civil right to counsel, searches in Westlaw are conducted for the following cases: \textit{Lassiter v. Department of Social Services of Durham County} (1981), \textit{Mathews v. Eldridge} (1975), and \textit{Turner v. Rogers} (2011).\textsuperscript{16} An index variable is constructed to measure how many of the three cases are cited in the majority opinion. As a result values range from zero, citing none of the cases, to three, citing all of the cases.\textsuperscript{17}

\textbf{Due Process Calculus.} The procedural due process calculus established in \textit{Mathews} is also expected to decrease the likelihood of outcomes recognizing a right to civil counsel because

\begin{itemize}
\item \textsuperscript{15} States coded as one in which the right to counsel or discretionary appointment of counsel is qualified are: Arkansas, Indiana (cases decided after July 1, 1998), Maryland, New Jersey, Pennsylvania, Utah (cases decided prior to July 12, 2005), Virginia (cases decided prior to October 1, 1998), and Washington (cases decided after September 1, 2007). States coded as one in which the appointment of counsel is discretionary are: Illinois, Kentucky, Louisiana, Michigan (cases decided after November 8, 2012), Minnesota, Missouri, Montana, New York, South Carolina, Tennessee, Texas, Utah (cases decided after July 12, 2005), Virginia (cases decided after October 1, 1998), and Wisconsin. States coded as zero that do not provide a right to counsel are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana (cases decided prior to July 1, 1998), Iowa, Kansas, Maine, Massachusetts, Michigan (cases decided prior to November 8, 2012), Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Vermont, Washington (cases decided prior to September 1, 2007), and Wyoming. States not included in the dataset are: Oklahoma, Rhode Island, South Dakota, and West Virginia.
\item \textsuperscript{16} Majority opinions for cases included in the dataset are searched in Westlaw using the following search terms: “\textit{LASSITER}” “542 U.S. 18” “\textit{MATHEWS V. ELDGRIDGE}” “\textit{MATTHEWS V. ELDRIDGE}” (some opinions misspelled Mathews) “424 U.S. 319” and “\textit{TURNER V. ROGERS}”. The United States Reports citation is not searched for \textit{Turner} as the page numbers have not yet been assigned. This is not considered overly problematic because most cases citing the other cases would include the name of the case as well as the citation.
\item \textsuperscript{17} A model was considered that had three separate dummy variables indicating if the case is cited in the majority opinion instead of the index variable discussed above. The dummy variables representing citations to \textit{Lassiter} and \textit{Mathews} are moderately correlated with the variables indicating whether the court mentions physical liberty (Pearson’s $r$ of .59 with the \textit{Lassiter} variable) and applies the procedural due process calculus (Pearson’s $r$ of .66 with the \textit{Mathews} variable). However, including all three dummy variables in the model and testing for multicollinearity results in tolerance levels well above the .2 cutoff value recommended by Menard (1995). In order to determine which variable(s) should be used in the final model, the goodness of fit of the model with the index variable is compared to that of the model with the individual dummy variables using the Bayesian information criterion (BIC). The difference between the BICs is 10.725 and provides very strong support for the model with the index variable (see Raftery 1996).
\end{itemize}
courts are instructed to take into account three factors when determining whether to provide litigants with counsel: the private interest at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions (see Lassiter 1981, 31; Martin 2013, 283). Judicial opinions are read in order to determine which of the cases citing Mathews apply the procedural due process calculus. A dichotomous variable is created in which cases that mention and factor all three prongs of the balancing test into the decision relating to appointed counsel are coded as one and all other cases as zero.

**Physical Liberty.** In Lassiter (1981), the Supreme Court also established a legal presumption that litigants are not to receive counsel unless a loss of physical liberty is at stake. Cases discussing Lassiter and physical liberty in the majority opinion should be less likely to grant litigants with counsel and are identified by searching Westlaw. As a result, cases mentioning Lassiter’s legal presumption relating to a loss of physical liberty is coded as one and all others as zero.

