

A Legislative Perspective on the Ohio, Massachusetts, and Federal Courts

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The eventual determination of public policy in the United States is often a result of the continuous interactions and dialogues between American legislative bodies and the courts.¹ Recently there has been increased scholarly activity regarding policymaking by the often neglected state courts.² 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."³

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¹ See, e.g., LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988) [hereinafter FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS]; JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (ROBERT A. KATZMANN ed., 1988); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) [hereinafter Fisher, *Constitutional Interpretation by Members of Congress*]; Beth M. Henschen & Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J.L. & POL. 685 (1989); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653 (1992); cf. CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1984) (examining the implementation of judicial policy).

² See, e.g., STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (Mary C. Porter & G. Alan Tarr eds., 1982); HARRY P. STUMPF & JOHN H. CULVER, THE POLITICS OF STATE COURTS vii (1992) (analysis of structure, policy, process, and impact of state courts); G. ALAN TARR & MARY C.A. PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988) (a comparative analysis of the activity of the Alabama, New Jersey, and Ohio Supreme Courts); Lawrence Baum, *State Supreme Courts: Activism and Accountability*, in THE STATE OF THE STATES 103 (Carl E. Van Horn ed., 1989); Stephen Daniels, *A Tangled Tale: Studying State Supreme Courts*, 22 L. & SOC'Y REV. 833-68 (1988); Craig F. Emmert, *An Integrated Case-Related Model of Judicial Decision Making: Explaining State Supreme Court Decisions in Judicial Review Cases*, 54 J. POL. 543 (1992); Craig F. Emmert & Carol A. Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37 (1992); Herbert Jacob, *Courts: The Least Visible Branch*, in POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 252 (Virginia Gray et al. eds., 5th ed. 1990).

³ Henry R. Glick, *Policy Making and State Supreme Courts*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 87 (John B. Gates & Charles A. Johnson eds., 1991).

In order to enhance our understanding of American courts as well as our understanding of the role they play in larger political systems, this Article will explore the relation between courts and legislatures in Massachusetts, Ohio, and the federal system, focusing on differences in the legislators' perceptions of the policymaking roles of their respective courts. Scholars traditionally have paid very little attention to questions of how and why American courts differ in their policymaking roles.⁴ For a complete understanding of the policymaking role of various American courts, it is thus very important that the courts not be treated as isolated decisionmakers, but as components of their larger systems of government.⁵ As Tarr and Porter 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."⁶

I. NEO-INSTITUTIONAL PERSPECTIVE

This Article will bring a neo-institutional perspective to the study of interactions between courts and legislatures. As used by Epstein, Walker, and Dixon,⁷ the neo-institutional approach combines the traditionalist scholars' interest in understanding governmental bodies as institutions with the behavioralists' emphasis on empirical, individual level research. In other words, the neo-institutionalist perspective combines the microlevel study of individual political behavior with the macrolevel sensitivity to the institutional factors that help shape that behavior. As Fiorina has stated, "To a greater degree than behavioral political scientists have acknowledged, institutional arrangements shape individual incentives, which in turn affect behavior. Both formal institutions and informal ones, such as custom or practice, are important."⁸

⁴ See *id.*, Charles R. Epp, *Why Courts? Judicial Policy-Making in Comparative Perspective* (Apr. 9-11, 1992) (unpublished paper, on file with the *Ohio State Law Journal*) This paper was presented at the April 1992 annual meeting of the Midwest Political Science Association in Chicago, Illinois.

⁵ See Baum, *supra* note 2, at 103.

⁶ TARR & PORTER, *STATE SUPREME COURTS IN STATE AND NATION*, *supra* note 2, at 41.

⁷ Lee Epstein et al., *The Supreme Court and Criminal Justice Disputes: A Neo-Institutional Perspective*, 33 AM. J. POL. SCI. 825 (1989).

