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Conflicts between the Massachusetts Supreme Judicial Court and the Legislature: Campaign Finance Reform and Same-Sex Marriage

MARK C. MILLER*

I. INTRODUCTION

This article will examine recent interactions and dialogues between the Supreme Judicial Court of Massachusetts (“SJC” or “Supreme Judicial Court”) and the Massachusetts State Legislature. The interactions between courts and legislatures are often cordial, but sometimes these interactions are also highly conflictual. During the 1980s and 1990s, the relationship between the Massachusetts legislature and the Supreme Court was indeed mainly cooperative.¹ Recently, however, in several high profile cases the Supreme Court has been willing to challenge directly the decisions of the legislature and vice versa. Among other controversies, the Court’s 2002 decision requiring that the state legislature fund the campaign finance reform initiative known in Massachusetts as the Clean Elections law,² and the Court’s 2003 decision that same-sex couples could not be denied marriage licenses under the state constitution,³ have created a great deal of friction between the Supreme Court and the legislature. This article will examine these controversies in some detail in order to gain a better understanding of the different institutional perspectives and different institutional wills that drive the relationship between these two institutions of government. My conclusion is that there needs to be greater communication between the legislative and judicial branches, and that each institution needs to have greater respect for the other body.

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1. See generally Mark C. Miller, *A Legislative Perspective on the Ohio, Massachusetts, and Federal Courts*, 56 Ohio St. L.J. 235 (1995) [hereinafter Miller, *Legislative Perspective*]; Mark C. Miller, *Lawmaker Attitudes Toward Court Reform in Massachusetts*, 77 *Judicature* 34 (1993) [hereinafter *Lawmaker Attitudes*].

2. *Bates v. Dir. of the Off. of Campaign and Political Fin.*, 763 N.E.2d 6 (Mass. 2002).

3. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

II. THE INTERACTION BETWEEN STATE SUPREME COURTS AND STATE LEGISLATURES GENERALLY

State courts are certainly important decision-makers in the American system of government. Of course, Justice Brennan reminded us of the importance of the state courts in a famous speech before the New Jersey Bar Association in 1976 entitled, “Guardians of Our Liberties – State Courts No Less than Federal.”⁴ And as Hall has argued, “Overcoming ignorance of the politics of state courts is necessary for a complete understanding of American politics and the vital role played by judicial institutions in the political process. . . . State courts can no longer be dismissed as inconsequential.”⁵ Brace and Hall also argue that state courts are important institutions in our system of government. These scholars note that:

Throughout United States history, state courts have played a fundamental role in keeping a lid on majoritarian impulses. They have tinkered with the particulars of majoritarian outcomes by resolving disputes and restricting alternatives. State courts have done this commonly in obscurity but with the confidence of the American people.⁶

State supreme courts, however, cannot and should not be studied in a vacuum without paying careful attention to the courts’ interactions with other institutions of government. As Porter and Tarr argue, “[T]o understand how state supreme courts participate in governance, one must also look at them as institutions of state government, interacting with and both influencing and being influenced by other political actors in the state.”⁷ Agreeing that state supreme courts cannot be considered in isolation, Laura Langer notes that, “The system of checks and balances ties political ambitions pursued by judges to the ambitions of the other government actors. While each branch of government works against the other, they must also work together.”⁸ Scholars and practitioners alike are therefore abandoning the simplistic high school civics textbook understanding of the separation of powers concept for a more realistic and nuanced version that can be

4. David M. O’Brien, *Judges on Judging: Views from the Bench* 279-286 (2d ed., CQ Press 2004).

5. Melinda Gann Hall, *State Judicial Politics: Rules, Structures, and the Political Game*, in *American State and Local Politics* 138 (Ronald E. Weber & Paul Brace eds., Chatham H. Publishers 1999).

6. Paul R. Brace & Melinda Gann Hall, *Is Judicial Federalism Essential to Democracy? State Courts in the Federal System* in *The Judicial Branch* 183 (Kermit L. Hall & Kevin T. McGuire eds., Oxford U. Press 2005).

7. *State Supreme Courts in State and Nation* 41 (Mary C. Porter & G. Alan Tarr eds., Yale U. Press 1988).

8. Laura Langer, *Judicial Review in State Supreme Courts: A Comparative Study* 12 (State U. N.Y. Press 2002).

called governance as dialogue.⁹ Instead of examining each branch of government separately, new institutionalist scholars are thus beginning to take a closer look at the interactions among the institutions of government in order to understand better the role of each body.¹⁰ As Richard Neustadt reminds us, in the United States, we do not have separate and distinct branches of government, but instead we have separated governmental institutions sharing powers.¹¹

These separated institutions must interact in a variety of ways over a range of issues at both the state and federal levels, therefore creating a system of governance as dialogue among the different branches of government at each level. The interactions between the federal courts and other branches have begun to receive some scholarly notice lately,¹² but the interactions and dialogues between state supreme courts and state legislatures have not yet received the attention that they clearly deserve. As Glick notes:

Clearly, state supreme courts are important political institutions within their own political systems, and combined, they contribute importantly to public policy nationwide. . . . But research also needs to link state supreme courts to the policymaking and political roles of other state political institutions.¹³

Langer goes even further when she argues, “Fundamentally, judges do not operate in a vacuum. Rather state supreme court justices are expected to alter their votes in response to the anticipated reactions from the legislature and the governor.”¹⁴

9. See e.g. Louis Fisher, *Constitutional Dialogues* (Princeton U. Press 1988); *Judges and Legislators: Toward Institutional Comity* (Robert A. Katzmann ed., The Brookings Instn. 1988) [hereinafter *Judges and Legislators*].

10. See e.g. *Making Policy, Making Law: An Interbranch Perspective* (Mark C. Miller & Jeb Barnes eds., Georgetown U. Press 2004) [hereinafter *Making Policy*].

11. Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* 34 (Free Press 1990).

12. See e.g. Jeb Barnes, *Overruled? Legislative Overrides, Pluralism, and Court-Congress Relations in an Age of Statutes* (Stanford U. Press 2004) [hereinafter *Overruled*]; *Congress and The Constitution* (Neal Devins & Keith E. Whittington eds., Duke U. Press 2005); Robert A. Katzmann, *Courts and Congress* (Brookings Inst. Press 1997) [hereinafter *Courts and Congress*]; Lauren C. Bell & Kevin M. Scott, *Policy Statements or Symbolic Politics? Explaining Congressional Court-limiting Attempts*, 89 *Judicature* 196 (2006); Beth Henschen, *Congressional Response to the Statutory Interpretations of the Supreme Court*, 11 *Am. Pol. Q.* 441 (1983); Mark C. Miller, *Congressional Committees and the Federal Courts: A Neo-Institutional Perspective*, 45 *W. Political Q.* 949 (1992).

13. Henry R. Glick, *Policy Making and State Supreme Courts in The American Courts: A Critical Assessment* 115 (John B. Gates & Charles A. Johnson eds., CQ Press 1991).

14. Langer, *supra* n. 8, at 16.

This article is clearly rooted in the new institutionalist analysis.¹⁵ Although there are now at least three different approaches that come under the new institutionalist umbrella [rational-choice, sociological, and historical-interpretive institutionalisms],¹⁶ it is now generally agreed that the new institutionalist or neo-institutionalist analysis examines how institutional features constrict the actions of individual political actors.¹⁷ As Smith argues, a neo-institutionalist analysis focuses on the “interrelationship between human ‘institutions’ or ‘structures’ and the decisions and actions of political actors.”¹⁸ Thus, the new institutionalist approach attempts to combine the traditionalist scholar’s interest in understanding governmental bodies as institutions with the behavioralist’s emphasis on empirical, individual-level research.¹⁹ This article will draw mostly from the historical-interpretative strain of neo-institutionalism, although it will also borrow some ideas such as institutional cultures from the sociological branch of new institutionalist analysis.

A very important aspect of the new institutionalist approach is the attempt to understand the so-called institutional will of the organization.²⁰ Governmental institutions are more than just mere automatically functioning organizations or systems, in large part because of the importance that ideas play in molding their institutional perspectives and institutional cultures. Smith explains that institutions “have a kind of life of their own. They influence the self-conception of those who occupy roles defined by them in ways that can give those persons distinctly ‘institutional perspectives.’”²¹ Or as Rawls conceptualizes institutions, they are “an abstract object” realized in “thought or conduct.”²² The institutional will of an institution then results from a combination of the collective perspectives of

15. James G. March & Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (Free Press 1989); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 *Am. Political Sci. Rev.* 734 (1984).

16. See *Supreme Court Decision-Making: New Institutional Approaches* 1-12 (Cornell W. Clayton & Howard Gillman eds., U. of Chi. Press 1999) [hereinafter *Clayton & Gillman*]; Peter A. Hall, & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 94 *Political Stud.* 936 (1996).

17. See e.g. Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making* in *Clayton & Gillman*, *supra* n. 16, at 67.

18. Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism,” and the Future of Public Law*, 82 *Am. Political Sci. Rev.* 89, 91 (1988).

19. See e.g. Lee Epstein et al., *The Supreme Court and Criminal Justice Disputes: A Neo-Institutional Perspective*, 33 *Am. J. of Political Sci.* 825 (1989).

20. See e.g. Lawrence C. Dodd, *Congress, the Constitution, and the Crisis of Legitimation in Congress Reconsidered*, (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed., Cong. Q. Press 1981); Mark C. Miller, *The View of the Courts from the Hill: A Neoinstitutional Approach in Making Policy*, *supra* n. 10, at 55.

21. Smith, *supra* n. 18, at 95.

22. John Rawls, *A Theory of Justice* 55 (Harvard U. Press 1971).

the individuals who make up the institution and the institutional culture of the organization. Clearly in the last few years the Massachusetts Supreme Judicial Court and the state legislature have developed radically different institutional perspectives and clearly conflicting institutional wills.

The literature on the relationship between the courts and Congress is clearly helpful in attempting to understand the interactions between the state courts and the state legislatures. Although he was focusing on the relationship among the institutions at the federal level, the comments of Michael H. Armacost, former president of the Brookings Institution, present an equally important point about the relationships between state courts and state legislatures. Armacost has written, “[t]he judiciary seeks an environment respectful of its independence. Congress seeks a judicial system that faithfully construes the laws of the legislative branch and efficiently discharges justice.”²³ Thus the two institutions often just do not understand how and why the other makes decisions. As Davidson and Oleszek comment about the federal level inter-branch relationships, “Communications between Congress and the federal courts are less than perfect. Neither branch understands the workings of the other very well.”²⁴ This lack of communication between the branches also exists at the state level and is clearly a problem for our political system. The political scientist, Judge Robert A. Katzmann, reminds us, “Governance . . . is premised on each institution’s respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity.”²⁵

Even though legislatures and courts have different institutional perspectives and different institutional wills, it is nonetheless important to note that most of the interactions between legislatures and courts are routine in nature and perhaps even mundane. Resnick reminds us that usually these interactions are also cooperative and non-conflictual.²⁶ These routine interactions between the branches do not make the news or usually even get the attention of scholars. As J. Mitchell Pickerill argues about the federal level:

Those who [always] expect a constitutional revolution, a constitutional moment, or other form of severe confrontation between the Court and Congress simply do not appreciate the more routine and

23. *Courts and Congress*, *supra* n. 12, at vii.