**Extralegal Political Factors**

**Amici Briefs.** There are multiple ways to measure interest group participation in state court litigation ranging from simple methods, such as whether an amicus brief is filed during litigation (e.g., Brace and Butler 2001; Epstein 1994), to more complex approaches measuring participation from certain groups or utilizing “precision matching” designs. This last method pairs cases on a variety of characteristics—such as judge, case type or issue, time or natural court, and litigant type—to isolate the effects that amicus brief participation has on judicial decision-making (e.g., Epstein and Rowland 1991; Songer and Kuersten 1995; Songer and Sheehan 1993). Since amicus briefs are filed less than five percent of the time (only in 22 cases) in the cases in the dataset, a more simplistic approach is selected to measure interest group

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18 In Westlaw, searches ran to identify cases citing Lassiter (see n16) were re-run and include the additional search term of “PHYSICAL LIBERTY”.

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participation in appellate state court decisions addressing appointed civil counsel.\(^{19}\) Cases in which amicus briefs have been filed should result in outcomes that support the right to counsel. These cases are identified by a Westlaw search of the attorneys and law firms section of opinions.\(^{20}\) A dichotomous variable is constructed by coding cases with amicus briefs as one, and all others as zero.

**Judicial Selection and Retention Method.** There are three general types of judicial selection and retention methods used in the states: merit, election, and appointment.\(^{21}\) Data on the judicial selection method used by states for intermediate appellate courts and courts of last resort are obtained from the National Center for State Courts (NCSC) and Banks and O’Brien (2015).\(^{22}\) Since judges needing to be re-elected or retained should be less likely to grant a right to civil counsel, dichotomous variables are constructed for each of the three judicial selection methods:

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\(^{19}\) Since state attorney generals have been found to discuss human rights principles and cite foreign sources of law in opinions relating to a variety of issues (Davis 2014), a variable is considered that measures whether the attorney general files an amicus brief and if so, if the brief makes reference to international human rights law. Following Davis (2014), Westlaw search terms include: “international law” “Bill of Rights” “United Nations” “Human Rights” “Inter-American” “Universal Declaration” “Hague Convention” and “Vienna Convention”. However, this variable is excluded from the final model because the attorney general only filed a brief in two of the 22 cases with amicus briefs. Another variable is considered that measures whether the court cites attorney general opinions on the civil right to counsel in decisions. This variable is also excluded from the final model because the searches in Westlaw are unable to identify any cases citing to opinions authored by the state attorney general.

\(^{20}\) This method is commonly used by researchers collecting data on amicus briefs (e.g., Collins 2008; Kearney and Merrill 2000; Songer and Kuersten 1995). In Westlaw, the following search terms are used: “AMICUS” and “AMICI”.

\(^{21}\) Some states employ slight variations to these methods or use multiple methods across court types for selecting judges. For example, Delaware utilizes a partial merit plan in which selection requires consent from the state senate and judges are retained by being re-nominated by the nominating commission, re-appointed by the governor, and re-confirmed by the state senate (e.g., Banks and O’Brien 2015). Similarly, Appellate Division, Superior Court judges in New Jersey are selected by the chief justice of the state supreme court while supreme court judges are selected through gubernatorial appointment with state senate confirmation. See Banks and O’Brien (2015) for a complete discussion of the judicial selection and retention methods and the various variations that exist across and within states.

\(^{22}\) See the NCSC’s webpage, Judicial Selection in the States (http://www.judicialselection.us/). This data was previously housed by the American Judicature Society. This website was accessed on July 4, 2015 for the data used in this analysis.
merit, election, and appointment. Cases are coded as one for the variable representing the type of selection method used in the state for the type of court deciding the case, and zero otherwise.\footnote{It is important to note that judicial selection methods did not change over the course of the timespan of this study. Furthermore, more states utilize the same selection method for intermediate appellate courts and courts of last resort. The only exception is North Dakota in which Supreme Court judges are selected by elections and Court of Appeals judges are chosen among district judges (active and retired), attorneys, and retired state Supreme Court justices. This is not overly problematic as no cases from the North Dakota Court of Appeals appear in the dataset. States coded as using merit plans are: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New York, Tennessee, Utah, Vermont, and Wyoming. States coded as using election systems are: Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota (Supreme Court cases only), Ohio, Oregon, Pennsylvania, Texas, Washington, and Wisconsin. States coded as using appointment systems are: California, New Jersey, South Carolina, and Virginia. See n15 for states not included in the dataset.}

