How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative Action, and Judicial Power

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I. INTRODUCTION

In Massachusetts, the much anticipated backlash against the judicial introduction of same-sex marriage failed to materialize. In fact, legislative supporters of same-sex marriage in aggregate gained ground on opponents, and the attempt to amend the Constitution to ban same-sex marriage failed in the Legislature. Even many previously staunch legislative opponents have ceased to support constitutionally banning same-sex marriage. And yet prior to *The Opinions of the Justices to the Senate*,T[1] there was significant and vocal opposition to gay marriage.

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1. 802 N.E.2d 565 (Mass. 2004). For example, the initial amendment's co-sponsor, Senator Brian Lees, acknowledged after the defeat in the Legislature that the amendment was no longer an appropriate measure. Nevertheless, following a petition, the Legislature will consider a new amendment; however, in a defeat for the petitioners, it will not do so until immediately after the 2006 election in November. *Same-Sex Marriage Win in Boston*, CBS NEWS, Sept. 14, 2005.

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That opposition was particularly strong with respect to gay marriage being judicially imposed. Why then have we not seen the revolt that was so widely predicted?

This article provides an explanation for how the Massachusetts Supreme Judicial Court managed to initiate same-sex marriage without provoking civil strife. It proposes a dynamic model of judicial and legislative behavior, whereby both institutions respond to and simultaneously influence public opinion. Legislatures and courts are both constrained to act within the bounds of public acceptance, and yet each institution simultaneously shapes public acceptability. In this way, the judiciary and the Legislature are also able to influence one another's actions. The positive political theory developed here illustrates how the Massachusetts Supreme Judicial Court managed public opinion and legislative expectations, and thus enabled gay marriage to be established without a public backlash.

When it considered the possibility of introducing same-sex marriage, the Massachusetts Supreme Judicial Court faced seemingly insurmountable public opposition. So the court used remedial delay, allowing the Legislature an opportunity to act. This did not simply buy the court time; rather it mimicked the actions of the Vermont Supreme Court, and thus raised expectations that civil unions could constitute an acceptable legislative compromise. By raising the specter of same-sex marriage as the default outcome if the Legislature failed to act, the Massachusetts court thus raised the costs of inaction for the Legislature, and prompted a civil unions bill. This "action" in turn changed public opinion; having two institutions of government supporting some form of recognition of the rights of same-sex couples dampened public opposition and lowered the costs for the court to introduce same-sex marriage itself. This article presents a positive political theory (PPT) of this process.

II. THE LACK OF BACKLASH

In Massachusetts, supporters of same-sex marriage have won the day. All State Legislators who supported same-sex marriage retained their seats in 2004, many with increased margins; whereas three legislators opposing it lost their seats. Six of the eight open seats were won by those supporting same-sex marriage, and the state gained a new, pro-gay marriage Speaker.[2] In the 2005 session, the proposed state constitutional

2. *See* Michael Kunzelman, *Support Still: Election Favors Rights Backers*, MILFORD DAILY NEWS, Nov. 7, 2004, http://milforddailynews.com (search field and follow hyperlink); Mary Bonauto & Marty Rouse, Op-Ed., *Gay Marriage Is Not to*

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amendment was "soundly" defeated by a vote of 157 to 39, "a sign that the legalization of same-sex marriage has changed the political landscape in Massachusetts."[3] Once instituted, same-sex marriage seemed to gain broad public acceptability: Massachusetts legislators reported hearing far less opposition from their constituents once same-sex marriages actually got underway.[4]

Nevertheless, after the 2004 election, the almost uniform analysis was that the *Goodridge*[5] case was the catalyst for a national backlash against same-sex marriage, manifested in state constitutional bans and George W. Bush's reelection on the basis of "moral values," which was taken to refer largely to same-sex marriage. The national backlash concept had three elements: that moral values determined the election,[6] that all states considering constitutional amendments banning same-sex marriage passed them,[7] and that moral values and the state amendments drew conservative voters to the polls.[8] All three of these claims are flawed,[9]

Blame, BOSTON GLOBE, Nov. 9, 2004, http://www.glad.org/marriage/Mary_and_Marty_Op-Ed.html.

3. Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A14.

4. Yvonne Abraham, *Activists Seek Wider Gay-Marriage Rights; Sticking to Goals Despite Impact on US Election*, BOSTON GLOBE, Nov. 18, 2004, at A14, *available at* 2004 WL 99991350; Kunzelman, *supra* note 2.

5. Goodridge v. Dep't of Public Health, 798 N.E. 2d 941, 957 (Mass. 2003).

6. *See, e.g.*, Boston Herald Editorial, *Goodridge Legacy: National Backlash*, BOSTON HERALD, Nov. 18, 2004; Elise Castelli & Emma Stickgold, *Gay-Marriage Backers, Opponents Vow Fights*, BOSTON GLOBE, Nov. 19, 2004, http://boston.com (search field and follow hyperlink); Mickey Wheatley, *For the Moment, Concentrate on Being Civil; We Gays Miscalculated on Marriage. Now We Must Work for Legal Unions*, L.A. TIMES, Nov. 10, 2004, at B11.

7. A typical example is Joan Vennochi, Op-Ed., *Was Gay Marriage Kerry's Undoing?*, BOSTON GLOBE, Nov. 4, 2004, at A15, LEXISNEXIS. She stated that Massachusetts "activist judges inspired ballot questions seeking to prevent the same type of judicial activism elsewhere. On Election Day, voters in 11 states approved constitutional amendments banning same-sex marriages. It was a clean sweep for proponents of traditional marriage."

8. *See, e.g.*, James Dao, *Same-Sex Marriage Issue Key to Some GOP Races*, N.Y. TIMES, Nov. 4, 2004, at P4; Michael Tackett, *Moral Issues Swayed Voters; Worries about Iraq, Economy Overshadowed*, CHI. TRIB., Nov. 3, 2004, http://www.chicagotribune.com (search field and follow hyperlink).

9. This is not to deny that certain states have reacted harshly against the recognition of the rights of gay couples. For instance, Virginia had a proposal to impeach judges who ruled in favor of same-sex marriage. H.D. 727, 2004 Gen. Assembl., 2004 Sess. (Va. 2004). Texas is soon to consider a constitutional amendment

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and the widespread myth of the broader effect of *Goodridge* is finally being debunked.[10]

First, the "moral values" explanation for the election was a result of badly worded polling, which was as reliable as exit poll results showing a Kerry landslide;[11] when framed neutrally, with voters asked open-ended questions, moral values consistently ranked in the single digits[12] and was the lowest determinant of vote outcomes, after the economy and national security.[13] Second, although all 13 states considering constitutional amendments banning same-sex marriage in 2004 were successful, there is a considerable selection bias at play: 12 of the 13 amending states already had both laws banning same-sex marriage and state Defense of Marriage Acts, which prevented recognition of out of state same-sex marriages. The amending states were not representative of the nation,[14] and their actions were ultimately mostly expressive

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that state and local governments "may not create or recognize any legal status identical or similar to marriage." The question is whether such actions constitute a national backlash.