24. Roger H. Davidson & Walter J. Oleszek, *Congress and its Members* 321 (6th ed., Cong. Q. Press 1998).

25. *Courts and Congress*, *supra* n. 12, at 1.

26. See Judith Resnik et al., *The Independence of the Federal Judiciary*, 17 Bull. of the Am. Acad. of Arts and Sci. 17 (2004); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924 (2000).

typical type of interaction between Court and Congress in the political process.²⁷

And as Lovell writes, “[T]he appearance of conflict between independent branches frequently masks more cooperative interaction between interdependent branches.”²⁸

These differences in institutional constraints between legislative bodies and the courts are nicely illustrated by the question of whether a single individual would make different choices on the same issue depending on whether they were a legislator or whether they were a judge. In other words, would the different institutional cultures, different institutional needs, and different institutional wills of the courts and Congress compel different results from the same individual depending upon which institution they were serving and what role they were playing? Justice Sandra Day O’Connor addressed just this question in her dissent in a case where the majority ruled that the death penalty was unconstitutional for juveniles who committed the crime in question before they were eighteen years old,²⁹ where she wrote, “[w]ere my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of eighteen in this context.”³⁰

Therefore, sometimes judges wish that they could act like legislators but feel that their reading of the law requires a different result. For example, in *Texas v. Johnson*,³¹ the case that declared that burning the American flag is protected political speech under the First Amendment, Justice Kennedy in his concurring opinion wrote about judges in general:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision.³²

Justice John Paul Stevens of the United States Supreme Court has also said that his decisions on a variety of issues would be different if he were

27. J. Mitchell Pickerill, *Constitutional Deliberation In Congress: The Impact of Judicial Review in a Separated System* 130 (Duke U. Press 2004).

28. George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* xix-xx (Cambridge U. Press 2003).

29. *Roper v. Simmons*, 543 U.S. 551 (2005) (O’Connor, J., dissenting).

30. *Id.* at 607.

31. 491 U.S. 397 (1989).

32. *Id.* at 420-21 (Kennedy, J., concurring).

in Congress rather than having to make the decisions from the bench. For example, in 2005 the United States Supreme Court handed down two highly controversial decisions. The first said that local governments can use their power of eminent domain to “take” private property in order to facilitate private economic development.³³ The second ruled that the Congress can decide to use federal drug laws to overrule various state decisions that had allowed marijuana use for medical purposes.³⁴ From a policy point of view, Justice Stevens said in a public speech to a bar association meeting in Las Vegas that both outcomes were “unwise,” but were required by his reading of the Constitution. Clearly illustrating the differences between decisions made by members of Congress and those made by judges, Justice Stevens concluded that, “in each [decision he] was convinced that the law compelled a result that [he] would have opposed if [he] were a legislator.”³⁵ Thus in areas where law and politics collide, judges tend to make decisions based on their reading of the law while legislators tend to make their decisions based purely on political considerations.

This article is also grounded in the governance as dialogue school of thought that says that the United States Supreme Court, and by analogy the state supreme courts, do not necessarily have the final say on issues of constitutionality.³⁶ Instead, William Eskridge³⁷ and others argue that one could think of the relationship among the courts, the legislature, and the executive as a multi-player game where no institution has the “last word,” but that issues of constitutionality play themselves out in a continuous colloquy or dialogue. Most of this literature focuses on the interactions between Congress and the federal courts, but the analysis can be equally valid at the state level. As Louis Fisher has argued, “An open dialogue between Congress and the courts is a more fruitful avenue for constitutional interpretation than simply believing that the judiciary possesses superior skills and authority.”³⁸ In a different work, Fisher also stated his belief that, “Although the Supreme Court periodically announces that it has the ‘final word’ on constitutional law, the reality has always been quite different.”³⁹ Fisher argues that scholars should explore not only how the

33. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

34. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

35. Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. Times A1 (Aug. 25, 2005).

36. See e.g. Alexander M. Bickel, *The Least Dangerous Branch of Government: The Supreme Court at the Bar of Politics* 240 (Bobbs-Merrill 1962).

37. See e.g. William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Cal. L. Rev. 613 (1991); William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991) [hereinafter Eskridge, *Overriding*].

38. Louis Fisher, *American Constitutional Law* 1051 (6th ed., Carolina Academic Press 2005).

39. Louis Fisher, *Judicial Finality or an Ongoing Colloquy?* in *Making Policy*, supra n. 10, at 153.

courts interact with Congress, but also with the President, executive branch agencies, the states, interest groups, the legal academic community, and the public at large.⁴⁰

III. THE MASSACHUSETTS CASE STUDY

Thus, the relationship between the Massachusetts Supreme Judicial Court and the state legislature provides an interesting case study of the broader question of how state courts and legislative bodies interact. At this point a brief description of these two governmental institutions would be useful. The Massachusetts Legislature, known formally as the Massachusetts General Court, consists of the 160 member House of Representatives and the forty-member Senate. It has long been considered one of the most professionalized state legislatures in the country, based in part on length of legislative sessions, frequency of turnover, legislator salaries, and staffing.⁴¹ The state legislature also has a very high percentage of self-identified full-time legislators.⁴² The Speaker of the House and the President of the Senate tend to be very powerful forces in their respective chambers, although the Senate has traditionally been more egalitarian than the House.⁴³ Both houses of the legislature have been totally dominated by Democrats for several decades, although the last four governors in the State have been Republicans.

In Massachusetts, all judges on all three levels of courts in the State, including the Supreme Judicial Court's justices, are appointed by the Governor for life terms until the mandatory retirement age of seventy. "Although not constitutionally required, since 1991 [all the governors] by executive order ha[ve] used so-called merit selection nominating commissions to help select candidates for the state bench."⁴⁴ The Governor's judicial choices are then confirmed by the State's little known and even less understood elected body called the Governor's Council. Created in colonial times as the people's envoy to the royal governor, today the obscure Governor's Council has few formal duties beyond confirming the Governor's judicial and quasi-judicial appointments (such as coroners, notaries public, justices of the peace, etc.) and approving gubernatorial pardons. The Governor's Council consists of eight members elected from special

40. Fisher, *supra* n. 38, at 22.

41. Malcom E. Jewell, *Representation in State Legislatures* 7 (U. Press of Ky. 1982).

42. Miller, *Lawmaker Attitudes*, *supra* n. 1, at 37.

43. See Frank Phillips, *Finneran's Focus Doubted Amid Redistricting Probe*, Boston Globe B1 (Apr. 19, 2004).

44. Miller, *Legislative Perspective*, *supra* n. 1, at 242 n. 30.

districts for two-year terms, plus the Lieutenant Governor. Many in the State have called for the abolition of the Governor's Council,⁴⁵ and, as will be discussed in more detail below, in March 2004 the state legislature considered, but did not approve a constitutional amendment to give the legislature confirmation power for judicial appointments. The state legislature currently plays no formal role in the judicial selection process in Massachusetts and has little informal influence over the selection decisions. The entire judicial selection process usually receives very little attention in the legislature or in the state's media.⁴⁶

Traditionally, the Supreme Judicial Court has been a highly respected judicial body. On a variety of reputational indexes, it has scored quite well. For example, in 1920 the Court ranked first in the nation among state supreme courts while in 1975 it ranked fifth. In the same study, forty-seven states reported citing Court's precedent.⁴⁷ As the former chair of the Massachusetts Legislature's Joint Committee on the Judiciary, Democratic Representative Eugene O'Flaherty noted on March 30, 2004, during a constitutional convention considering an amendment to change the judicial selection process in the State:

Having been chair of the Judiciary [Committee], I have had an incredible opportunity to talk to members of the judiciary from other states and it has impressed me how they view our judiciary as some of the finest legal scholars in the nation.⁴⁸

Of the seven members of the Court sitting in 2004, six of them were appointed by Republican Governors.

At times in its history, the Court has taken very progressive stands that drew nation-wide attention. For example, in 1783 the Court was the first state supreme court to outlaw slavery (as the current Chief Justice Margaret Marshall is fond of reminding listeners in her public speeches),⁴⁹ and in 1984 the Court decided that the death penalty violated the state constitution.⁵⁰ But the Court's decisions on campaign finance reform and same-sex marriage have drawn the most attention recently. These decisions

45. See e.g. Robert L. Turner, *Editorial: A Council Whose Time has Passed*, Boston Globe 19 (Feb. 27, 1992).

46. Miller, *Lawmaker Attitudes*, *supra* n. 1.

47. Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 *Political Behavior* 83, 89, 92 (1983).

48. All quotations from the debates held during the state constitutional conventions come from the transcriptions of the debates made by the State House News service, a private reporting organization. The transcriptions can be found at *State House News Service*, <http://www.statehousenews.com> (accessed May 22, 2006).

49. Melanie Mangum, *Clark Grads Hear SJC's Marshall*, Worcester Telegram & Gaz. A1 (May 24, 2004).

50. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984).

among others have created a great deal of mistrust among the three branches of government in Massachusetts.

A popular new strain of judicial scholarship sees the courts as strategic decision-makers.⁵¹ Most of these works draw heavily from Walter Murphy's insights.⁵² While most of the literature centers on the strategic decisions of the United States Supreme Court, recently more works have begun to examine the strategic behavior of state supreme courts as well.⁵³ Although much of this literature focuses on statutory interpretation cases, Epstein, Knight, and Martin argue that judges also act strategically when writing constitutionally based decisions.⁵⁴ These scholars assert that judges have policy and ideological preferences, but also that judges act strategically in order to reach those goals in both statutory interpretation and in constitutionally based decisions. Therefore judges cannot, "simply vote their own ideological preferences as if they are operating in a vacuum; they must instead be attentive to the preferences of the other institutions and the actions they expect them to take if they want to generate enduring policy."⁵⁵ Thus, judges are seen as wanting to make good decisions in the cases before them, but also as ideological and strategic political actors who anticipate the reactions of other institutions to their judicial decisions. As Hall and Brace explain this approach:

[J]udges' goals are pursued strategically in response to context and to institutional arrangements that link the two. . . . Generally, one might expect the nature of a court's or a judge's response to context to depend, in part, upon institutional features that create, to greater or lesser degrees, linkages to the political environment.⁵⁶

Therefore, one can assume that state supreme courts are acting strategically and asserting their institutional wills when they hand down highly controversial constitutional decisions that appear to challenge legislative majori-

51. See e.g. Lee Epstein & Jack Knight, *The Choices Justices Make* (CQ Press 1998); Forrest Maltzman et al., *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge U. Press 2000); Eskridge, *Overriding*, *supra* n. 37; John Ferejohn & Barry Weingast, *The Limitation of Statutes: Strategic Statutory Interpretation*, 80 *Geo. L.J.* 565 (1992).