**Ideology.** The most common methods for measuring the judicial ideology of state courts are partisan-based measures or ideal point estimates. Partisan-based measures determine court ideology through the partisan affiliations of each judge; but this can be difficult to ascertain in states without partisan elections (e.g., Canes-Wrone, Clark, and Park 2012; Hanssen 2000; Langer 2002). Thus, ideal point estimates have been developed for state supreme court justices using the judge’s partisan affiliation in conjunction with the ideological preferences of the public, governor, or legislature, depending on the state’s judicial selection method (Brace, Langer, and Hall’s [2000] Party-Adjusted Justice Ideology [PAJID] scores) or campaign finance records (Bonica and Woodruff’s [2015] Common-Space Campaign Finance [CF] scores). Although ideal point estimates are more sophisticated, these scores are not available for state appellate courts. Since state court preferences are impacted by the ideology of the other branches of government (e.g., Brace and Hall 1995, 1997; Langer 1997; Brace, Langer, and Hall 2000), the Berry et al. (2010) NOMINATE measure of state government ideology is used as a proxy measure of judicial ideology to assess whether liberal courts are more likely to grant litigants with appointed counsel. These scores are constructed as a weighted average of the ideological preferences of the legislature and the governor with final scores ranging from 0 (most
conservative) to 100 (most liberal). In order to test whether the effect of ideology on judicial decision-making within the context of appointed civil counsel differs based on the political environment, interactive terms are created with this variable and each of the judicial selection and retention method variables.

**Control Variables**

**Published Opinion.** Most states do not provide a right to civil counsel in cases implicating basic human needs. Also, Supreme Court precedent—specifically *Lassiter* (1981) and *Turner* (2011)—has not extended Sixth Amendment rights to civil cases. Accordingly, it is probable that state courts will publish decisions granting such a right because published opinions serve as binding precedent, whereas unpublished opinions are resolutions that only apply to the parties involved and not future cases (Weisgerber 2009). In order to identify published opinions, the reported opinion option is used in Westlaw to narrow search results. Accordingly, these cases are coded as one, and all others are zero.

**Concurring and Dissenting Opinions.** It is plausible that decisions in cases in which state appellate courts consider granting a civil right to counsel are not unanimous because of the competing stances of domestic and foreign sources of law on the issue. As a result, concurring and dissenting opinions are more likely to be filed in these cases so judges can express their disagreement with the majority’s legal rationale or decision. In order to control for this possibility, cases are searched in Westlaw to determine whether one or more judges author

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24 The first step in constructing these scores is to obtain the governor’s partisan affiliation and the party seat shares for the Democratic and Republican delegations within the state house and senate (Berry et al. 1998, 2010). Second, the ideological preferences of these five actors are estimated by assuming that the mean ideological position is equal to the mean of the state’s congressional delegations of the same party, as measured using NOMINATE scores (Berry et al 2010; Poole 1998). Finally, the ideological scores of each chamber are estimated and the final score is constructed. The weighted average for the final score assumes that both chambers within the legislature are equally as powerful as are the entire legislature and the governor when it comes to policymaking (Berry 2010, 2012). See Berry (2010, 2012) for a full discussion of how the scores are constructed, including relevant equations.
dissenting or concurring opinions. Two dichotomous variables are constructed. The first takes a value of one if a concurring opinion is filed in the case and zero otherwise. The second variable codes cases with dissenting opinions as one and all others as zero.

**Court of Last Resort.** It is important to control for court type because courts of last resort appear to be influenced more by Supreme Court precedent in an effort to avoid decisions from being overturned (e.g., Baum 1978; Benesh and Martinek 2002). Using data obtained from the National Center for State Courts (NCSC), a dichotomous variable is created that takes the value of one if the court deciding the case is a court of last resort and zero for intermediate appellate courts.