10. *See* Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW AND SEXUALITY 11 (2006).

11. Twenty-two percent of polled voters reported that they based their decision on moral values, but this resulted from a poll in which the vague 'moral values' category stood in sharp contrast to the six other specific options that were available for voters to explain their choice. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, VOTERS LIKE THE CAMPAIGN 2004, BUT TOO MUCH 'MUD SLINGING' (2004). For instance, Iraq and terrorism were listed separately. *See also* Gary Langer, Op-Ed., *A Question of Values,* N.Y. TIMES, Nov. 6, 2004, at A19; Peter Steinfels, *Voters Say Values Matter, But It's Important to Find out What Really Is Behind This Convenient Catchall,* N.Y. TIMES, Nov. 6, 2004, at A15.

12. One Pew study directly tested the effect of prompting: it found 27% of voters chose moral values from a list of seven items as most important, but only 9% volunteered it in an open-ended question. "Specific social issues—including abortion, gay marriage and stem cell research—were volunteered by 3%." Tim Rutten, *Sudden Focus on 'Moral Values',* L.A. TIMES, Nov. 13, 2004, at E1 (quoting Andrew Konut, Director, Pew Center). An October survey found only 1% of respondents independently mentioned moral values. Jim Rutenberg & David D. Kirkpatrick, *Poll Question Stirs Debate on Meaning of 'Values'*, N.Y. TIMES, Nov. 6, 2004, at 13 (quoting Humphrey Taylor, Chairman of the Harris Poll).

13. When compared with other equally broad categories, moral values came in last. *See, e.g.*, CBS NEWS, POLL: AMERICA'S CULTURAL DIVIDE (2004), http://www.cbsnews.com/stories/2004/11/22/opinion/polls/main657068.shtml.

14. New Mexico, Wisconsin, New York, and Rhode Island have all maintained non-gender specific definitions of marriage; Rhode Island and Washington have stated their intent to recognize out of state same-sex marriages; California, Connecticut, Washington, D.C., Hawaii, Maine and New Jersey have joined Vermont in offering some of the benefits of marriage to same-sex couples; and California is the first state to pass same-sex marriage legislation, although this was vetoed by the Governor.

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protests, reiterating pre-existing laws. Third, the claim that moral values and the state constitutional amendments drew conservative voters to the polls in far greater numbers than would otherwise have occurred was not borne out in the nation generally—Evangelicals "made up the same share of the electorate as they did in 2000."[15] Nor was the turnout claim even true in the states with same-sex marriage bans on the ballot.[16]

Better evidence of popular views lies in the fact that the federal constitutional amendment has failed to get out of Congress, and that a majority of the public disapprove of the proposed amendment.[17] Also, even after the 2004 election, and all of the misinformation following it, a majority of voters support some recognition of same-sex relationships: 21% support same-sex marriage, an additional 32% support civil unions; only 43% oppose both.[18]

Nevertheless, prior to the imposition of same-sex marriage in Massachusetts, there was significant opposition to gay marriage, both in Massachusetts[19] and the nation generally.[20] The salience of the same-sex marriage issue is subject to dispute, both in relation to the election, as discussed, and more generally.[21] But what was clear is that public

15. Pew results showed that "there was no disproportionate surge in the evangelical vote this year." David Brooks, Op-Ed. *The Values-Vote Myth,* N.Y. TIMES, Nov. 6, 2004, at A19 (quoting Andrew Kohut, Director, Pew Center).

16. Bush did not gain significantly in any of the 11 states with same-sex marriage bans on the ballot, and not only did Kerry win two of the key battleground states with constitutional amendments on the ballot (Oregon, Michigan), he increased on Gore's margin in 2000. Pam Belluck, *Maybe Same-Sex Marriage Didn't Make the Difference,* N.Y. TIMES, Nov. 7, 2004, at WK5; Ellen Goodman, *Must Gay Rights Wait for Our 'Comfort'?*, BOSTON GLOBE, Dec. 16, 2004, http://boston.com (search field and follow hyperlink).

17. *See* Adam Nagourney, *Americans Show Clear Concerns on Bush Agenda*, N.Y. TIMES, Nov. 23, 2004, at A1.

18. THE GALLUP ORGANIZATION, HOMOSEXUAL RELATIONS, Nov. 19-21, 2004, http://institution.gallup.com/content/Default.asptici=1651 (search field and follow hyperlink).

19. *See* Rick Klein, *Marriage Measure A Shaky Solution*, BOSTON GLOBE, Mar. 14, 2004, http://boston.com (search field and follow hyperlink) (reporting 53% opposition to gay marriage in Massachusetts).

20. Discussed in detail in Part III. See below text accompanying note 50.

21. The two major polling services, Gallup and Pew, came to contrary conclusions on the basis of their different approaches in their February 2004 polls. Gallup argued that "every indicator in our polling over the years suggests that in the broadest sense, gay and lesbian issues are not highly salient to voters." This was supported by a poll that listed 14 issues that respondents could rate in importance in influencing their vote for president, of which same-sex marriage came in last at 44%. Frank Newport, *Americans Evenly Divided On Constitutional Marriage Amendment: Majority Oppose Same-Sex*

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opposition to same-sex marriage was particularly strong with respect to the possibility of gay marriage being judicially introduced.[22] What changed? The claim of this article is that in deciding Massachusetts' two same-sex marriage cases, the judges of the Massachusetts Supreme Judicial Court carefully managed public and legislative expectations.

Instead of judicially imposing same-sex marriage in the first case, *Goodridge*, the court recognized the right to same-sex marriage, but demurred from providing a remedy, giving the State Legislature a chance to act. This created the appearance of judicial self restraint, thus minimizing public opposition to the judicial holding. Simultaneously, by mimicking the Vermont Court's approach to same-sex marriage, the Massachusetts Court's use of remedial delay created an impression of the possible constitutionality of a legislative alternative to same-sex marriage: a middle ground between judicial recognition of full marriage equality rights and outright opposition to any recognition of those rights. This possibility created an incentive for the State Legislature to propose a bill establishing civil unions, which provides most of the rights of opposite-sex couples; this action in turn shaped public acceptance of gay couples exercising those rights.