52. Walter Murphy, *Elements of Judicial Strategy* (U. Chi. Press 1964).

53. See e.g. Scott A. Comparato, *Amici Curiae and Strategic Behavior in State Supreme Courts* (Praeger Publishers 2003); Melinda Gann Hall & Paul Brace, *State Supreme Courts and Their Environments: Avenues to General Theories of Judicial Choice* in Clayton & Gillman, *supra* n. 16, at 281; Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 *J. Pol.* 427 (1992).

54. Lee Epstein et al., *Constitutional Interpretation from a Strategic Perspective in Making Policy*, *supra* n. 10.

55. *Id.* at 173.

56. Melinda Gann Hall and Paul Brace, *State Supreme Courts and Their Environments: Avenues to General Theories of Judicial Choice*, in Clayton & Gillman, *supra* n. 16, at 285.

ties. The nature of these controversial decisions may change according to the political environment present and other contextual factors.

The strategic model of judicial decision-making assumes that, when making controversial decisions, judges consider many more factors than just the legal facts of the cases before them, including how the other branches of government will react to their pronouncements. It seems logical that, before handing down highly controversial constitutionally based decisions, state supreme courts clearly anticipate the reactions of legislative bodies. While most of the academic work on interbranch interactions has focused on the relationship between Congress and the United States Supreme Court,⁵⁷ the lessons learned seem equally valid when examining the relationship between state supreme courts and state legislatures. Discussing the court-legislative relationship at the federal level, Baum and Hausegger argue, "In fact, the conception that justices routinely take Congress into account in reaching decisions has become the predominant way of thinking about how the Court responds to congressional power."⁵⁸ It seems quite reasonable to assume that state supreme courts approach their relationship to their state legislatures in much the same way, especially in a state like Massachusetts where the justices of the Supreme Judicial Court have life terms similar to those of their federal counterparts.

A. Campaign Finance Reform

In Massachusetts, it appears that the Supreme Judicial Court was reacting to a changing political environment when the Court issued several constitutional decisions to which the state legislature strongly objected. The recent feud between the courts and the legislature in Massachusetts first erupted when the Court in January 2002 declared that the legislature was constitutionally required to fund the State's Clean Elections law or repeal it altogether.⁵⁹ This case was extremely important in developing the latest versions of the institutional wills and perspectives of these two organizations. As one journalist noted at the time:

57. See e.g. *Overruled*, *supra* n. 12; *Congress Confronts the Court: The Struggle for Legitimacy and Authority in Lawmaking* (Colton C. Campbell & John F. Stack, Jr. eds., Rowman & Littlefield 2001); *Courts and Congress*, *supra* n. 12; *Judges and Legislators*, *supra* n. 9; Lovell, *supra* n. 28; Pickerill, *supra* n. 27; John R. Schmidhauser & Larry L. Berg, *The Supreme Court and Congress: Conflict and Interaction, 1945-1968* (Free Press 1972).

58. Lawrence Baum & Lori Hausegger, *The Supreme Court and Congress: Reconsidering the Relationship in Making Policy*, *supra* n. 10, at 109.

59. See Pam Belluck, *Act on Clean Elections Law, Court Orders Massachusetts*, N.Y. Times 16 (Jan. 29, 2002).

The case has been closely watched not only because of its implications for candidates and their campaigns, but also because it forced the high court, which has traditionally resisted involving itself in legislative affairs, to grapple with whether to preserve a law widely despised by incumbent legislators.⁶⁰

This conflict signaled a clear shift in the political environment in the State, including the relationship between the state Supreme Court and the legislature. As Massachusetts Appeals Court Judge Gordon Doerfer explained the judiciary's different institutional perspective and institutional culture in the State:

[T]here's a great deal of historical tension, at least in Massachusetts, and a great deal of misunderstanding between the legislative and the judicial branches. The legislative branch is suspicious of what the judges do; the judges are suspicious of what the legislators do. A lot of it is just a lack of sunshine, a lack of contact, and a lack of an attempt to have a normal dialogue.⁶¹

The story about this new period of conflict between the Court and the legislature begins when the voters in November 1998 approved by a twelve-to-one margin a referendum to create one of the strongest campaign finance reform laws in the country.⁶² Only four states had enacted such campaign finance reform programs at the time. The new Massachusetts program would have provided public funding to any candidates for any state office, including the legislature, who agreed to specific limits on how much they would raise and how much they would spend for the election. As one journalist noted, "[t]he program's advocates said that the plan would lessen the influence of special interest groups, enable more people to run for office and make races more competitive."⁶³

Due in part to the fierce opposition of Speaker Thomas M. Finneran and other key legislators, the legislature refused to fund the Clean Elections program even though it was approved by the voters by such a wide margin. In 2000, the legislature did authorize \$23 million for the program, but then refused over a period of several years to appropriate any money that Clean Elections candidates could actually tap.⁶⁴ Several candidates running for office in 2002 sued, and the Supreme Judicial Court in January

60. Rick Klein, *Fund or Repeal Clean Elections, Justices Order*, Boston Globe B4 (Jan. 26, 2002).

61. Gordon Doerfer, *The Courts, the Legislature, and the Executive: Separate and Equal?*, 87 *Judicature* 230, 236 (2004).

62. Brian Falter, *Mass. Clean Elections May be Doomed*, Wash. Post A6 (June 8, 2003).

63. *Id.*

64. Seth Stern, *Bay State Politics Roiled by Funding of Clean Elections*, Christian Sci. Monitor 2 (May 6, 2002).

2002 ruled that the legislature either had to repeal the law or fully fund it. An editorial in the *Boston Globe* called the Court's Clean Elections decision, "A Victory for Democracy" and the *Globe's* editorial staff commented: "The court's 5-2 order made it clear that the Legislature, while an independent and co-equal branch of government, cannot flout the state Constitution."⁶⁵ The fight between the legislature and the Court was just beginning. As one journalist exclaimed, "The Supreme Judicial Court has gotten into the business of doing the unthinkable on Beacon Hill: bossing around House Speaker Thomas M. Finneran."⁶⁶

Clearly thumbing its nose at the Court's ruling, the legislature again refused to fund the law, so the Court then ruled that the State could be forced to sell surplus state property in order to fund the Clean Elections program. Advocates of the Clean Elections law even attempted to sell the office furniture of Speaker Finneran and of Representative Joseph Wagner, the chair of the Elections Committee in the legislature.⁶⁷ They also tried to get the Court to sell the legislators' parking spaces.⁶⁸ Instead of giving in to the supporters of the law, Representative Wagner moved all of his office furniture into storage, and Speaker Finneran sued to keep his office furniture intact. The Court agreed to allow the Speaker to continue furnishing his office, calling the request to sell his furniture "an unseemly media circus."⁶⁹ But the conflict revealed the clear differences in the institutional wills of the two bodies. As one journalist noted, "Showdowns between branches of government over how best to spend money aren't unusual. . . . But seldom does a legislature so brazenly ignore a court mandate."⁷⁰ Predicting further problems, because of the Court's decision, another journalist noted, "It's uncharted territory for a court that tries to hover above politics, and if the state's highest court takes on the state's most powerful and controversial political figure, it could have lasting consequences for the judicial branch."⁷¹

After the Court forced the sale of some state cars and a vacant state owned hospital, the legislature quite reluctantly agreed to appropriate \$4 million for the Clean Elections law for the 2002 election cycle. Twelve clean elections candidates used the public money in the November 2002

65. *A Victory for Democracy*, *Boston Globe* A14 (Jan. 26, 2002).

66. Rick Klein, *Risks Lurk in SJC's Clash with Legislature*, *Boston Globe* B1 (Mar. 11, 2002).

67. Elisabeth J. Beardsley, *Election Fund Backers put Price on Finneran's Desk*, *Boston Herald* 1 (Apr. 10, 2002).

68. Stern, *supra* n. 64.

69. *Massachusetts Legislature Repeals Clean Elections Law*, *N.Y. Times* A16 (June 21, 2003) (quotations omitted) [hereinafter *Clean Elections*].

70. Stern, *supra* n. 64.

71. Klein, *supra* n. 66.

elections, but they were outspent by a margin of twenty-three-to-one.⁷² The legislature also placed a non-binding question on the November 2002 ballot written in such a way that the voters would reject the Clean Elections concept. Supporters of the Clean Elections law placed a second question on the ballot, written in such a way to garner support for the program. Predictably, the voters split on the questions. Eventually, in June 2003, the legislature included an amendment in the annual budget bill to repeal the Clean Elections law. The amendment was adopted on a voice vote with very little discussion.⁷³ Governor Romney never supported the law and refused to veto its repeal. Thus, the law died a relatively quiet death after a long and tortuous struggle between the legislature and the Court over its funding.⁷⁴

However, the legislative responses to the Court's rulings on the Clean Elections issue were far from quiet. In a speech to the Boston Bar Association, soon after the Supreme Judicial Court's initial Clean Elections decision, Speaker Finneran commented, "I think it is well beyond controversial for courts to begin to dictate the results or the outcomes of the budget process."⁷⁵ Soon after that speech, Speaker Finneran increased his attacks on the Court and called for the direct election of all judges in the State, which would have ended the life appointments that have allowed Massachusetts judges to retain their judicial independence.⁷⁶ Clearly angry about what he saw as the Court's intrusion into legislative turf, Speaker Finneran said of the Court's decision: "Some kind of cleansing agent may have to be brought to bear. We give independence to the judiciary. But if the court's going to insert itself into things like this, you may as well put everything on the ballot."⁷⁷ Ironically, of course, the Clean Elections law had been initiated by the voters.

Conservative columnist Jeff Jacoby is among many who want more accountability for the judges in Massachusetts. Jacoby has argued:

In a democracy, the people are supposed to be supreme, but Massachusetts law gives the people no recourse when a judge has lost their trust and respect. That is not healthy. Judges are not meant to be gods on high, secure in their power whether or not they have

72. *Clean Elections*, *supra* n. 69.

73. Faler, *supra* n. 62.

74. *Clean Elections*, *supra* n. 69.

75. David Abel, *Finneran Questions SJC Ruling*, Boston Globe B1 (Jan. 27, 2002).

76. Klein, *supra* n. 66.

77. Rick Klein, *Finneran Suggests Election of Judges*, Boston Globe A1 (Feb. 8, 2002).

the consent of the governed. They are public servants, and should be answerable to their masters.⁷⁸

Other members of the legislature suggested the less radical idea of switching to a retention election system for judges.⁷⁹ The Speaker's threats to switch to the election of judges never led to any legislative action, but he clearly brought up the idea in retaliation for the Court's Clean Elections decision. A somewhat similar proposal to elect the State's judges, however, was eventually considered by a March 2004 constitutional convention, but the proposal was quickly modified to provide for legislative confirmation of judicial appointees instead. That amended proposal was then referred to committee for further study without being approved.