**Methods**

Since the dependent variable is a dichotomous indicator of whether a state appellate court granted appointed counsel in a civil case (see Appendix A for descriptive statistics), logistic regression analysis is required to test the aforementioned hypotheses (Menard 1995). The diagnostic tests did not reveal any issues with multicollinearity; and the chi-square for the model in Table 1 is statistically significant at the .01 level, thus indicating that the independent variables accurately explain judicial decision-making with respect to granting appointed civil counsel. The reduction of error and Nagelkerke $r$-square statistics reveal that the model has modest explanatory power (Nagelkerke 1991). The model tends to underestimate when courts grant appointed counsel in civil cases and slightly reduces the error of predicting this behavior by roughly 13%. Nevertheless, the next section discusses the effect that foreign and domestic

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25 In order to find cases with concurring and dissenting opinions, a Westlaw search within results is performed for the terms “concur” and “dissent”. For each, the cases are examined to determine whether a concurring or dissenting opinion was filed.

26 See the NCSC’s Court Statistics Project State Court Structure Charts website (http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx).

27 The tolerance levels for all the independent variables are above the recommended cutoff of .2 (Menard 1995).
sources of law, the political environment, and court characteristics have on state courts reviewing requests for civil counsel.

**IV. Results**

The results of the empirical analysis explaining the conditions under which state appellate courts grants appointed counsel in civil cases are shown in Table 1. Two key results are discernable. First, there is no support for the hypothesis predicting state courts as more likely to cite human rights instruments and other sources of foreign law in decisions providing a civil right to counsel (rejects H1). As discussed in the previous data and methods section, none of the cases included in the dataset reference the variety of treaties, regional authorities, or international court precedent identified by the civil Gideon reformers that mandate the appointment of counsel in cases concerning basic human needs (e.g., ICCPR, *Airey v. Ireland* [1979], and/or OAS). Second, the effect of ideology on decision-making is not attenuated by judicial selection and retention methods as liberal courts in states requiring judges to be re-elected or retained by voters are not less likely than their appointed liberal counterparts to afford litigants civil legal aid (rejects H11).

[Insert Table 1 about here]

Since the interactive relationship between ideology and judicial selection and retention methods is premised upon the willingness of courts (particularly those with judges that could be held electorally accountable) to cite sources of foreign law when extending a right to appointed civil counsel, an additive model is considered. This model is focused more on domestic and state-level legal and extralegal factors that may dictate judicial decision-making in civil legal aid cases. In order to determine whether the interactive model or the additive model best describes judicial outcomes in cases addressing the civil right to counsel, the goodness of fit of both
models is compared using the Bayesian information criterion (BIC). A difference of 9.702 provides strong support for the additive model (see Raftery 1996). Thus, the results from this model (see Table 2) are discussed in the remainder of this section.\(^{28}\)

[Insert Table 2 about here]

Few of the independent variables influence state appellate court decision-making in cases with litigants requesting appointed civil counsel (see Table 2). Beginning with human rights standards and principles derived from foreign sources of law, a positive, albeit statistically insignificant, relationship is evidenced between decisions discussing issues of equality and a litigant receiving appointed counsel (\textit{rejects H2}). While the results have not shown that state appellate courts are embracing international human rights standards in civil right to counsel cases, there still is evidence that counsel is granted in cases involving some basic human needs. As predicted, state courts are 8.5\% more likely to provide appointed counsel in child custody cases than miscellaneous cases (\textit{supports H3}).\(^{29}\) However, the likelihood of litigants receiving counsel in child custody cases is still relatively low at 20.7\%. A similar relationship is not evidenced between all other basic human needs and miscellaneous cases because there is no statistically significant difference between the two types of cases (\textit{rejects H3}). Furthermore, and in contrast to theoretical expectations, these results indicate that basic human needs cases are associated with a lesser likelihood of receiving counsel than miscellaneous cases. Overall, these