Part IV provides an expansion and formalization of this explanation for how same-sex marriage was introduced in Massachusetts without a public backlash. But first, it is necessary to briefly establish that public opinion is highly variable, and although public opinion acts as a constraint on legislative and judicial behavior, it is also highly influenced by the actions of those branches of government.

Marriage In Principle, GALLUP NEWS SERVICE, Feb. 11, 2004, http://institution.gallup.com (search field and follow hyperlink). In contrast, Pew concluded that "gay marriage has surpassed other major social issues like abortion and gun control in its influence on voters. Four-in-ten voters say they would not vote for a candidate who disagrees with them on gay marriage, even if they agree with the candidate on most other issues," although they considered the constitutional amendment rated as a low priority. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, CONSTITUTIONAL AMENDMENT RATES AS LOW PRIORITY; GAY MARRIAGE AND VOTING ISSUE, BUT MOSTLY FOR OPPONENTS, Feb. 7, 2004. However a different Gallup poll in relation to the proposed constitutional amendment, to define marriage between a man and a woman, arguably supports Pew's conclusion. It found that over 60% of both supporters and opponents of the proposed constitutional amendment would be either somewhat upset or very upset if the government failed to support their preferred outcome, and only 33-34% would be not too upset or not at all upset by that outcome. The Gallup Organization, *Gallup Poll Social Series: World Affairs* (2/9/2004-2/12/2004), http://institution.gallup.com (search field and follow hyperlink).

22. *See id.* (reporting that 71% of Massachusetts respondents in one poll said "they want voters to be able to define marriage, not the Courts or the Legislature").

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III. THE INTERACTION OF JUDICIAL BEHAVIOR, LEGISLATIVE BEHAVIOR, AND PUBLIC OPINION

Since *Marbury v. Madison*,[23] courts have anticipated and adjusted to the constraints posed by the elected branches and potential public opposition when making their most controversial decisions. Numerous studies have empirically established that courts shape their decisions and methods according to their perceived vulnerability to congressional override,[24] and take cues regarding public and political interest and acceptability of outcomes from the public[25] and organized interests.[26] But equally, courts influence public opinion, both by drawing attention to issues,[27] and by mobilizing interested groups,[28] which in turn affects the policy choices of elected representatives. Judicial and legislative pronouncements can both influence public opinion directly, and can also frame and define which options are considered relevant alternatives.

The direct impact on public opinion is illustrated by the June 2003 *Lawrence* decision,[29] which held anti-sodomy legislation was unconstitutional. *Lawrence* prompted a backlash in public opinion against homosexuality: the percentage of poll subjects who believed that "homosexuality should be considered an acceptable lifestyle" dropped significantly from 54% in May 2003 to 46% in July, after the decision.[30]

Judicial decisions may also frame issues in a way that affects public opinion. The effects of framing generally are well understood; the number and order of the presentation of alternatives affects the outcome

23. 5 U.S. (1 Cranch) 137 (1803).

24. *See, e.g.*, Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002).

25. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

26. *See, e.g.*, Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717 (1993).

27. *See, e.g.*, Roy B. Flemming, John Bohte & B. Dan Wood, *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-1992*, 41 AM. POL. SCI. 1224 (1997).

28. *See, e.g.*, MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

29. Lawrence v. Texas, 539 U.S. 558 (2003).

30. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, REPUBLICANS UNIFIED, DEMOCRATS SPLIT ON GAY MARRIAGE: RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY, Nov. 18, 2003, at 18. With a +/-3% error rate, this drop is statistically significant with a 95% confidence interval.

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of decisions.[31] This effect has been seen in relation to same-sex marriage in particular: public opposition to civil unions is greatly reduced if subjects are first questioned about their attitudes to same-sex marriage. Seemingly, by framing the potential outcome of civil unions with reference to what many consider a far worse result, same-sex marriage, a large percentage of the public becomes more amenable to allowing some rights for same-sex couples.[32]

Public opinion appears to be influenced not only by the individual actions of the branches of government, but also by their interactions. In particular, as Gerald Rosenberg showed, public acceptability of innovation is more likely when it results from joint or dual governmental action; broader coalitions of elites supporting an issue sends a message of both the acceptability and inevitability of the expansion of the right. As such, courts are far more effective in bringing about social change when they have the support of at least one other branch of government.[33]

Arguably, this explains the actions of the Vermont Supreme Court in its same-sex marriage case, *Baker v. State*.[34] In that case, the court recognized that the rights of same-sex couples to equal treatment under the law were being violated by their exclusion from the benefits and privileges associated with marriage, but the court refrained from providing a remedy to that violation. Instead, the court used "remedial delay" to allow the Vermont General Assembly an opportunity to craft a compromise remedy, under the threat that the court would impose same-sex marriage if the Legislature failed to act. By deferring to the Legislature and granting a less interventionist remedy than recognizing same-sex marriage rights, the Vermont court was protecting itself from public anger over "judicial imperialism." Simultaneously, the decision to remand the creation of a remedy to the Legislature protected the court by enlisting the support of the other branches of government: by placing the onus on the Legislature to act, the *Baker* court forced the Legislature to share the responsibility for both fashioning a remedy and protecting

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31. *See, e.g.*, SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES (1991); ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON ORGANIZATION OF EXPERIENCE (1986); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986).

32. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note *30*, at 16. *See also* David W. Moore & Joseph Carroll, *Support for Gay Marriage/Civil Unions Edges Upward: Public Remains Divided on Constitutional Amendment to Ban Gay Marriage*, GALLUP NEWS SERVICE, May 17, 2004, http://institution.gallup.com (search field and follow hyperlink).

33. *See* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

34. 744 A.2d 864 (Vt. 1999).

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gay rights.[35] This strategy was successful: the State Legislature implemented civil unions legislation,[36] and the court shared the controversy with both the State Legislature and then Governor Howard Dean.

When the issue of the constitutionality of denying same-sex couples the right to marry arose in Massachusetts, the court in the *Goodridge* case issued an order that was reminiscent of *Baker*. It recognized that exclusion from the right to marry bars individuals from the "full range of human experience and . . . full protection of the laws"[37] and "violates the basic premises of individual liberty and equality of the law protected by the Massachusetts Constitution."[38] Nevertheless, just as in *Baker*, the court refused to enforce its ruling immediately. The court stayed entry of its judgment, that the right to same-sex marriage exists, for 180 days in order "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."[39]

The similarity between the two courts' actions in Vermont and Massachusetts was highly significant. Although there had been prior judicial consideration of the issue of same-sex marriage,[40] *Baker* constituted the most politically salient indication of what could be expected of judicial responses to legislative actions. By mimicking the actions of the Vermont Supreme Court, the Massachusetts court raised expectations that civil unions could constitute an acceptable legislative compromise.