While the legislature has not dramatically altered the selection system for judges in Massachusetts, it has recently used its budget powers to attempt to exert more direct control over the courts. Legislators have successfully pressured individual judges to hire their political supporters and friends because the "Massachusetts' budgeting system, in which the Legislature controls individual budget line items for the State's sixty-one courthouses, allows lawmakers to punish some judges and reward others with funding."⁸⁰ The legislature has also used its budget powers in other ways. For example, after the Court's Clean Elections decision, the legislature took away the ability of judges to hire their own probation officers, giving that power to the State's Commissioner of Probation, a key ally of Speaker Finneran.⁸¹

Also following the Court's Clean Elections ruling, key members of the legislature recommended that all hiring and firing responsibilities for judicial staff be transferred from the judges to the clerk magistrates, who are closely tied politically to the leaders of the legislature. Under the proposal, the clerk magistrates would have been able to oversee all court personnel except judges, control the assignment of judges, and veto the granting of leaves of absence to judges.⁸² That measure would have even prevented judges from hiring their own secretaries and clerks.⁸³ The legal establishment in the State quickly condemned the idea, although most judges remained painfully silent.⁸⁴ Edward P. Ryan, Jr., the then immediate past president of the Massachusetts Bar Association, said of the proposal: "In

78. Jeff Jacoby, *Who Should Judge the Bay State's Judges?*, Boston Globe E7 (May 12, 2002).

79. Frank Phillips, *Judges Watch as Legislators Ready a Power Play*, Boston Globe B1 (May 7, 2002).

80. *Id.*

81. Jacoby, *supra* n. 78.

82. Phillips, *supra* n. 79.

83. Jacoby, *supra* n. 78.

84. Phillips, *supra* n. 79.

my [twenty-six] years, I have never seen relations between the Legislature and the courts at this level. I think we are at a very serious moment in the history of the Commonwealth.”⁸⁵ Michael B. Keating, then president of the Boston Bar Association, complained:

I am disturbed by the level of rhetoric involving the court system. The level reflected in this amendment could undermine the authority of the courts, which are so integral to our society.⁸⁶

Another potentially fierce conflict was averted when the legislature eventually backed down and instead created a new commission to study judicial operations.⁸⁷

The conflicts between the courts and the legislature continued to simmer for the next several years. In addition to repealing the Clean Elections law, in the June 2003 budget bill the legislature also expanded the Boston Municipal Court to include eight previously independent district courts. Governor Romney had called for the abolition of the Boston Municipal Court, but the legislature expanded its jurisdiction instead. The Boston Globe declared in an editorial that, “the Legislature was mean-spirited to use the [Boston Municipal Court] BMC issue to reaffirm its archaic domination of the courts.”⁸⁸ Jacoby summarized the fights between the courts and the legislature in Massachusetts when he concluded:

Judges in Massachusetts have long been under the Legislature’s thumb; if [Speaker] Finneran gets his way, they will find themselves under its heel. At that point, two of the state’s three branches of government will be controlled by a small clique of Democratic politicians, and the transformation of Massachusetts from democracy to oligarchy will be nearly complete.⁸⁹

B. *Same-Sex Marriage*

Even more serious tensions between the legislature and the courts erupted when the Supreme Judicial Court in November 2003 declared that denying marriage rights to same-sex couples violated the state constitution. A variety of same-sex couples had attempted to obtain marriage licenses in Massachusetts. When their applications were denied, they filed a lawsuit in the state courts arguing that the state constitution prohibited discrimina-

85. *Id.*

86. *Id.*

87. Jennifer Peter, *Gay Marriage Decision Renews Tension between Legislature, Courts*, Associated Press (Nov. 28, 2003).

88. *Stealth Lawmaking*, Boston Globe A18 (June 25, 2003).

89. Jacoby, *supra* n. 78.

tion against same-sex couples and therefore required that they be allowed to marry. The lawsuit followed similar judicial rulings in Hawaii,⁹⁰ Alaska,⁹¹ Vermont,⁹² and Ontario.⁹³ Although the highest courts in Hawaii and Alaska ruled that same-sex marriages could not be prohibited under their state constitutions, those state constitutions were later amended to prevent same-sex couples from marrying.⁹⁴ The Supreme Court of Vermont ruled that same-sex couples deserved equal rights under its state constitution, but allowed the legislature to fashion a remedy to protect those rights. The legislature chose a new option, and thus civil unions for same-sex couples were born in Vermont.⁹⁵ The highest court in Ontario, in the spring 2003, declared that same-sex couples had an immediate right to marry in that province.⁹⁶ This was the context that faced the Supreme Judicial Court when it ruled on the same-sex marriage issue.

In November 2003, the Supreme Judicial Court of Massachusetts, citing the Ontario decision, ruled that the Massachusetts constitution prohibited discrimination against same-sex couples and therefore declared that marriage licenses could not be denied to same-sex couples in the state. The Court's opinion gave the legislature six months before same-sex marriages would become legalized to allow the legislature to adjust any statutes, rules, etc. as necessary. The 4-3 opinion created a great deal of controversy nationwide. In response, President George W. Bush advocated a federal constitutional amendment to overturn the Court's ruling.⁹⁷ In all the media hype over the Court's ruling, rarely was it mentioned that six of the seven justices on the Court were Republican appointees.

In response to the Court's decision declaring a right to same-sex marriage in the state, the state Senate in January 2004 requested an advisory opinion from the Court asking whether Vermont-style civil unions would meet the Court's requirements. On February 5, 2004, the Court responded

90. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). For more detailed discussions of the Hawaii ruling, see Patricia A. Cain, *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement* 259-61 (Westview Press 2000) and Jason Pierceson, *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada* 107-25 (Temple U. Press 2005).

91. The Alaska case was decided by a trial court in the state. See Liz Rushkin, *Judge Backs Gay Marriage; Superior Court Ruling Puts Burden on State to Justify Ban*, Anchorage Daily News A-1 (Feb. 29, 1998). For more detailed discussions of the Alaska ruling, see Pierceson, *supra* n. 90, at 125-29.

92. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

93. *Halpern v. Atty. Gen. of Can.*, 172 O.A.C. 276 (2003).

94. See Michael Mello, *Legalizing Gay Marriage* 12 (Temple U. Press 2004).

95. For more detailed discussions of the Vermont ruling, see Pierceson, *supra* n. 90, at 130-43, Cain, *supra* n. 90, at 261-263 and Mello, *supra* n. 94, at 74-141.

96. *Halpern*, 172 O.A.C. 276.

97. *New Fuel for the Culture Wars; Gay Marriage*, Economist 29-30 (Feb. 28, 2004).

with the same 4-3 majority stating that civil unions would not be sufficient.⁹⁸ The Court's majority stated:

This is not a matter of social policy but of constitutional interpretation. As the court concluded in *Goodridge*, the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children. The very nature and purpose of civil marriage, the court concluded, renders unconstitutional any attempt to ban all same-sex couples, as same-sex couples, from entering into civil marriage. . . . The dissimilitude between the terms 'civil marriage' and 'civil unions' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual couples, to second-class status. . . . The history of our nation has demonstrated that separate is seldom, if ever, equal.⁹⁹

Following the Massachusetts decisions on same-sex marriage, same-sex marriage laws spread to many other countries; however, as of March 2006 no other state court in the United States has followed the lead of the Supreme Judicial Court. In Canada, the highest courts in eight provinces and one territory quickly agreed with the Ontario Court of Appeals that same-sex marriages were constitutionally required,¹⁰⁰ and the Supreme Court of Canada issued a unanimous ruling in December 2004 paving the way for federal legislation to make same-sex marriages legal, although it stopped just short of requiring them.¹⁰¹ Legislation making same-sex marriage legal throughout Canada passed the parliament in July 2004,¹⁰² although the election of Conservative Prime Minister Stephen Harper in January 2006 cast some doubt on the issue.¹⁰³ In late 2005, the Supreme Court of Appeal of South Africa also declared that same-sex marriage is a

98. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 566 (Mass. 2004).

99. *Id.* at 569.

100. *Re Same-Sex Marriage* [2004] 3 S.C.R. 698; see also Doug Struck, *Same-Sex Marriage Advances in Canada*, Wash. Post A01 (June 29, 2005).

101. See Clifford Krauss, *Canada's Supreme Court Clears Way for Same-Sex Marriage Law*, N.Y. Times A7 (Dec. 10, 2004); Doug Struck, *High Court in Canada Backs Gay Marriage*, Wash. Post A01 (Dec. 10, 2004).

102. See Struck, *supra* n. 101; *Senate OKs Same-Sex Bill*, Ottawa Sun 14 (July 20, 2005).

103. See Stephanie Rubec, *Same-Sex Vote Soon*, Ottawa Sun 6 (Jan. 27, 2006).

right in that country,¹⁰⁴ thus joining Belgium, the Netherlands, Canada, the United Kingdom, and Spain as sanctioning same-sex marriages.¹⁰⁵

Some jurisdictions established legalized same-sex partnerships or civil unions using legislation instead of court orders. Following the Supreme Judicial Court's decision, the State of Connecticut established same-sex civil unions through legislation.¹⁰⁶ The Spanish parliament also enacted legislation legalizing same-sex marriage,¹⁰⁷ and in late 2005 same-sex civil partnerships became legal in the United Kingdom through legislative means (although the press throughout the United Kingdom repeatedly referred to these events as same-sex marriages and same-sex weddings).¹⁰⁸ In September 2004, the California legislature voted narrowly to approve a bill legalizing same-sex marriage, but that legislation was vetoed by Governor Arnold Schwarzenegger.¹⁰⁹

The Supreme Judicial Court's second ruling on same-sex marriage again ignited a firestorm of controversy in the legislature, increasing calls for a state constitutional amendment to overturn the court's decisions.¹¹⁰ In Massachusetts, a joint session of the legislature, sitting in a constitutional convention, must first approve an amendment to the state constitution by a majority vote. Then a second constitutional convention, held after legislative elections have occurred, must also approve the amendment. After that, the amendment must be approved by a majority of the voters in the State on the general election ballot. Thus, the earliest that the Court's opinion on same-sex marriages could have been overturned by a state constitutional amendment would have been November 2004.

However, the constitutional amendment proposal approved by the legislature in March 2004 by a vote of 105-92 was defeated in the legislature in September 2004, with only thirty-nine members voting in favor of it and one hundred and fifty-seven opposed to the amendment.¹¹¹ A second way

104. Craig Timberg, *S. Africa's Top Court Blesses Gay Marriage; Parliament Given One Year to Amend Law*, Wash. Post A16 (Dec. 2, 2005).

105. Janice Tibbetts, *Top Court Poised to OK Same-Sex Marriage*, Ottawa Citizen A11 (Dec. 1, 2004).

106. See David Fahrenthold, *Connecticut's First Same-Sex Unions Proceed Civilly; Little Hoopla Surrounds Occasion*, Wash. Post A03 (Oct. 2, 2005); William Yardley, *Day Arrives for Recognition of Gay Unions in Connecticut*, N.Y. Times B1 (Oct. 1, 2005); William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. Times B5 (Apr. 21, 2005).