\(^{28}\) Diagnostic tests are also ran for this model and did not reveal any issues with multicollinearity as the tolerance levels are well above the recommended cutoff of .2 (Menard 1995). The chi-square for the model (see Table 2) is also statistically significant at the .01 level and indicates that the independent variables in the model accurately explain judicial decisions granting a civil right to counsel. The reduction of error and Nagelkerke \(r\)-square statistics show that this model also has moderate explanatory power and underestimates when state appellate courts provide appointed counsel in civil cases by reducing the error of predicting this behavior by only 8.5\% (Nagelkerke 1991). \(^{29}\) Predicted probabilities were calculated using SPost in Stata 14 (Long and Freese 2005). For variables in the model not of interest, the continuous variable, ideology, is set at the mean and all dichotomous variables are set at the mode. The modal category for most dichotomous variables is zero except for the variables representing child custody cases and states with election systems. In order to determine how much more likely counsel is to be provided in child custody cases, a predicted probability is calculated for miscellaneous cases. This is accomplished by first running a model that omits the child custody variable, and second, by setting the miscellaneous variable at one. The resulting predicted probability for receiving counsel in miscellaneous cases is 12.2\%. 

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results provide mixed support for the hypothesis suggesting that courts would be more likely to
provide counsel in basic human needs cases.

Attention to international human rights principles and the effect of the civil Gideon
movement is also shown by the decision of state legislatures or courts to provide litigants civil
counsel through pilot programs or other means, such as statutes, constitutional provisions, court
rules, or case precedent. Courts in states utilizing these latter mechanisms as sources of civil
legal aid are associated with granting litigants appointed counsel, although not at a rate
statistically different from that of courts in other states (rejects H4). Interestingly, courts in states
with pilot programs are less, rather than more, likely to make decisions that support the right to
civil counsel in which litigants have a 12.1% likelihood of receiving appointed counsel from the
courts in these states (rejects H4). This result—significant at the .1 level—serves as a substantial
obstacle for the civil Gideon movement to overcome. It is probable that courts in these states are
unwilling to provide counsel in cases (other than those identified by the legislature during the
creation of the pilot programs) in an effort to avoid political criticism and/or electoral
punishment.30

Regarding citations to Supreme Court precedent, state courts are not less likely to deny
the right to counsel when citing *Lassiter, Mathews,* or *Turner* or discussing the physical liberty
presumption established in *Lassiter* (rejects H5 & H7). In addition to these variables failing to
achieve statistical significance, the relationship with citations to these three Supreme Court cases

30 It is important to note that this relationship is significant at the .1 level. There is debate as to whether coefficients
significant at the .1 level should be reported as statistically significant because the conventional cutoff in the social
sciences is .05. However, coefficients with p values between .05 and .1 can be considered “approaching”
significance (e.g., Samprit, Hadi, and Prince 2000) and are increasingly being reported as statistically significant
results in political science research (e.g., Goldstein 2010). Furthermore, presenting such results as substantively
meaningful can be supported for reasons relating to research design (usually the size of the dataset), theoretical
considerations, and/or the results of prior research (e.g., Lewis-Beck 1995; Noymer 2008). Although the variable
measuring whether a state has a pilot program is not signed as expected, this result can be explained by theories of
state court behavior. This is also the case for the remaining independent variables significant at the .1 level that will
be discussed next. Prior research has also found similar results with respect to some of these variables.
is in the opposite direction as expected, given the holdings in these decisions. However, using the so-called procedural due process calculus established in *Mathews* leads to decisions rejecting requests for appointed counsel (*supports H6*). There is only a 4.5% likelihood of litigants receiving counsel in these cases. This finding underscores not only the restrictive nature of this controlling legal standard, but also the difficulty litigants have demonstrating how appointed counsel is beneficial to them and the government. This is more so the case with respect to the government’s interests of eliminating the possibility of erroneous decisions and increasing fairness within the civil justice system.\(^{31}\)

The findings suggest that to date the civil Gideon movement has been unable to encourage state courts to expand the right to civil counsel in states in which courts or legislatures have established methods for providing civil legal aid in certain types of cases and/or to specific litigants, typically indigents. However, it does appear that advocates for the right to civil counsel have been able to impact state court decision-making in cases addressing requests for appointed counsel by filing amicus briefs. The positive and statistically significant relationship evidenced at the .1 level for this variable supports the hypothesis that the presence of one or more amicus briefs encourages the court to grant appointed counsel (*supports H8*). Specifically, litigants have a 44.5% likelihood of receiving counsel if at least one amicus brief is filed in the case.