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35. Tonja Jacobi, *Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary's Role*, 26 VT. L. REV. 381 (2001).

36. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2004).

37. Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 957 (Mass. 2003).

38. *Id.* at 968.

39. *Id.* at 969-70.

40. In Hawaii and Alaska, state courts found the gender specification in their marriage statutes to be unconstitutional, then judicially remanded the cases for determination of further issues. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Baehr v. Miike, 910 P.2d 112 (Haw. 1996); Brause v. Bureau of Vital Statistics, No. 3 AN-95-6562 CI, 1998 WL 88743 (Ala. 1998), respectively. Meanwhile, each state passed constitutional amendments banning same-sex marriage. *See* HAW. CONST., art I, § 23 (amended 1998); ALA. CONST. art. I, § 25 (amended 1998). Also, subsequent to *Baker*, Arizona's one-man-one-woman marriage requirement was upheld. Standhardt v. Superior Court, 77 P.3d 451 (Ariz. 2003).

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In fact, the circumstances of the two cases were significantly different. Whereas the Vermont court found a right to the benefits and protections of marriage,[41] the Massachusetts court found that the prohibition of same-sex marriage was unconstitutional.[42] As such, remedial delay by the Vermont court allowed the State Legislature to craft an exactly calibrated remedy that provided those benefits, no more and no less. In contrast, the precise remedy that was required in Massachusetts, as became clear in the second same-sex marriage case, the *Opinions of the Justices to the Senate*, was same-sex marriage itself, which the court ultimately provided.[43]

But even if lawyers and legal academics can see differences between *Baker* and *Goodridge* in hindsight, and even then only after the *Opinions of the Justices to the Senate*, prior to legislative action and the resulting second case, they were perceived similarly. In particular, the two decisions were perceived by the public, the media and State Legislators to be meaningfully alike in what they signaled about judicial expectations of acceptable State Legislative responses to their holdings.[44]

As a result, the two cases prompted similar legislative responses. Following *Baker*, and under threat of the court acting by itself otherwise, the Vermont General Assembly passed, and the Governor signed, an Act establishing a legally binding civil unions relationship, under which most benefits and protections, as well as the responsibilities, of marriage could be undertaken by same-sex couples.[45] Because that satisfied the

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41. Baker v. State, 744 A.2d 864, 885 (Vt. 1999).

42. In *Goodridge*, the Massachusetts Court recognized a "personal interest of fundamental importance" in marriage itself. *Goodridge*, 798 N.E.2d at 941. Since *Goodridge* did not consider alternatives to marriage, it seemed possible that its finding may have been equivalent to *Baker's*, just differently expressed. However, the *Opinions of the Justices to the Senate* explained that the court in *Goodridge* had already ruled that forbidding same-sex marriages was unconstitutional. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004).

43. *See* Jacobi, *supra* note 10 (exploring these and other differences in greater detail).

44. A Lexis-Nexis search found 823 newspaper articles written in the almost three-month period between the first and second Massachusetts cases that referred to same-sex marriage in Vermont (this excludes articles that referred to "dean" within the same paragraph, to exclude articles on Governor Howard Dean's presidential campaign).

45. Some argue that it is not possible for all the benefits and protections of marriage to be provided by civil unions legislation; for example, interstate recognition of marriage does not currently apply to civil unions. *See* Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont Civil Union Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 137 (2000); Gerald V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB POL'Y 729, 730 (2000). However, even if same-sex marriages were allowed in one of the jurisdictions, this would also not ensure interstate recognition. *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005).

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Vermont court, remedial delay in *Goodridge* similarly encouraged the State Legislature to propose a civil unions compromise. Following *Goodridge*, the Massachusetts State Legislature wrote a bill prohibiting same-sex marriage but allowing civil unions, providing the "benefits, protections, rights and responsibilities" of marriage to same-sex couples.[46] This legislative proposal was undertaken explicitly in response to *Goodridge*.[47] The State Legislature apparently believed that in light of the *Goodridge* opinion, there was some possibility[48] that a civil unions bill would satisfy the court's requirement that discrimination against same-sex couples be ended.

In contrast to *Baker*, the Massachusetts' legislative proposal was ultimately ruled unconstitutional.[49] However, its proposal nevertheless advantaged the Massachusetts court by reframing the issue, altering public perceptions, and ultimately reducing the court's costs in providing the full right to same-sex marriage itself. The following section explains how.

IV. A THEORY OF JUDICIALLY CREATED ACCEPTANCE OF SAME-SEX MARRIAGE

This Part presents a positive political theory of how the Massachusetts court influenced legislative action and public opinion, and in doing so rendered same-sex marriage acceptable to the Massachusetts public.

Figure 1 shows public opinion between June 2003 and May 2004, as tested by the Gallup News Service polls.[50] This poll series is used because it is the most comprehensive—providing information on the three primary alternatives available: same-sex marriage (SSM), civil unions (CU), and a proposed constitutional amendment to ban same-sex marriage (Cn At). It is also the most consistent, asking a similar question in each of the polls taken over the two years examined. The questions asked were "do you think marriages between homosexuals should or should not be recognized by the law as valid?,"[51] "would you

46. MA Senate No. 2175, *An Act Relative to Civil Unions* (2003).

47. *Opinions of the Justices to the Senate*, 802 N.E.2d at 567-68.

48. There was, however, "grave doubt" as to the constitutionality of the bill, which led the Senate to request the opinion of the Justices on the constitutionality of the bill, which gave rise to the *Opinions of the Justices to the Senate*. *Id.* at 566-67.

49. *Id.* at 571-72.