107. See Jennifer Green, *Spain Legalizes Same-Sex Marriage*, Wash. Post A14 (July 1, 2005).

108. See e.g. Simon Edge, *So How Gay is Britain?* Express 26 (Jan. 27, 2006); *Couple Make History with First Scottish Gay Wedding*, Evening Times (Glasgow) 3 (Dec. 20, 2005); Marc Horne, *Warning Issued to Honeymoon Gays*, Sunday Times (London) 13 (Dec. 4, 2005).

109. See Jeff Jacoby, *The People's Voice on Gay Marriage*, Boston Globe A19 (Oct. 5, 2005).

110. Pam Belluck, *Massachusetts Gives New Push to Gay Marriage*, N.Y. Times A1 (Feb. 5, 2004).

111. See Emelie Rutherford, *Lawmakers Nix Measure to Prohibit Gay Marriage*, Boston Herald 16 (Sept. 15, 2005); Raphael Lewis, *After Vote, Both Sides in Debate Energized*, Boston Globe A1 (Sept. 15, 2005).

for constitutional amendments to appear on the ballot for voter consideration is for supporters to collect over 65,000 signatures from voters in the State. A proposed constitutional amendment proposed by initiative requires only fifty votes in two successive sessions of the legislature.¹¹² After the defeat of the anti same-sex marriage constitutional amendment in the legislature in 2005, opponents of same-sex marriage then turned to getting an initiative drive to get a constitutional amendment proposal before the voters, but such a proposal could appear on the ballot no earlier than November 2008.¹¹³

The situation concerning the debate over same-sex marriage in 2004 illustrates the clear conflicts between the institutional will of the legislature and the courts in Massachusetts. The powerful then Speaker of the House, conservative Democrat Thomas M. Finneran, had long been an opponent of gay rights. Before the Court's decision on same-sex marriage, he had blocked House consideration of popular legislation to create civil unions or even domestic partnerships for gay couples. During the constitutional convention, however, the Speaker and the then President of the Senate supported a so-called compromise version of an amendment that would have barred same-sex marriage but would have created civil unions in the State. The Speaker's position was that the Court was improperly activist in its decision, and that the legislature had to take steps to overturn that decision through a constitutional amendment process like those enacted after similar court decisions in Hawaii and in Alaska. During the February 11, 2004 debates on the constitutional amendment, the Speaker said:

In at least two other jurisdictions, Alaska and Hawaii, where there was imposition by the judiciary, the people reacted to that [by amending their state constitutions]. [The courts' actions were] seen as highly inappropriate. . . . This amendment, if adopted, would begin the course of correction of the SJC's intrusion into an area where they are not to operate, the area of policy. That is [the legislature's] jurisdiction and domain. That is the reason you ran for office, to shape and speak out and fight for public policy. It is emphatically not the domain of the SJC.¹¹⁴

112. See Raphael Lewis, *Reilly OK's 2008 Initiative on Ban of Gay Marriage*, Boston Globe A1 (Sept. 8, 2005).

113. See e.g. Stephanie Ebbert, *Healey Backs Proposed Constitutional Amendment on Gay Marriage*, Boston Globe B1 (Nov. 19, 2005); Lewis, *supra* n. 111.

114. All quotations from the debates held during the state constitutional conventions come from the transcriptions of the debates made by the State House News service, a private reporting organization. The transcriptions can be found at *State House News Service*, <http://www.statehousenews.com> (accessed May 22, 2006).

Proving how different the institutional perspectives of the court and the legislature were on this issue, the Speaker went on to further attack the Court's majority opinion when he said:

That 4-3 decision has caused extraordinary division and controversy. Everybody I have spoken to has commented on the vituperative language of the decision. I have read and re-read the decision. In the majority opinion was a statement that I would describe as libelous and defamatory of this institution. The libel spoke to the definition of marriage that has come to us from custom, tradition, every society, every culture, and every nation in all of recorded history as one man and one woman. The defamatory statement stated this: in light of that extraordinary history, the SJC said this about you and the citizens of Massachusetts. They said that definition was rooted in animus and bigotry.¹¹⁵

After same-sex marriage became legal in the state on May 17, 2004, Speaker Finneran's first cousin was one of the first people to apply for a marriage license. The Speaker was not invited to the wedding. When asked about his cousin's wedding, Finneran replied:

I'm a traditionalist. My sense is this would have been better left to the consideration of the Legislature rather than to an edict of the judiciary. It's a classic separation of powers [question] in my mind, and I don't think any amount of conversation with any family members would have changed my position.¹¹⁶

Finneran may have also been less active on this issue because at the time he was facing a federal investigation about whether he committed perjury during a federal trial concerning state redistricting efforts in 2001. A three judge panel of the Massachusetts District Court ruled in 2004 that the state legislative redistricting plan was racially discriminatory, and they strongly suggested that Finneran had lied during the trial when he stated that he was not involved in the redistricting efforts and that he did not know the racial makeup of his own House district.¹¹⁷ Amid this federal investigation, Speaker Finneran resigned in September 2004 to become a lobbyist for the State's biotech industry.

115. The compromise constitutional amendment eventually passed the constitutional convention in March 2004 by a slim margin, but it died when the legislature voted on it again in September 2005. See e.g. Ebbert, *supra* n. 113; Lewis, *supra* n. 111.

116. Ron DePasquale, *Romney Among Key Figures Invited to Nuptials – But He Won't Attend*, Boston Globe B4 (May 17, 2004).

117. Frank Phillips, *Finneran's Focus Doubted Amid Redistricting Probe*, Boston Globe B1 (Apr. 19, 2004).

Statements made during the constitutional conventions by other legislators who opposed the Court's decision also reveal the radically different institutional wills between the legislature and the Court on the issue of same-sex marriage. For example, Senate Minority Leader Brian Lees stated on February 11, 2004, "[t]he SJC usurped the people's power." Republican Representative Paul Loscocco said on the same day:

Shame on the SJC. Four activist judges made the decision. Regardless of the position on gay marriage, there should be outrage over their specious legal reasoning. They stifled debate by the people and the legislators. That's contrary to our representative form of government. If left unchecked, what rights will the court attempt to usurp tomorrow?

In a similar vein, Democratic Representative Marie Parente noted, "The [Massachusetts] constitution is the oldest in the world and says the judiciary must never interfere in the business of the Legislature. Four people are going to change what the people of the Commonwealth want and eventually impact the entire country." In addition, Democratic Representative Stephen Tobin stated on March 11, 2004, "Three thousand years of recorded history have upheld the definition of marriage. It is presumptuous for a court to challenge that and hold that they are more enlightened."¹¹⁸

Some legislators cited the dissents in the *Goodridge* same-sex marriage case to bolster their arguments that the Court's majority acted improperly. The dissents in the Clean Elections case had also stated that the Court should stay out of legislative affairs. On March 11, 2004, Republican Representative John Lepper noted:

Read the SJC dissents. Judge Spina wrote that the power of the Legislature to affect social change without interference from the courts is at risk. Judge Sosman said the people should decide when the benefits of marriage should be extended, whatever the risk. She said it was not up to the court to decide when the time is right. Judge Cordy said the Legislature is the appropriate branch to answer this question.¹¹⁹

Other legislators argued that the Supreme Judicial Court should have left the final decision to the people instead of interpreting the state constitution in an activist manner. Democratic Representative John Rogers argued:

118. *See supra* n. 48.

119. *Id.*

The 4 to 3 Goodridge decision to many citizens transformed us from a government of and for the people to a government of four people. The only forum for us to debate is this one. The great question before this body is whether the people have a right to participate in that debate or whether we shall allow the Goodridge decision to stand? The courts cannot change the constitution; they can interpret it. The executive branch cannot change the constitution; they enforce it. The legislative branch can make recommendations, but cannot change the constitution. The only ones who can change the constitution are the people themselves. On this question, should they be allowed to?¹²⁰

On the other hand, former Republican Governor William Weld, two former Democratic state attorneys general, the president of the Boston Bar Association, and well-known constitutional scholar Laurence Tribe of Harvard Law School all supported the Supreme Judicial Court's opinion.¹²¹ The executive director of the Log Cabin Republicans in the State, former state representative Patrick Guerriero, called the Court's decision bold and historic. He also said of the Court's decision:

More significantly, the power and clarity of the decision stems from the fundamentally conservative and family-values based arguments offered by the state's highest court. . . . The opponents of basic fairness for all Massachusetts families are left arguing against stable relationships, against increased protection for all children, against limited government, against individual liberty, and against religious freedom.¹²²

The Massachusetts Bar Association also supports the same-sex marriage ruling, as does a special panel of the New York State Bar Association who forwarded a proposal yet to be acted on by the full state bar association.¹²³

Many Massachusetts legislators also supported the Court's handling of this sensitive issue. They often argued that it was the Court's duty and responsibility to interpret the state constitution in order to protect minority interests and to prevent discrimination. Speaking during the February 11, 2004 constitutional convention, Democratic Representative Frank Smizik said of the Court:

120. *Id.*

121. Raphael Lewis, *Weld, 2 Ex-AGs Urge Passage of Gay Marriage Law*, Boston Globe A1 (Jan. 5, 2004).

122. Patrick Guerriero, *A Conservative Ruling on Gay Marriage*, Boston Globe A11 (Jan. 3, 2004).

123. See John Caher, *State Bar Panel Backs Gay Unions*, Natl. L.J. 13 (Nov. 15, 2004).

My political and formative years took place during the civil rights struggles of the [19]60s. The judges in the heart of the south were at risk of impeachment, danger to life and limb and of being ostracized. Still they upheld the equal protection law of the constitution. . . . The [SJC] exercised its judgment as the court is required to do. If we push with one of these amendments today, we will be trying to usurp the court's decision. I can't go that route. Courts have a long history of providing civil rights to our citizens. I appreciate the special role decisions have made regarding constitutional rights.

Keeping with the theme that the Court was merely preventing discrimination, Democratic Representative Ruth Balsler argued:

Why are so many people trying to write discrimination into our Constitution? Although I am saddened, I am not surprised. When women and blacks and Irish Americans and workers fought for their rights, many fought them back. It does not surprise me that when homosexual people fight for their rights, many heterosexual people fight back. The SJC has done us proud. My constituents support the decision.¹²⁴

On February 12, 2004, Representative Byron Rushing, an African-American Democrat, noted that the Court's decision was based only on the requirements of the Massachusetts Constitution and not on the provisions of the United States Constitution. Representative Rushing stated:

The United States Constitution and the Constitution of Massachusetts in 1790 were very different documents because the United States Constitution did not guarantee liberty. But the Massachusetts Constitution did. . . . One judge ruled that slavery was unconstitutional in Massachusetts. Not because of the United States Constitution, but because of the Massachusetts Constitution. . . . We were able to take this remarkable position because of a constitution that said liberty would be available to every citizen of this commonwealth. We are being called by some today to change that. We are being asked to say to one group – you no longer have the rights of everyone else in this Commonwealth.