Although the civil Gideon movement has had a limited impact on the decision-making of state courts in civil right to counsel cases, the results also indicate that judicial responses can be constrained by other actors, such as state legislators and the public. State court decision-making can be influenced most by these actors through judicial selection and retention methods,\(^{31}\)

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\(^{31}\) See n29 for a discussion of how predicted probabilities are calculated. Since the use of the due process calculus is dependent upon cases citing *Mathews*, the index variable measuring how many of the three Supreme Court cases among *Lassiter*, *Mathews*, and *Turner* are cited in the opinion is set at one instead of zero when calculating this predicted probability.
particularly electoral punishment, but the results do not support this conclusion. Contrary to the expectations, courts in states with election judicial selection and retention methods are 10.7% more, rather than less, likely to grant litigants appointed counsel than courts from states with appointment methods \(^{(rejects \ H9)}\).\(^{32}\) The results comparing the willingness of courts to provide counsel in states with merit and appointment systems also fail to support the research expectations because there is not a statistically significant difference in the decision-making of these courts in civil legal aid cases \((rejects \ H9)\). Thus, the likelihood of receiving counsel is as low as roughly 10% in states with appointment and merit plan systems and as high as 20.7% in states with election systems. The lack of a difference between courts in states with merit and appointment systems is not surprising as judges are very rarely removed from office in either system \((e.g., \ Aspin \ and \ Hall \ 1987; \ Aspin \ et \ al. \ 2000; \ Choi, \ Gulati, \ and \ Posner \ 2010; \ Hall \ 2001; \ Shepard \ 2009)\). The odds of judges being electorally punished is also relatively low because voters prefer judges with the same partisan affiliation and/or incumbents \((e.g., \ Brace \ and \ Hall \ 1997, \ Bonneau \ 2005; \ Bonneau \ and \ Hall \ 2009; \ Kritzer \ forthcoming)\). However, elected courts may be more willing to support a civil right to counsel since the decisions can be used during campaigns as examples of the judge promoting access to the courts and fairness within the civil justice system.

In addition to legal and extralegal political factors, such as the civil Gideon movement and judicial retention method, outcomes in civil right to counsel cases can also be affected by the ideological preferences of the court. As seen in Figure 1, the likelihood of litigants receiving

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\(^{32}\) See n29 for a discussion of how predicted probabilities are calculated. The resulting predicted probability for receiving counsel in cases decided by courts in states with election system is 20.7%. To determine how much more likely counsel is to be provided by courts in states with election systems, a predicted probability is calculated for courts in states with appointment systems. This is accomplished by first running a model that omits the election systems variable, and second, by setting the appointment variable at one. The resulting predicted probability for receiving counsel from a court in a state with appointment systems is 9.97%.
civil legal aid increases as the court becomes more liberal (supports H10). Litigants before conservative courts have roughly a 15-20% likelihood of being afforded counsel while this jumps to as high as 23-28% for more liberal courts.

Notably, the relationships for each of the control variables are in the direction expected with the exception of cases with judges authoring concurring opinions. Concurring opinions are filed in cases that do not support the right to civil counsel as opposed to those that grant litigants with appointed counsel. Only published opinions, and cases in which dissenting opinions are registered, are associated with decisions that provide litigants with a right to counsel. The likelihood of a case supporting the right to civil counsel is 48.6% for published opinions and 39.1% in cases with dissenting opinions.

V. Discussion and Conclusion

Prior to this study, the claim of civil legal aid reformers that state courts are more apt than federal courts to grant civil legal aid in human rights terms had not been empirically tested by the civil Gideon literature (e.g., Davis 2006, 2013; Davis, Iniguez-Lopez, and Thukral 2014; Columbia Law School Human Rights Clinic 2014; Pollock 2012). Interestingly, state courts do not cite foreign sources of law—such as human rights instruments, foreign precedent, and regional authorities—that express civil counsel to be a basic human right. Despite this finding, there is some support that the human rights standards articulated in international law have impacted state courts as litigants in a narrow set of cases: that is, litigants in child custody cases are likely to receive appointed counsel. Still, the substantive results reveal that the likelihood of litigants receiving legal assistance is relatively low at 20.7%. Similar results were not evidenced for cases regarding other basic human needs (sustenance, shelter, and health and safety). Thus, the impact
of human rights standards are modest at best and these effects may be explained more so by courts following state legislative and constitutional provisions relating to the appointment of counsel in child custody cases than provisions of foreign law.