50. Moore & Carroll, *supra* note 32.

51. Prior to March 2004, the question continued "with same rights as traditional marriages," but this appears to have been left off the May 2004 sample. *Id.*

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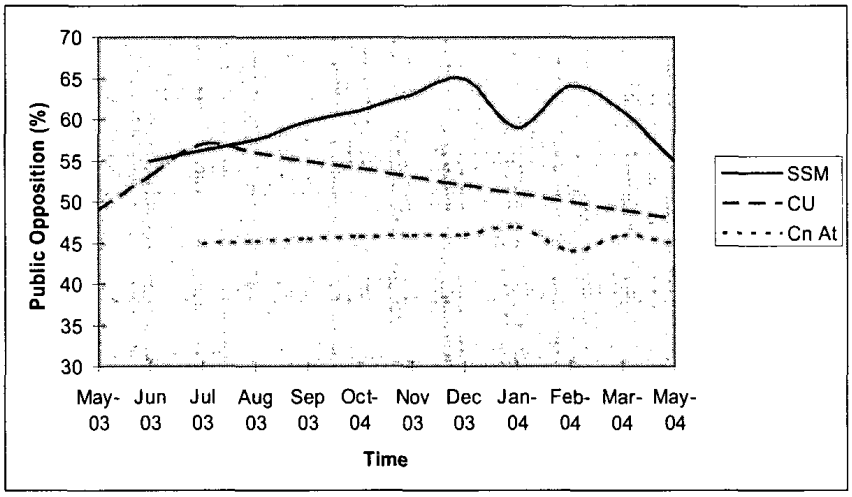
favor or oppose "a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples?" and "would you favor or oppose a constitutional amendment that would define marriage as being between a man and a woman, thus barring marriages between gay or lesbian couples?" The Gallup poll results track fairly closely to the results of the other major polling service on these issues, conducted by the Pew Research Center.[52]

Figure 1 maps the public's opposition to, rather than support for, those options, because courts are institutionally designed to be concerned with intense opposition, but non-elected judges have little institutional incentive to actively seek public support for their actions. However, public support for each of these options varies in a similar way.

FIGURE 1: PUBLIC OPPOSITION ASSOCIATED WITH SAME-SEX MARRIAGE OVER TIME



Data source: time-series Gallup polls, May 2003 to June 2004, aggregated in Moore and Carroll, *supra* note 33.

52. *See* PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 21. That series of polls found that in February 2004, support for same-sex marriage was 28%, opposition 65% (for regular voters; for the total population it was 30% and 63% respectively); in November 2003, the figures were 30% and 62% respectively, in October 2003, 32% and 59% respectively, and in mid-July 2003, the figures were 38% and 53%. There are other polls that are more sporadic, not asking the same or similar questions over time; these results are largely consistent with the results reported here. The author can be contacted for a comprehensive list.

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Figure 1 shows public opposition to same-sex marriage is variable, ranging from 55% in June 2003 to a peak of 65% in December 2003; subsequently, opposition dropped to 59% in February 2004, rose again later that month to 64%, before falling again to 55% in May. In contrast, opposition to civil unions and a constitutional amendment are both comparatively stable. Opposition to civil unions generally hovered around 50%, with one exceptional peak in July 2003 of 57%. Opposition to a constitutional amendment also centered around 50%, ranging in the year only 6 percentage points.

The most noteworthy changes in public opinion represented in Figure 1 are:

1. Prior to *Goodridge*, during a period of public anticipation of possible court action to introduce same-sex marriage, popular opposition to same-sex marriage increased from 55% in late June to 61% in late October.
2. Following *Goodridge*, public opposition to same-sex marriage peaked at 65% in mid-December.
3. With legislative action prompted by the *Goodridge* remedial stay, the second court decision did not cause an increase in opposition to same-sex marriage; in the days after the *Opinions of the Justices to the Senate*, same-sex marriage opposition was at 59%, significantly lower than in December.
4. Opposition to same-sex marriage increased again, to 64%, only later in the month.
5. In May, with same-sex marriages about to commence with apparent legislative acceptance, opposition to same-sex marriage fell again to 48%.

The third point is particularly remarkable: the *Opinions of the Justices to the Senate*, in which the Massachusetts court fully embraced the right to same-sex marriage, did not result in a public backlash. Given the 3% margin of error of the polls, we know with 95% confidence that there was not a significant increase in opposition to same-sex marriage immediately after *Goodridge*. The *Opinions of the Justices to the Senate* was handed down on February 3, 2004. Only 59% of subjects polled between February 6-8, 2004 expressed opposition to same-sex marriage; this rose to 64%, but not to a level that can be confidently differentiated from no change, and only when subjects were polled on February 16-17, 2004, as anticipation grew that the President was going to call for a

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constitutional amendment, which he did on February 24, 2004. Most commentators have missed this point, bundling in the increased opposition to same-sex marriage that came later, stemming from executive interference, with the direct effect of the second Massachusetts case on popular opinion,[53] of which we know with 95% confidence had no significant immediate effect.

Consequently, these results suggest that a number of effects followed from judicial and legislative action in Massachusetts. From June 2004 until December 2004, shortly after *Goodridge*, anticipation of judicial action to introduce same-sex marriage, and public expressions regarding the controversy, led to a 10% increase in opposition to same-sex marriage, a statistically significant effect. As the Legislature began to debate providing rights to same-sex couples, opposition to same-sex marriage decreased significantly by 6%, as having two branches of government recognize the rights of same-sex couples encouraged greater acceptance in the populace. Then, when the court made its second ruling in early February 2004 that fully endorsed the right of same-sex couples to marry, public opposition did not increase. Only later, with other public officials, including the President, expressing intolerance of same-sex marriage and proposing policy in that vein, did public opposition increase again, and even then not to a significant degree.[54]

Most analysts have failed to scrutinize the timing of the rises and falls in public opposition to same-sex marriage closely enough to appreciate their correlation to the specific events playing out. But a more detailed appreciation of the timing of the public opinion results provides both a better understanding of judicial behavior and public reaction. It explains both why the Massachusetts judges bothered to delay providing a remedy in the *Goodridge* case, and the puzzle of why there ultimately was no backlash against the introduction of same-sex marriage in

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53. *See, e.g.*, Jonah M. A. Crane, *Legislative and Constitutional Responses to Goodridge v. Department of Public Health*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 465, 484 (2003-2004), who provides a multi-paged description of the effect of both cases, but concludes that "*Goodridge* did much to advance the civil rights of gay citizens, but this has come at considerable cost. The reaction to *Goodridge* has been almost uniformly negative, and the gay rights cause has suffered many setbacks in recent months."

54. Interestingly, variation in public opinion on discussion of a constitutional amendment was minimal. There was a low point in opposition to a constitutional amendment, which corresponded with the second peak in opposition to same-sex marriage, but once again this occurred after the President's call for a constitutional ban, not immediately after the *Opinions of the Justices to the Senate*. This supports the notion that combined elite support of even a controversial topic such as same-sex marriage increases public acceptance, and that this can be undermined by the expression of opposition by leaders.

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Massachusetts. We can now better analyze both the actions of the Massachusetts judges and the reactions of the public to those actions, with the aid of positive political theory.