Arguing that the legislature should preserve the special judicial role in the State, during the March 11, 2004 constitutional convention Democratic Representative Jay Kaufman argued that, “[t]he courts serve as a check on

124. *See supra* n. 48.

legislative action or legislative inaction. The plaintiffs took their case to the SJC because we the Legislature failed them. They did what any citizen has the right to do. They went to the courts.”¹²⁵

Some legislators argued that the institutional wills of the legislature and the courts should work together to end discrimination in the State. For example, then House Majority Leader Salvatore DiMasi (who later became Speaker of the House in October 2004) gave this impassioned explanation on March 11, 2004 for his opposition to the constitutional amendment supported by the Speaker of the House:

My grandfather read the Bible and constitution by the window. I had to ask why he read the constitution. He said it gave hope and promise to him and his family because it gave rights and privileges to everyone. He marveled at how each person, even he as an immigrant, would be free to live the life he desired equally. I stand to protect and defend the constitution my grandfather held so dear and taught me to respect. It is the oldest continuous constitution in the world. It is a living and breathing and evolving document. Its contents reference equality, justice, the enjoyment of life and liberty. Our commitment binds us to ensure the constitution contains the highest and noblest of ideals. It must not be a weapon to render any citizen less than any of our fellow citizens. The SJC has found the constitution does not discriminate amongst its citizens. Today we gather to possibly change that, to consider language so divisive and damaging that we must ask ourselves whether we embrace two classes of citizens? I hope it is not. When legislators have been slow to act, the public has no recourse other than the courts.

Also supporting the Court's judicial perspective on this case, the Assistant Majority Leader in the Senate, Democratic Senator Marian Walsh, noted her opposition to the constitutional amendment being supported by the Senate President and by the Speaker when she stated on March 29, 2004, “The SJC did not amend our Constitution, they interpreted it. That is their function. They did not hijack democracy. They did not diminish this Legislature. They did not dismiss my constituents. They heard a case before them and they applied the law.” Also supporting the interpretive role of the courts, Republican Senator JoAnn Sprague concluded that:

I believe the SJC was rendering an impartial interpretation of our constitution. The framers of the constitution envisioned a constitu-

125. *Id.*

tion of civil government, not sectarian or theological government. That guarantees that all of us have equal access to civil procedures under a civil government. We are here to decide whether to change our great constitution. Some say the Legislature needs to speak because the SJC has overstepped its judicial boundaries. I suggest that our SJC did exactly what our framers of our constitution ordered them to do when asked to make a judgment. They provided an impartial interpretation of Massachusetts law.

Other legislators linked the controversies over the Supreme Judicial Court decision in the Clean Elections case and its decision on same-sex marriage. For example, Democratic Representative Christopher Fallon concluded:

I feel frustrated by some of my colleagues who have criticized the SJC. Yes, it was a narrow vote. So are we going to start picking and choosing what judicial rulings we are going to uphold? That's an affront to the Constitution. I find it hypocritical that some members are also arguing to put this before the voters after [the legislature] gutted Clean Elections.¹²⁶

From the Governor's office, Republican Governor Mitt Romney tried to do everything within his limited powers to block implementation of the state Supreme Court decision legalizing same-sex marriage, but for the most part he was unsuccessful in his efforts. Romney had repeatedly said that the voters, and not the courts, should define marriage in the State.¹²⁷ He tried to ask the Court to stay their decision, pending the outcome of the legislature's vote on a constitutional amendment to ban same-sex marriage. However, the Democratic State Attorney General Thomas Reilly refused to allow the Governor to present his request to the Court, stating that only the Attorney General's office could request such a stay.¹²⁸ The Attorney General, a likely Democratic candidate for the governor's office in the next election, then refused to do so. The Governor then asked the legislature for the authority to bypass the Attorney General's office on the issue and personally present his request to the Court, but it also refused.¹²⁹ In the first few days after same-sex marriage became legal in Massachusetts, unclear about the political ramifications of his opposition to same-sex marriage, the Governor then opted to stay out of the limelight.¹³⁰

126. *Id.*

127. Frank Phillips, *Romney Keeps Low Profile, but Reiterates That Voters Should Decide Issue*, Boston Globe B8 (May 18, 2004).

128. Raphael Lewis, *Romney Chides Legislature on Gay Marriage*, Boston Globe B1 (Apr. 24, 2004).

129. *Id.*

130. Phillips, *supra* n. 127.

The Governor within a few days, however, became more active in the fight against allowing same-sex marriage to spread to other states. Some critics of the Governor said that he was using this issue to bolster his nation-wide image, regardless of what his opposition did to his standing within the State.¹³¹ When the Governor declared that a 1913 law discussed in more detail below prohibited out-of-state gay couples from obtaining marriage licenses, several town clerks said that they would openly defy his directives. The Governor then asked the Attorney General to investigate whether the clerks were in violation of the state law. Eventually, with the Attorney General's help,¹³² the Governor forced the clerks to abide by his wishes, but the town clerks later filed a lawsuit claiming that the 1913 law was unconstitutionally discriminatory.¹³³ Using a rational basis test, in March 2005 the Court ruled that the 1913 law was not unconstitutional.¹³⁴

Governor Romney then declared his support for a federal constitutional amendment to overturn the Court's decision, in addition to the state constitutional amendment that he also then supported.¹³⁵ The outcome of the Governor's actions was that his approval ratings dropped in the State,¹³⁶ although he did get some positive attention from conservative voices outside Massachusetts.¹³⁷ But liberals inside Massachusetts were furious with the Governor. For example, when the Governor gave the commencement address at Suffolk University in Boston in May 2004, many students and faculty stood and turned their backs during the Governor's address in protest against his staunch opposition to same-sex marriage.¹³⁸

Other opponents of gay marriage have also tried a variety of tactics to attempt to overturn the Supreme Judicial Court's decision legalizing same-sex marriage. For example, several legislators introduced long-shot bills to remove from the bench the four justices who voted in favor of allowing same-sex marriage. The last time the state legislature actually removed a justice from the Supreme Judicial Court was in 1803, and the only other attempt ended in failure in 1922.¹³⁹ In addition, thirteen legislators filed a suit in state courts to block implementation of the Court's decision, arguing

131. *Editorial: Romney's Marriage Vows*, Boston Globe A14 (June 23, 2004).

132. Yvonne Abraham, *AG Asks End of Out-of-State Marriage Licenses*, Boston Globe A1 (May 22, 2004).

133. Pam Belluck, *Suits to Fight Ban on Some Gay Marriages*, N.Y. Times A21 (June 17, 2004).

134. *Cote-Whitacre v. Dept. of Pub. Health*, 844 N.E.2d 623, 644 (Mass. 2006).

135. Yvonne Abraham & Raphael Lewis, *Romney to Speak Before US Panel*, Boston Globe B1 (June 22, 2004).

136. Jennifer Peter, *Romney Trying to Walk Gay Marriage Tightrope*, Worcester Telegram & Gaz. A3 (May 23, 2004).

137. See Raphael Lewis, *Romney Urges Federal Ban on Gay-Marriage Experiment*, Boston Globe A1 (June 23, 2004).

138. David Abel, *Romney is Booed at Suffolk Commencement*, Boston Globe B1 (May 24, 2004).

139. Raphael Lewis, *Foes of Gay Marriage Try Long Shot*, Boston Globe B1 (Apr. 20, 2004).

that the Court had no jurisdiction over marriage issues. One lobbyist who supports same-sex marriage said that the Supreme Judicial Court was fully within its authority to issue its ruling in the *Goodridge* case, and ridiculed the legislators' lawsuit by stating, "[n]ow they're throwing something the equivalent of a legislative temper tantrum as a result."¹⁴⁰ The Supreme Judicial Court eventually rejected the suit.¹⁴¹

Opponents also filed suit in federal court in an attempt to block the granting of marriage licenses to same-sex couples. The plaintiffs included eleven members of the state legislature. They argued that the Supreme Judicial Court overstepped its authority by revising the definition of marriage, an action that the plaintiffs argued is solely a legislative function in the State. They also urged the court to stop same-sex marriages until the voters could vote on the constitutional amendment to outlaw gay marriage and create civil unions instead that passed the legislature in March 2004. Their case was rejected by the Massachusetts District Court in May 2004. However, the United States Court of Appeals for the First Circuit did hear oral arguments on the case in early June 2004, but the three-judge panel ultimately rejected the plaintiff's arguments and the court refused to stop the legalization of same-sex marriages.¹⁴² Representative Travis, the lead author of the proposed state constitutional amendment to ban gay marriages, argued that the Supreme Judicial Court had usurped his power as a state lawmaker when it declared that denying marriage rights to same-sex couples is discriminatory under the state constitution. Revealing that he had a very different understanding of the role of the judiciary and of the legislature, Representative Travis argued, "We never gave them the authority to redefine marriage."¹⁴³ The United States Supreme Court eventually refused to grant certiorari in the case, thus allowing same-sex marriages to continue in the state.¹⁴⁴

The issue of whether out-of-state same-sex couples could marry in Massachusetts was complicated by a 1913 state law that forbids a marriage within the State if that marriage would be void in the couple's home state. Many argued that the law was enacted in part to prevent out-of-state interracial couples from marrying in Massachusetts.¹⁴⁵ The law had not been enforced in the State for decades, but after same-sex marriages became legal in Massachusetts in May 2004, Republican Governor Romney and

140. Matthew Rodriguez, *Lawmakers Challenge SJC Ruling*, Boston Globe A20 (Apr. 28, 2004).

141. Shelley Murphy, *Foes Sue Justices of SJC in US Court*, Boston Globe B1 (May 11, 2004).

142. *Coalition Asks US Court to Halt Gay Marriages*, Boston Globe B3 (June 8, 2004).