The human rights standards conveyed in foreign sources of law have also inspired states to provide litigants counsel in civil proceedings via constitutional amendments, statutes, court rules, and/or pilot programs. It is expected that states with provisions for providing legal aid would be more likely to have courts appointing litigants counsel; however, the results suggest the opposite. The presence of legal aid pilot programs make courts less likely to support the right to legal representation in civil matters. This finding serves as a substantial obstacle for the civil Gideon reform movement because pilot programs—for example, California’s Shriver Act—are considered promising initiatives that identify where counsel is needed most and provide cost-effective solutions by partnering with various providers of legal aid (McNeal 2014; Pastore 2014; National Coalition for a Civil Right to Counsel 2015a). By addressing costs—the primary criticism relating to appointing litigants civil counsel—the reform movement expects pilot programs, in conjunction with other state-level mechanisms for providing counsel and international human rights standards, to create a legal framework state courts can refer to when recognizing a right to civil counsel. However, the turn towards legislation and pilot programs that determine whether to appoint counsel based on factors such as income and case type, has diverted efforts away from recognizing an unqualified right to civil counsel (Pastore 2014). In a similar vein, it is possible that state courts are unwilling to provide counsel outside the parameters or issue areas already identified by the legislature in an effort to avoid political criticism and/or electoral punishment.
Another human rights standard reflected in foreign sources of law that does not appear to influence state appellate courts granting civil counsel is the principle of equality. Within the context of civil legal aid, equality refers to remedying the inherent disadvantage—in terms of understanding the law and legal procedures and the ability to present evidence and make oral arguments—faced by indigent litigants proceeding *pro se* as compared to litigants with retained counsel or superior legal resources (Davis 2013; American Bar Association, Standing Committee on Legal Aid and Indigent Defendants 2014). This finding suggests that state courts approach civil legal aid cases in a manner that is similar to federal courts that exhibit a reluctance to cite international law or human rights principles (Tushnet 2006; Zaring 2006). Still, despite this finding, other studies have shown that state courts do cite to foreign precedent or human rights standards (e.g., Abrahamson and Fischer 1997; Banks and Carbonell 2013). Even so, except in the absence of controlling domestic law, sources of foreign law (especially human rights treaties) are rarely referenced in state court decisions (DeLaquil 2006). As a result, this finding supports the observation by civil Gideon reformers who recognize that briefs submitted by litigants to state courts routinely do not mention foreign court decisions, human rights instruments, or regional agreements declaring a right to civil counsel. This omission, in all likelihood, is a factor in the court’s decision to deny counsel (Davis 2014).

In addition, the civil Gideon movement has targeted state courts because of the Supreme Court’s refusal to extend the Sixth Amendment’s right to counsel to civil cases in *Lassiter v. Department of Social Services* (1981) and *Turner v. Rogers* (2011). Despite the restrictive nature of Supreme Court precedent, it does not influence state court decision-making entirely as civil legal aid reform has been evidenced in post-*Lassiter* litigation (e.g., Pollock 2012). The results of this study substantiate those observations as citations to *Lassiter, Turner,* and *Mathews v.*
Eldridge (1975) does not lead to decisions denying a civil right to counsel. Similar results are found with respect to Lassiter’s physical liberty presumption; however, state courts are less likely to grant appointed counsel in civil cases when applying the procedural due process calculus established in Mathews. Thus, these results imply that it is the application of Supreme Court precedent to case facts that impact state court decision-making more so than merely referencing the Court’s decisions on the issue of civil legal aid. Civil Gideon advocates realized this possibility following Turner because it was apparent that the balancing test established in Mathews would typically lead to decisions rarely recognizing a right to civil counsel (e.g., Davis 2014; Flanders and Muntges 2014).