The situation immediately prior to the *Goodridge* decision being handed down is represented in Figure 2. The court can be seen as choosing between various remedial actions, given the level of popular opposition each alternative could be expected to provoke. Figure 2A represents the preferences of, and choices available to, the court; Figure 2B represents those of the State Legislature. Although they occur in the same policy space, for simplicity, the two actors' options are initially graphed separately.

FIGURE 2: INITIAL JUDICIAL AND LEGISLATIVE REMEDIAL PREFERENCES, SUBJECT TO POPULAR OPPOSITION

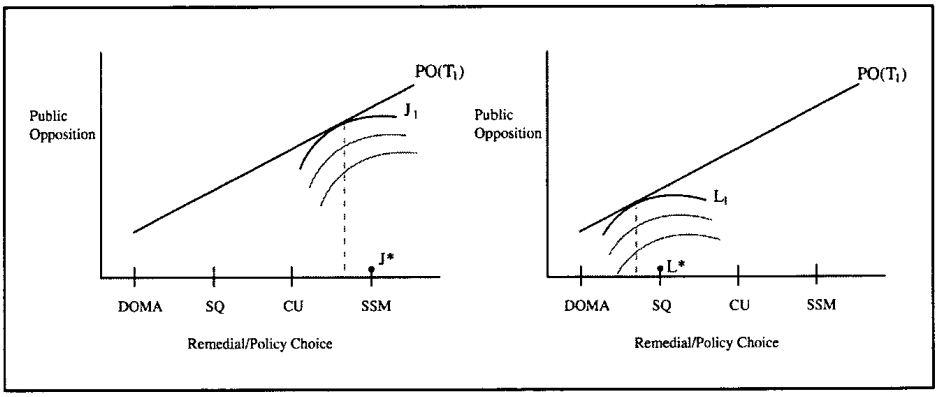

Figure 2 maps the court and the Legislature's two primary considerations, remedial or policy choice and expected popular opposition; these are graphed on the x and y-axes respectively. Four remedial options are identified. Ranging from least to greatest recognition of the rights of same-sex individuals, they are: Defense of Marriage Act-type (or constitutional enshrinement) opposition to any recognition of same-sex couples (DOMA); inaction or maintenance of the status quo (SQ); a civil unions-type marriage equivalent compromise (CU); and the full recognition of the right to same-sex marriage (SSM). Public opposition is a percentage continuum.

The court majority, represented as J, has an ideal outcome at the lower right-hand point J* at (SSM, 0), at which same-sex marriage would be

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judicially granted with no popular opposition. This preference is evidenced by the strong language the *Goodridge* majority used in its opinion.[55] But the imposition of the remedial stay strongly suggests that the *Goodridge* judges appreciated the institutional limitations on their ability to embrace that outcome. The court knew it was dealing with an issue that was extremely controversial,[56] on a topic that the public did not want the court deciding for them. Although the court may have had the power to impose same-sex marriage independently, it would have expected strong negative reactions to such an action, and that such opposition could manifest itself in costly attacks on the court.[57]

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55. For example, the court considered that the right to marry is so fundamental that without it, "one is excluded from the full range of human experience and denied full protection of the laws;" that the state's actions denying the right to same-sex marriage "confer[red] an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and not worthy of respect;" and that "extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities" and is "a testament to the enduring place of marriage in our laws and in the human spirit." *Goodridge*, 798 N.E.2d at 957, 962, 964-65.

56. Same-sex marriage arguably faced less opposition in Massachusetts than it did in most of the United States, however it is still very controversial. *See* Frank Phillips, *Support for Gay Marriage Mass. Poll Finds Half in Favor*, BOSTON GLOBE, Apr. 8, 2003 at A1, LEXIS (reporting a Boston Globe Poll showing 50% support and 44% opposition to same-sex marriage, compared to national polls that show support ranging from 35-39% and opposition at around 55%.). At any rate, polls showed that at least a substantial section of the Massachusetts populace were highly opposed to the recognition of such rights, and the issue was highly salient—44% considered the issue to be extremely or very important. *See* Newport, *supra* note 21.

57. In addition to the national media and political attention the Vermont and Massachusetts cases have gained, they have also spawned an enormous academic literature. Many of these works are ideological polemics, but even more scholarly works put the judiciary under close scrutiny due to the controversial nature of this topic. A small sample of such writings includes: ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW (2002); Jay Weiser, *The Next Normal—Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48 (2004); Jonah M. A. Crane, *Legislative and Constitutional Responses to Goodridge v. Department of Public Health*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 465 (2004); Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003 (2004); Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage"?*, 12 B.U. PUB. INT. L.J. 137 (2002); Lynn D Wardle, *'Multiply and Replenish': Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001); David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000); Lawrence Friedman & Charles H. Baron, *Baker v. State and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125 (2001); Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State*

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In the model, popular opinion is variable. As such, the court can be expected to have preferences over each remedial action; however the relative value of each action varies with the level of opposition associated at any time with each action. This trade-off is captured in the J indifference curves: at any point along the indifference curve, the court faces the choice between the four remedies represented on the x-axis and the corresponding levels of popular opposition each would provoke. For example, the court may wish to recognize same-sex marriage, but not at the cost of undermining the popular legitimacy of the judiciary. In that case, the less desirable but also less controversial civil unions alternative could be preferable to the court.

The State Legislature also has preferences along the same two dimensions, graphed in Figure 2B. The State Legislature, represented as L, has preferences centered at L* at the point (SQ, 0). This can be inferred from the fact that, prior to *Goodridge*, the Massachusetts State Legislature neither passed DOMA-style legislation restricting the right to same-sex couples, nor passed same-sex marriage or civil unions legislation promoting those rights. The difference between the court's and the Legislature's preferences can be driven by a simple difference in policy preferences of legislators and judges; however, it is quite possible this difference is institutionally derived. This model represents preferences, however formed, and subject to other factors, such as party platforms; such factors may, for example, result in the median legislators overall ideal point being at SQ, even if his or her pure policy preference lies elsewhere.

Legislators face re-election, and are thus closely bound to public opinion; judges, at least in Massachusetts, are appointed, tenured until retirement at 70, and are thus restricted by public opinion only to the extent judicial legitimacy demands, as outlined in the previous Part Relative to the Judiciary, which although subject to popular opinion is also protected from it somewhat,[58] legislatures are highly sensitive to public opinion.[59] This relative sensitivity to popular opinion is reflected in the fact that the Legislature's indifference curves are flatter than the court's: movement in popular opinion sways the position of the

Constitutional Case on Marriage of Same-Sex Couples, 43 B.C. L. REV. 73 (2001); Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075 (2000/2001); Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL OF RTS. J. 1 (2000).