143. *Id.*

144. Yvonne Abraham, *No Court Ruling on Same-Sex Marriage*, Boston Globe A1 (Nov. 30, 2004).

145. Scott S. Greenberger, *The 1913 Law: History Suggests Race Was the Basis*, Boston Globe B6 (May 21, 2004).

the Democratic State Attorney General Reilly interpreted the law to ban the marriages of gay couples who did not intend to reside in the State. Several towns and cities in the State such as Somerville, Provincetown, Springfield, and Worcester initially attempted to defy the Governor's instructions to refuse to issue marriage licenses to out-of-state couples, but eventually they acceded to the orders from the Governor and the state Attorney General to stop issuing such licenses. The orders were preceded by demands from the Governor that the towns submit copies of the marriage licenses from out of state couples to his office, and he forwarded those applications to the state Attorney General.¹⁴⁶ Several elected local district attorneys said that they would not prosecute town clerks who issued marriage licenses to out-of-state couples, and they questioned the Governor's interpretation of the previously unenforced law.¹⁴⁷ The Republican Governor, however, then refused to allow state officials to record officially the marriage applications from out-of-state couples who did not say that they intended to reside in Massachusetts, and the State Attorney General eventually ordered towns to stop accepting marriage license applications from out-of-state couples.¹⁴⁸

Two separate lawsuits challenged the constitutionality of the enforcement of the 1913 law, one filed by twelve Massachusetts cities and towns which argued in part that the town clerks should not be forced to be the "marriage police," and a second suit filed by a variety of same-sex couples who attempted to marry in Massachusetts and were turned away or who were actually married but their marriages were later invalidated by the State.¹⁴⁹ Both lawsuits argued that the 1913 law was unconstitutionally discriminatory, given the Supreme Judicial Court's decision allowing same-sex marriages as a matter of right under the state constitution. Some of the couples lived in states such as Maine or New Hampshire with so-called Defense of Marriage Acts that outlaw same-sex marriage, while other couples lived in states where the validity of same-sex marriages performed in Massachusetts was less clear.¹⁵⁰ A state trial judge refused to block enforcement of the controversial state law because the State started applying it to both gay and straight marriages, although the judge did state

146. Pam Belluck, *Governor Seeks to Invalidate Some Same-Sex Marriages*, N.Y. Times A16 (May 21, 2004).

147. Michael Levenson, *Two DA's say They Won't Charge Clerks who Defy 1913 Law*, Boston Globe A27 (May 16, 2004).

148. Pam Belluck, *Suits to Fight Ban on Some Gay Marriages*, N.Y. Times A21 (June 17, 2004).

149. Yvonne Abraham & Elise Castelli, *Couples Launch Gay Union Lawsuit*, Boston Globe B1 (June 18, 2004).

150. Pam Belluck, *Eight Diverse Gay Couples Join to Fight Massachusetts*, N.Y. Times A18 (June 18, 2004).

that the law violated the spirit of the Supreme Judicial Court's decision.¹⁵¹ Supporters of same-sex marriage appealed that decision as part of their larger litigation strategy.¹⁵² The Supreme Judicial Court heard oral arguments in this case in October 2005,¹⁵³ and on March 30, 2006 ruled that the 1913 law was not unconstitutional, using a rational basis test.¹⁵⁴

In response to a demand from the Governor of Massachusetts asking whether same-sex marriages performed in Massachusetts would be valid in their states, the attorney generals of New York, Rhode Island, and Connecticut responded that the issue was not settled in their states; this opened the door for additional lawsuits to clarify the situation in those states without a Defense of Marriage Act or a state constitutional prohibition on same-sex marriage.¹⁵⁵ In the Massachusetts legislature, during deliberations on the annual budget bill in May 2004, the state Senate overwhelmingly voted to repeal the 1913 law.¹⁵⁶ Five Senate Republicans even voted to repeal the law, and some legislators interpreted the overwhelming repeal vote as a clear rebuke to the Governor.¹⁵⁷ However, the final compromise version of the budget bill omitted the repeal language.¹⁵⁸ Given the Court's decision upholding the constitutionality of the 1913 law, opponents of the measure are again calling for the legislature to repeal the statute.¹⁵⁹

After same-sex marriages became legal in Massachusetts on May 17, 2004, over 2,500 gay couples sought marriage licenses in the first week alone following that date.¹⁶⁰ As of November 2004, over 4,200 same-sex couples had been married in Massachusetts.¹⁶¹ Most public opinion polls showed opposition to same-sex marriage dropping in the State after the marriages became legal.¹⁶² In the November 2004 legislative elections, supporters of same-sex marriage actually gained seats in the state legisla-

151. Scott S. Greenberger, *Ruling Backs Law Restricting Marriage*, Boston Globe B1 (Aug. 19, 2004).

152. Yvonne Abraham, *Activists Seek Wider Gay-Marriage Rights, Sticking to Goals Despite Impact on US Election*, Boston Globe A14 (Nov. 18, 2004).

153. See Jonathan Saltzman, *SJC Hears Challenge to Marriage Law*, Boston Globe B1 (Oct. 7, 2005).

154. *Cote-Whitacre*, 844 N.E.2d at 644.

155. See Raphael Lewis & Stephanie Ebbert, *R.I., Conn. May Grant Recognition*, Boston Globe A1 (May 18, 2004). Connecticut's legislature then enacted same-sex civil union legislation. See William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. Times B5 (Apr. 21, 2005).

156. Abraham, *supra* n. 132.

157. Raphael Lewis & Yvonne Abraham, *Senate Votes to End 1913 Law*, Boston Globe A1 (May 20, 2004).

158. Yvonne Abraham, *Two Lawsuits to Challenge 1913 Law*, Boston Globe B5 (June 17, 2004).

159. See e.g. *Editorial: Marriage Rites and Wrongs*, Boston Globe A10 (Apr. 1, 2006); Eileen McNamara, *Justice Rests Not on Hope*, Boston Globe B1 (Apr. 2, 2006).

160. Christine MacDonald & Bill Dedman, *About 2,500 Gay Couples Sought Licenses in 1st Week*, Boston Globe A1 (June 17, 2004).

161. Abraham, *supra* n. 144.

162. Phillips, *supra* n. 127.

ture.¹⁶³ Supporters of same-sex marriage were also bolstered with the resignation of the anti-gay rights Speaker Finneran in September 2004 and his replacement by liberal Democrat Speaker Salvatore DiMasi, a supporter of same-sex marriage.¹⁶⁴ Supporters of same-sex marriage also wondered whether Senate President Robert Travaglini, a supporter of the compromise constitutional amendment outlawing same-sex marriage but allowing civil unions, had changed his position on the issue when he delivered a strongly supportive toast at the same-sex wedding of state Senator Jarrett T. Barrios after the November 2004 legislative elections.¹⁶⁵

The September 2005 defeat of the constitutional amendment to reverse the Court's decision revealed that opponents of same-sex marriage will have a very difficult time in Massachusetts. Between the March 2004 vote and the September 2005 vote, fifty-five of the lawmakers (over twenty-five percent of the legislators) switched their votes on the amendment, leaving the proposed amendment with only thirty-nine supporters in the legislature.¹⁶⁶ After the defeat of the anti same-sex marriage constitutional amendment in the legislature in 2005, opponents of same-sex marriage then turned to getting an initiative drive to get a constitutional amendment proposal before the voters, but such a proposal could appear on the ballot no earlier than November 2008.¹⁶⁷ A proposed constitutional amendment proposed by initiative requires only fifty votes in two successive sessions of the legislature. Two key proponents of reversing the Court's decision on same-sex marriage have either changed their views or have left the legislature. In November 2005, state Representative Eugene L. O'Flaherty announced that he would no longer support a constitutional amendment to prohibit same-sex marriage.¹⁶⁸ State Representative Philip Travis, whom the Boston Globe declared to be "the preeminent gay marriage opponent in the Legislature," announced that he was not seeking reelection in 2006.¹⁶⁹

C. Judicial Elections

The conflicts between the legislature and the courts have manifested themselves in other ways as well. In part as a reaction to the Supreme Judicial Court's ruling in the same-sex marriage case, and in part because the

163. Raphael Lewis, *Same-Sex Marriage Ban Loses Ground*, Boston Globe B1 (Nov. 5, 2004).

164. Frank Phillips, *Foes of Gay Marriage See Blow to Amendment Hopes*, Boston Globe A1 (Sept. 28, 2004).

165. Abraham, *supra* n. 144.

166. Lewis, *supra* n. 111.

167. See e.g. Ebbert, *supra* n. 113; Lewis, *supra* n. 111.

168. Stephanie Ebbert, *Lawmaker Shifts Gay Marriage Stance*, Boston Globe B3 (Nov. 11, 2005).

169. Scott Helman, *Gay Marriage Opponent Decides He Won't Seek Another Term*, Boston Globe B6 (Nov. 17, 2005).

state courts were perceived to be too lenient on criminal sentencing matters, Republican Senator Michael Knapik authored a proposed constitutional amendment in 2003 that would have changed the judicial selection system in the State to provide for the direct partisan election of all state judges for six-year terms. Senator Knapik argued that his proposed amendment was necessary because:

This amendment would allow for the periodic reaffirmation of judges. . . . A judge's name would go before voters every six years in their jurisdiction. Their record would be made available. It was designed to create a greater degree of accountability. We all have to face voters every two years and defend our records. We too often cannot ask judges how they come to their conclusions. In some situations it just defies logic.

The constitutional convention considered the proposed amendment on March 30, 2004. However, on the motion of Democratic Senator Robert Creedon, then chair of the Joint Committee on the Judiciary, the proposed amendment was modified to delete the language providing for the election of judges and instead to allow for legislative confirmation of judicial appointments. The constitutional amendment, as modified, was then forwarded to the Judiciary Committee for further study.¹⁷⁰

It is unclear whether this amendment will ever be considered again in the future. Both Governor Romney and Chief Justice Margaret Marshall of the Supreme Judicial Court have both publicly stated that they strongly oppose the election of judges in the State.¹⁷¹ However, Lieutenant Governor Kerry Healey, who is running for Governor in 2006, has called for a constitutional amendment to limit state judges to seven year renewable terms.¹⁷²

IV. OBSERVATIONS DERIVED FROM THE MASSACHUSETTS CASE STUDY

The issues of campaign finance reform and same-sex marriage clearly illustrate the different institutional perspectives and institutional wills of the Court and the legislature in Massachusetts. Until 2002, it appeared that the Court did not have the will to challenge the legislature directly. It had avoided clear conflicts with the legislative branch for decades. After 2002,

170. See *supra* n. 48.

171. Raphael Lewis & Jonathan Saltzman, *SJC Chief Justice Counters "Judicial Activism" Charge*, Boston Globe A1 (Oct. 20, 2004).

172. See Edward P. Leibersperger, *Protecting Judicial Independence*, Boston Globe A13 (Apr. 4, 2006).

however, the Court's institutional will obviously changed, in part because the political environment and other contextual factors had changed. The majority of the justices on the Court then saw their role as doing justice by interpreting and applying the state constitution regardless of how the legislature and its powerful Speaker felt about the issue. The Court and the rest of the state court system went from being perceived as being subservient to the legislature to asserting their independence and their own views on several critical policy issues. One must assume that the justices of the Court were acting strategically and asserting their institutional will when they handed down this series of constitutional decisions that resulted in their dramatically changed relationship with the state legislature.