The civil Gideon literature focuses primarily on the constraining effect of Supreme Court precedent in the area of civil legal aid. This effect is in contrast to human rights principles that are more supportive of the right and which can be derived from foreign sources of law. As a result, political factors identified by political scientists in the judicial behavior literature that influence state court decision-making have not been explored as variables that explain civil legal aid case outcomes. First, the effect of amicus briefs was assessed because they may be an alternative means by which advocates attempt to influence state court civil legal aid decisions. The empirical evidence suggests that this litigation strategy is successful because courts are more likely to grant appointed counsel in cases where interest groups have filed one or more amicus briefs.

A second factor influencing state court decision-making is the judicial selection and retention method used to select judges. The primary argument against providing litigants with a civil right to counsel is the cost that would be passed onto taxpayers (Martin 2013). Thus, it was posited that judges might be reluctant to hand down decisions supporting civil legal aid if they
could be electorally punished. In contrast to our expectations, the results suggest that elected judges are more likely to grant appointed counsel than appointed judges; still, there is no statistical difference between the latter and judges selected through merit plans. It appears as if the rarity of judges being removed from the bench is behind the similarities evidenced between courts in merit and appointment systems (e.g., Aspin and Hall 1987; Aspin et al. 2000; Choi, Gulati, and Posner 2010; Hall 2001; Shepard 2007). Furthermore, elected judges may also be more willing to provide litigants with counsel because electoral punishment is relatively unlikely as voters are unaware of most judicial decisions and cast ballots for incumbents or based on partisan affiliation (e.g., Baum and Hojnacki 1992; Brace and Hall 1997; Bonneau 2005; Bonneau and Hall 2009; Kritzer forthcoming). However, even when voters possess little information, judges in election systems (partisan and nonpartisan) cater to public opinion on salient issues, such as the death penalty, because judicial campaigns have become more policy-oriented (Canes-Wrone, Clark, and Kelly 2014). These findings suggest that the results from this study could also be due to the right to civil counsel being a salient policy issue within the states that use election systems to elect judges. Additionally, it is also possible that judges use right to counsel decisions when campaigning to highlight their support of improvements to the civil justice system relating to increasing access to the courts, and ensuring fairness during proceedings.

Lastly, the ideological composition of the court influences decisions as liberal courts are more likely than their conservative counterparts to grant appointed counsel. These results cannot be attributed to viewpoints associated with citing foreign sources of law because none of the cases included in the analysis referred to the cases, treaties, or agreements identified by the civil Gideon literature. Instead, these results are likely due to ideological divisions: liberals are likely
to be more supportive of civil legal aid reforms, whereas conservatives are more reluctant to subsidize such efforts through government (e.g., Houseman 1998).

Although the empirical analysis sheds some light on state courts decision-making regarding the right to appointed counsel in civil cases, there are many avenues for future research. First, additional studies should examine federal courts to determine if similar factors influence decisions in civil right to counsel cases. For example, it is likely that federal courts also will not cite foreign sources of law. However, differences are also expected because it is probable that the absence of controlling state provisions providing a right to civil counsel might allow Supreme Court precedent to have more of a constraining impact on decisions. A second promising area for future research at both the state and federal levels is to examine the voting behavior of individual judges to determine if characteristics such as partisan affiliation, experience, and/or gender are influencing whether litigants are provided counsel. Finally, a more detailed examination of the cases may provide insight on when courts are more likely to grant counsel. Of particular interest would be to determine why human rights standards have a limited impact on civil legal aid decisions as compared to other types of cases (e.g., the death penalty).
### Appendix A: Summary Statistics

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### Table 1. Logistic Regression Results on State Appellate Court Civil Right to Counsel Cases: Interactive Model

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† p < .1, *p < .05, **p < .01 (two tailed tests)

**Omitted Categories:** Miscellaneous Cases, Appointment System, & Appointment System * Ideology

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Figure 1. The Effect of Ideology on State Appellate Court Right to Counsel Decisions