58. *See, e.g.*, Suzanna Sherry, *Independent Judges and Independent Justice*, 61 LAW & CONTEMP. PROBS. 15 (1998) (noting the existence of only limited grounds for removal).

59. *See, e.g.*, DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

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Legislature more than it sways that of the Judiciary. The preferences of L are drawn as symmetrical around SQ, but they need not be: L may have a higher tolerance for deviation in one direction than the other. Prior to *Goodridge*, while there was public pressure coming from both directions for the State Legislature to act, L was able to tolerate popular opposition enough to remain inactive on the issue, at SQ.

The interaction between popular opinion and the inherent appeal to either actor of a given tack is captured by an infinite number of indifference curves. The court's indifference curve radiates out from the point J* at (SSM, 0); the Legislature's from L* at (SQ, 0). The further from the points J* and L* that J and L's indifference curves lie, the less the outcome is favored by the court and the Legislature respectively. Popular opinion varies with judicial and legislative action, as captured by the y-axis; but popular opinion at a single point in time is captured by the line $PO(T_1)$. This line is upward sloping, representing the greater popular opposition to same-sex marriage over civil unions, over status quo, over DOMA legislation at time 1,[60] when the court was deciding *Goodridge*. This line determines the operable indifference curves for J and L: the curve for each that is tangent to popular opposition at T_1 predicts what J and L will do. These are represented in Figure 3 as J_1 and L_1 respectively, with the subscript designating the curve that intersects at time 1.

This relationship can be presented more formally:

$v(.)$ = Legislature's utility
$u(.)$ = Court majority's utility
x = remedial outcome, determined by the Court
PO = popular opposition
θ = Court majority's type, where $\theta \in g(\Theta)$[61]
L = Legislature's action
J will maximize with respect to x: $U(p, x, \theta)$
subject to the constraint $PO = f(x, L)$
So, J will maximize with respect to x: $U(f(x, L), x, \theta)$

To solve this formally would require assumptions as to the stability of the shape of PO; that is, any formal solution would hinge on public

60. Some polls suggest that opposition to a constitutional ban against same-sex marriage has higher opposition than civil unions or even same-sex marriage in Massachusetts. *See* Phillips, *supra* note 56. This suggests the PO line in Massachusetts could be check-shaped rather than linear; but the important point for this analysis is the upward slope of the line between SQ, CU and SSM.

61. θ, the Court majority's type means the Legislature is uncertain of the Court's ideal preferences or willingness to bear costs to achieve its preferred outcome; $\theta \in g(\Theta)$ represents that the Court's type is a product of some independent function, for example, appointment process combined with each judge's personality.

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opposition to same-sex marriage always being greater than public opposition to civil unions, which in turn must always be greater than the status quo. The endogeneity of public opposition is too central to this analysis to justify such an assumption. Without making this assumption, it is possible to examine the implications of public opposition at time 1 through an analysis of Figure 2A.

In Figure 2A, the J_1 indifference curve strikes the $PO(T_1)$ line at the point correlating to the range on the x-axis between CU and SSM. This outcome is associated with a high level of public opposition. In Figure 2B, the L_1 indifference curve strikes the $PO(T_1)$ line closest to the x-axis at the point SQ, with relatively low public opposition. So factoring into account public opinion, the court may nevertheless have preferred the outcome SSM to its other choices, and hence provided initial support for same-sex marriage in *Goodridge*. However, Figures 3 and 4 show how the Court can achieve full but delayed judicial recognition of same-sex marriage with lower associated public opposition by staying its holding.

The costs to the Legislature of maintaining the status quo were changed by *Goodridge*. The declaration of unconstitutionality of SQ increased the costs to the Legislature of not acting: as in Vermont, legislative inaction appeared at this time likely to cause the court to institute same-sex marriage. By contrast, drafting civil unions legislation offered the possibility of potentially preventing judicial recognition of same-sex marriage. So, even without any public opinion change, the State Legislature's ideal point shifted towards CU and away from SQ. This is represented in Figure 3 by a rightward shift in L's preferences, resulting not from any substantive policy shift, but by changing costs. This explains the Legislature's decision to propose civil unions legislation.

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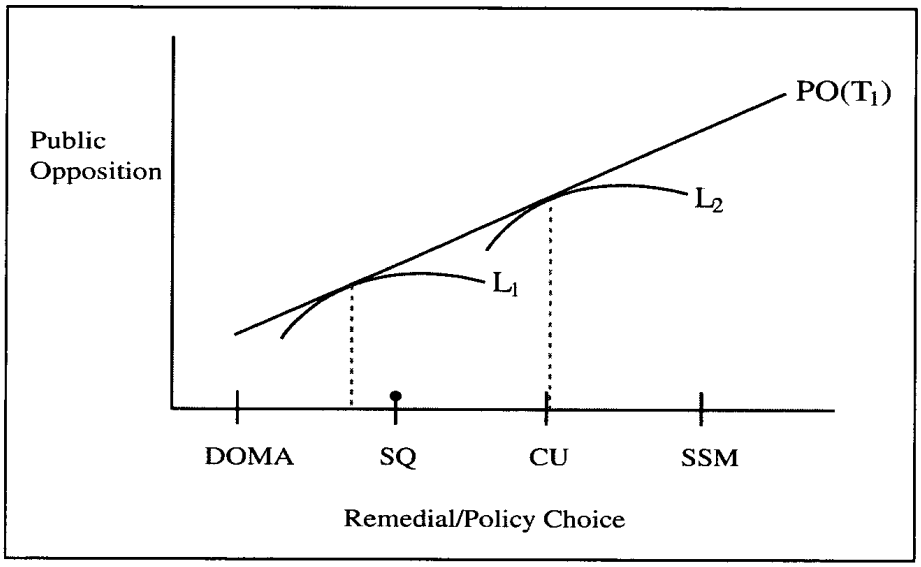
FIGURE 3: CHANGE IN LEGISLATIVE UTILITY ARISING FROM *GOODRIDGE*



Although the Legislature was responding to the constraint of popular opinion in the new circumstances of the *Goodridge* ruling, legislative action also shapes public opinion, as discussed above. Legislative proposal of the civil unions bill, combined with judicial recognition of some rights of gay couples in *Goodridge*, led to decreased opposition to same-sex marriage, with no increase in opposition to civil unions, as seen in Figure 4. Figure 4 represents the court's options in light of popular opinion at time 2, after the Legislature's action proposing the civil unions bill.