Chief Justice Margaret H. Marshall, the author of the Court opinions on same-sex marriage, remained unapologetic about the court's actions. In a highly publicized speech to the Greater Boston Chamber of Commerce delivered just before the November 2004 elections, Chief Justice Marshall refuted what she called "attack politics" that sometimes ensnare judges and endangers an independent judiciary. When asked to defend her colleagues, the Chief Justice stated, "I don't think they are activist judges. I think they are judges doing their constitutional duty."¹⁷³ The Chief Justice continued:

Judges do become the focus of attack politics. It has been so since our country's founding and is certainly evident in the heated political climate today. . . . It would be foolish, in my judgment, to heed the voices of those who would curtail a judge's independence. . . . It would be foolish to tinker with the [John] Adams model of constitutional government that has served us so well for more than two centuries.¹⁷⁴

The Chief Justice concluded by telling the business leaders present that, "an independent judiciary, sustained by public trust and commitment, is good for business."¹⁷⁵ Some scholars such as Cass Sunstein assumed at the time that Chief Justice Marshall's comments were a thinly veiled criticism of conservative efforts in Congress to prevent federal judges from declaring the so-called federal Defense of Marriage Act to be unconstitutional.¹⁷⁶ Chief Justice Marshall has also expressed her concern that judicial salaries in the State are too low, and that the legislature seems to be delaying any pay raises for judges perhaps because of its concern over a variety of Su-

173. Lewis & Saltzman, *supra* n. 171. John Adams was the author of the Massachusetts constitution.

174. *Id.*

175. *See id.*

176. *See id.*

preme Judicial Court decisions.¹⁷⁷ But clearly the Chief Justice was asserting her institution's perspective that an independent judiciary will not always hand down the decisions that elected politicians prefer. The Chief Justice was clearly implying that the Court would continue asserting its own institutional will against whatever forces would seek to challenge that will.¹⁷⁸

Thus the relationship between the Supreme Judicial Court and the legislature in Massachusetts over the last few years has generally been tense and conflictual. Although the legislature has refused to grant salary increases to judges for several years and it has used its appropriations power to control patronage hiring in individual courthouses,¹⁷⁹ the state legislature has nevertheless refused to take more drastic measures to attack the courts as institutions such as changing the selection system for state judges or impeaching judges for their views.¹⁸⁰ To date, the legislature has also failed to pass constitutional amendments to overturn the highly controversial Court decisions discussed in this article.

Why has the Supreme Judicial Court been protected from the harshest of the possible attacks from the state legislature? One explanation is that the judicial branch is protected by a notion of reverence for the courts among the voters and therefore among their elected officials. This reverence for the courts explanation was quite popular among academics in the 1960's, and Murphy and Pritchett in 1961 framed the argument in this way, "courts are protected by their magic; only rarely can a hand be laid on a

177. Jonathan Saltzman, *Marshall Urges Legislators to Approve Judicial Pay Hikes*, Boston Globe B1 (Mar. 26, 2006). Judges in Massachusetts had not received a salary increase since 1999.

178. In addition to the same-sex marriage issue, the Supreme Judicial Court also caused controversy in April 2004 when it ruled that a change in the state capital gains tax was unconstitutional because the effective date was May 1, 2002, instead of the constitutionally required effective date of January 1. *Peterson v. Commr. of Revenue*, 806 N.E.2d 78, 86 (Mass. 2004).

The ruling seemed to have required the state legislature to refund over \$275 million to investors or to have required the investors to pay around \$102 million in back taxes depending on whether the tax change would become effective on January 1, 2002 or on January 1, 2003. Neither option was acceptable to the legislature or to the Governor. The legislature then chose a third option, making the effective date of the tax January 1, 2002, but then giving taxpayers a tax amnesty for the first four months of the tax. Using that solution, no taxpayers would receive refunds or be required to pay additional taxes because of the Supreme Judicial Court ruling. But the Court decision did create a great deal of initial uncertainty in the legislature, and led to further criticisms of the Court. See Scott S. Greenberger, *Romney Backs Up House on Gains Tax*, Boston Globe B4 (Apr. 30, 2004).

179. *Supra* n. 177.

180. In neighboring states, state supreme court judges have come under attack for their decisions. In New Hampshire, Chief Justice David Brock was impeached (although eventually not removed from office) in part because of his views in a school funding controversy. See Langer, *supra* n. 8, at 38-39; see also Michele DeMary, *Legislative-Judicial Relations on Contested Issues: Taxes and Same-Sex Marriage*, 89 *Judicature* 202 (2006).

In 1994, the Chief Justice of the Rhode Island Supreme Court resigned from office rather than face impeachment in part because of his decisions from the bench. See Langer, *supra* n. 8, at 38-39.

judge without a public outcry of sacrilege.”¹⁸¹ In the late 1960’s, Stuart Nagel argued that milder attacks on specific court decisions were very different and more common than full scale attacks on the courts.¹⁸² Harry Stumpf also agreed with the reverence for the courts argument when he wrote, “The prestige or sacrosanctity argument in Congress is used and used with some effectiveness in protecting the judiciary against anti-Court legislative reaction.”¹⁸³ By the 1970’s, many scholars were questioning the validity of the reverence for the courts hypothesis.¹⁸⁴ Given the different institutional perspectives and institutional wills among the legislature and Supreme Judicial Court in Massachusetts, it does not seem that the courts are protected by their “magic” in the Commonwealth.

There are also some other interesting arguments for why the Massachusetts legislature did not make serious and substantial attacks on the courts as an institution in the recent period where the relationship between the two institutions of government was tense at best. One argument is that because there are so many lawyers serving in the Massachusetts legislature the courts are protected from the most egregious legislative attacks. Lawyer-legislators have more respect for the courts than do their non-lawyer colleagues, and thus would move to prevent frontal attacks on the judiciary.¹⁸⁵ A different argument regards the interplay between the state judicial selection method and the policymaking role of the courts. Laura Langer and Teena Wilhelm argue that retaliation by the state legislature against the courts varies by the type of judicial selection system used in the state. These scholars based their findings on extensive interviews with state Supreme Court justices and with legislators in a variety of states using the entire range of state judicial selection methods. Langer and Wilhelm found that states with executive appointment of judges (like Massachusetts) and states with life tenure for their state judges (like Massachusetts) have some of the lowest levels of direct institutional attacks and retaliation against the courts.¹⁸⁶

Another explanation is that even when activist courts are striking down legislation, they are not really acting in a counter-majoritarian fashion.

181. Walter F. Murphy & C. Herman Pritchett, *Courts, Judges, and Politics: An Introduction to the Judicial Process* 554-55 (Random H. 1961).

182. Stuart S. Nagel, *The Legal Process from a Behavioral Perspective* 277 (Dorsey Press 1969).

183. Harry F. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. Pub. L. 377, 394 (1965).

184. See e.g. Schmidhauser, *supra* n. 57.

185. See Mark C. Miller, *The High Priests of American Politics: The Role of Lawyers in American Political Institutions* (U. Tenn. Press 1995); see also Glendon A. Schubert, *Constitutional Politics: The Political Behavior of Supreme Court Justices and the Constitutional Policies They Make* (Hold, Rinehard, & Winston 1960).

186. Laura Langer & Teena Wilhelm, *State Supreme Courts as Policymakers: Are They Loved?* in *Rethinking U.S. Judicial Politics* (Mark C. Miller ed., Roxbury Press forthcoming 2007).

Neal Devins argues that even when declaring legislation to be unconstitutional, the United States Supreme Court and by analogy state supreme courts take their cues “from elected officials, the public, or elites (academics, journalists, and other opinion leaders).”¹⁸⁷ In other words, even activist courts may be following the majority will, or at least following elite opinion on the issue. Thus when the Court handed down its decisions on campaign finance reform, it was merely reflecting the views of the vast majority of the voters who had approved the State’s campaign finance reform program. Likewise, when the Court declared that there was a right to same-sex marriage under the state constitution, it seems to have been reflecting majority will in the State. Since the supporters of same-sex marriage gained seats in the legislature in the election following the court’s decision, and since some of the staunchest legislative opponents of same-sex marriage have either changed their positions or retired from the legislature in dismay, there seems to be a great deal of support for this argument. Changes in the leadership of the legislature may have also contributed to the fact that the legislature did not have the institutional will to overturn the Court’s same-sex marriage decisions or the desire to punish the court for those decisions. Whether the Court was leading or following public opinion or even elite opinion in the state on the same-sex marriage issue is an open question, but it seems that the court was not offering a classic counter-majoritarian attack on the legislature in the controversy. Now the Court seems right in tune with both public opinion and elite opinion in the State on the question.

In his recent book on the relationship between the federal courts and Congress,¹⁸⁸ Charles Gardner Geyh offers a different explanation for the fact that the federal legislature has not to date enacted direct institutional attacks on the judiciary such as impeaching federal judges for their unpopular decisions. After dismissing arguments that the courts are protected from attack due to the constitutional notion of separation of powers or because of legislative neglect or indifference, Geyh posits that the courts are protected instead by a notion of “customary independence.” This concept seems equally applicable to the state supreme courts. He defines this concept as:

[T]he emergence and entrenchment of customs, conventions, or norms that have guided Congress in its regulation of the federal judiciary. These customs, conventions, or norms have created for

187. Neal Devins, *Is Judicial Policymaking Countermajoritarian?* in *Making Policy*, *supra* n. 10, at 189.

188. Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of American’s Judicial System* (U. Mich. Press 2006).

the judiciary a zone of autonomy that Congress respects in the exercise of its constitutional powers over courts and judges.¹⁸⁹

Geyh continues with his explanation, “Over the course of our history, Congress has slowly come to accept the role of an independent judiciary in American government. In that time, it experimented with a variety of means to control court decision making, eventually jettisoning them an antithetical to judicial independence.”¹⁹⁰ He concludes that this notion of “customary independence” has created a “dynamic equilibrium” in the relationship between the legislative and judicial branches.¹⁹¹ Because of this “dynamic equilibrium” which favors the “customary independence” of the courts, the legislature has refrained from enacting serious attacks on the courts. Thus President Roosevelt’s infamous Court-Packing Plan failed in Congress,¹⁹² and no judge has been impeached at the federal level for their judicial views since Justice Samuel Chase of the United States Supreme Court in 1803.¹⁹³ Geyh warns, however, that customary independence might not protect the courts forever. He concludes, “It would be a mistake to assume that independence norms have been so deeply entrenched as to render either these episodic challenges inconsequential or the vigilant defense of those norms unnecessary to their preservation.”¹⁹⁴

V. CONCLUSION

It is inevitable that at times a state’s highest court will clash with the state legislature. The two institutions clearly have different institutional cultures, institutional perspectives, and institutional wills. The decision by state supreme courts to assert their institutional wills appears to be a strategic one, based in part on the political environment and other contextual variables.¹⁹⁵ In some states these institutional clashes will be more common than in others, and during some periods of time these conflicts will be more intense. But neither the courts nor legislatures operate in a vacuum. These institutions must interact in a variety of ways over a variety of issues. Therefore, both courts and legislatures must attempt to understand

189. *Id.* at 11.

190. *Id.*

191. *Id.* at 253-61.

192. See David M. O’Brien, *Storm Center: The Supreme Court in American Politics* 337-38 (W.W. Norton 2003).

193. See William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (Quill 1992).

194. Geyh, *supra* n. 188, at 260.

195. See *e.g.* Langer, *supra* n. 8.

better the institutional perspectives of the other organization.¹⁹⁶ In short, both institutions need greater communication with and greater respect for the other body. In reality, in the United States our system of government requires us to abandon an archaic concept of separation of powers in favor of a notion of governance as dialogue among institutions with potentially conflictual institutional wills. This case study of the interactions between the courts and legislature in Massachusetts nicely illustrates the point that studying the interactions between and among institutions can help us understand the decision-making process better than examining either institution in isolation.

196. *The Courts, the Legislature, and the Executive – Separate and Equal? Issues at the State Level*, 87 *Judicature* 230 (2004).