The proposal of the civil unions bill lowered public opposition to both civil unions and same-sex marriage, without significantly altering public opinion on the DOMA-type banning of recognition of same-sex rights. Consequently, the slope of the public opposition line at time 2 ($PO(T_2)$) is flatter and lower than $PO(T_1)$. The consequence of this change was to reduce the court's costs associated with both civil unions and same-sex marriage as remedial outcomes. Consequently, the court was able to introduce full same-sex marriage rights at time 2, in the *Opinions of the Justices to the Senate*, with lower public opposition than the less extreme *Goodridge* outcome provoked at time 1.

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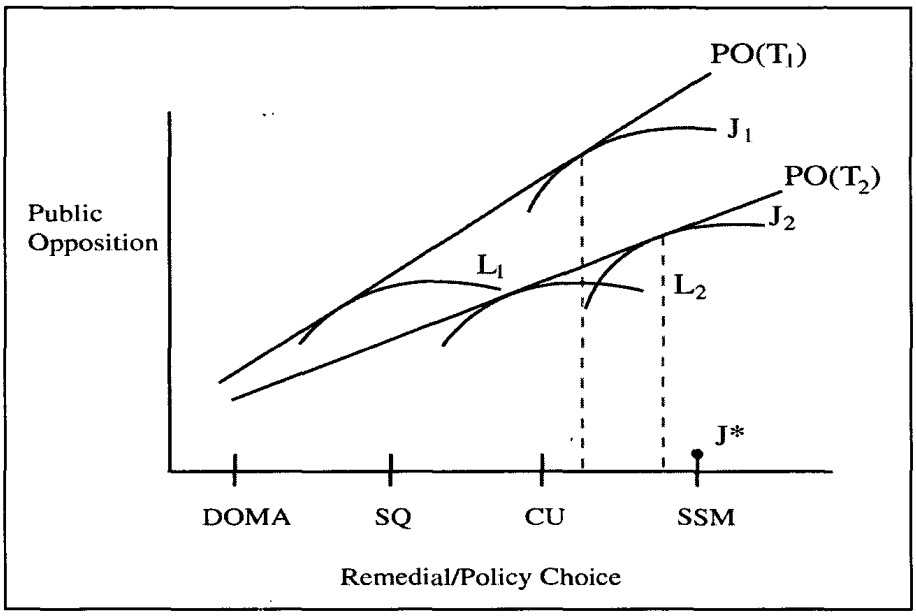
FIGURE 4: JUDICIAL UTILITY FOLLOWING THE CIVIL UNIONS BILL PROPOSAL



The ambiguity of *Goodridge* as to the constitutionality of civil unions, combined with the implicit threat of the court imposing same-sex marriage rights in the absence of legislative action, had the effect of changing the Legislature's costs of continued inaction compared to proposing civil unions legislation. This shifted the ideal point of the Legislature from SQ to CU. Legislative action supporting civil unions, in turn, shaped public opinion, lowering opposition to same-sex marriage. This change enabled the court to embrace its preferred outcome of recognition of the right to same-sex marriage in February 2004, at a lower cost in terms of public opposition than would have occurred in November 2003.

IV. CONCLUSION

The PPT model in the previous Part provides an answer to the puzzle of why the much-anticipated backlash against the judicial introduction of same-sex marriage in Massachusetts did not occur. Although the bill proposing a civil unions compromise was held unconstitutional by the

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court, its proposal was nevertheless significant. It represented a second branch of government joining the court in recognizing some of the rights of gay couples. This action was instigated by the court staying its own holding, and giving the Legislature the incentive and opportunity to act. By staying its decision and drawing the Legislature into the process, the court reduced its institutional costs of ultimately enforcing the right to same-sex marriage itself. Unlike its initial action in *Goodridge*, which was associated with large increases in public opposition to same-sex marriage, the court's eventual recognition of the right to same-sex marriage was accompanied by continued decreases in opposition to same-sex marriage. Although the court was alone in requiring same-sex marriage, it was no longer alone in its support for substantive equal protection for same-sex couples.

Remedial delay in *Goodridge*, and the ambiguity it created regarding the constitutionality of potential civil unions accommodations, changed the State Legislature's costs, as well as the court's. This prompted the Legislature to propose civil unions legislation, which led to a decrease in public opposition to both civil unions and same-sex marriage. The Legislature's action changed the apparent nature of the debate concerning same-sex unions: the elite debate, and so the presentation of the public's choice, changed the choice from between same-sex marriage versus the status quo to the choice between same-sex marriage versus civil unions. By the time the court then found that civil unions were unsatisfactory, this framing effect had been established: the Legislature was on the record proposing civil unions legislation. The resulting change in public opinion in turn lowered the costs faced by the court in fully recognizing the right of same-sex couples to marry. The Massachusetts court was able to successfully utilize not only its own ability to influence public opinion but also the State Legislature's, in order to mitigate the constraining effect of popular opposition.

Note that if this was the court's strategy, it was a risky one. As is illustrated by President Bush's proposal of a constitutional amendment, even such strategic success can prompt public hostility. Of potentially greater significance to the Massachusetts judges was Governor Romney's attempt to stay the effect of the court's rulings, and the constitutional amendment process initiated in Massachusetts. Although as yet, none of these counter-measures have been successful.

It is also possible that these effects were not intended by the judges: the ambiguity of *Goodridge* may have simply reflected the uncertainty of the judges as to the level of public anger the ruling would provoke. The judges' reason for delay may simply have been to leave themselves the fallback position of accepting civil unions as a compromise. Even if

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this is the case, the causal effect is the same: the ambiguity inherent in the *Goodridge* ruling created an incentive for the Legislature to involve itself in the process, which in turn lowered public opposition to same-sex marriage and enabled the court to take the clearer stance it took in the *Opinions of the Justices to the Senate.*

If, however, these actions were a conscious strategy by the Massachusetts judges, then they were using three time-honored judicial strategies: using delay to buy time to ultimately do what the court initially refrained from doing; using deference to ultimately increase the court's own power; and adapting judicial action to public opinion without kowtowing to it.[62] Thus although the strategic impact of remedial delay in *Goodridge* has not previously been recognized, and the specific tactics involved here may be quite novel, this model has revealed that the Massachusetts' court's action in the gay marriage cases comport to a more general strategic mode of judicial behavior that has been successful in different forms and contexts.

62. *See, e.g.*, ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT (2005); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH : THE SUPREME COURT AT THE BAR OF POLITICS (1986).

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