⁸ Morris P. Fiorina, *The Presidency and Congress: An Electoral Connection?*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 443, 444 (Michael Nelson ed., 3d ed. 1990). Other recent examples of the neo-institutional approach include: Michael M. Atkinson & Robert A. Nigol, *Selecting Policy Instruments: Neo-Institutional and Rational Choice*

Various scholars have recently argued that the effects of institutional context on political and judicial behavior need to be re-examined.⁹ As Smith concludes, "Ideally, then, a full account of an important political event would consider both the ways the context of 'background' institutions influenced the political actions in question, and the ways in which those actions altered relevant contextual structures or institutions."¹⁰

Until the late 1950s and early 1960s, most judicial scholars used what is now called the "traditionalist" approach to understanding political institutions and phenomena. This traditionalist approach relied heavily on the techniques of historical, and institutional analysis.¹¹ These scholars were concerned with how political institutions functioned and how they were structured, often with a legalistic or normative bias in their approach to these questions. The traditionalists tended to employ logical reasoning to analyze politics and to

Interpretations of Automobile Insurance in Ontario, 22 CAN. J. POL. SCI. 107 (1989); Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990); Matthew D. McCubbins & Terry Sullivan, *Institutional Aspects of Decision Processes*, Introduction to CONGRESS: STRUCTURE AND POLICY 1-11 (Mathew D. McCubbins & Terry Sullivan eds., 1987); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991) (a collection of related essays); Bert A. Rockman, *The New Institutionalism and the Old Institutions*, in NEW PERSPECTIVES ON AMERICAN POLITICS 143 (Lawrence C. Dodd & Calvin Jillson eds., 1994); Donald D. Searing, *Roles, Rules, and Rationality in the New Institutionalism*, 85 AM. POL. SCI. REV. 1239 (1991).

⁹ See, e.g., Epstein, *supra* note 7; Melinda G. Hall & Paul Brace, *Order in the Courts: A Neo-Institutional Approach to Judicial Consensus*, 42 W. POL. Q. 391 (1989) [hereinafter Hall & Brace, *Order in the Courts*]; Melinda G. Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 147 (1992) [hereinafter Hall & Brace, *Toward an Integrated Model*] (arguing that institutional rules affect judicial choice); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984); cf. JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 171 (1989) (arguing that "systemic attention to political institutions" is necessary to understand the political system); John B. Gates, *Theory, Methods, and the New Institutionalism in Judicial Research*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 469, 481 (John B. Gates & Charles A. Johnson eds., 1991) (discussing the advantages and disadvantages of an institutional analysis of judicial systems).

¹⁰ Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 91 (1988).

¹¹ See ALAN C. ISAAK, SCOPE AND METHODS OF POLITICAL SCIENCE: AN INTRODUCTION TO THE METHODOLOGY OF POLITICAL INQUIRY 33-38 (4th ed. 1985); Roger H. Davidson, *Legislative Research: Mirror of a Discipline*, in POLITICAL SCIENCE: LOOKING TO THE FUTURE, VOLUME FOUR: AMERICAN INSTITUTIONS 1, 19-23 (William Crotty ed., 1991).

make normative statements about how politics and political institutions should operate in this country.¹² They also relied heavily on description of political realities and institutions as their main tool of analysis. The works of these scholars were closely related to the scholarly approaches found in the disciplines of history, philosophy, and literature. In other words, the traditionalist judicial scholars often saw the study of politics as a branch of the humanities.

Beginning in the late 1950s, however, a “behavioral revolution” occurred among scholars of the courts. The new “behavioralist” approach determined that political phenomena must be studied using a more scientific approach with more scientific methods.¹³ Over time the behavioralist view has become the dominant approach in political science and other social science disciplines, especially in the subfield of American politics.¹⁴ Having developed ever more objective and statistically oriented techniques, the behaviorists feel that the job of judicial scholars is not merely to describe political realities, but to predict political behavior. Thus, “[i]ts objectives are the development of empirical generalizations and systematic theory, and the use of these in the explanations of political phenomena.”¹⁵

The tools of the behaviorists are generally high level quantitative statistical methods, because, “[q]uantification of data is a significant goal of every science, and no science will develop beyond a fairly primitive level unless it employs quantitative techniques of various sorts.”¹⁶ These behaviorists urge scholars to study judicial political activity and behavior, not just institutional structures, rules, and cultures. Thus judicial scholars should as closely as possible emulate the disciplines of physics, chemistry, and the other “hard” sciences, and abandon any links to the approaches of the softer humanities. The adherents of this more scientific approach to the study of the courts generally feel that only quantitative indicators of political behavior, such

¹² See ISAAK, *supra* note 11, at 13.

¹³ For leading discussions of the need for a behaviorist revolution, see DAVID EASTON, *A FRAMEWORK FOR POLITICAL ANALYSIS* (1965); DAVID EASTON, *THE POLITICAL SYSTEM* (1953); HEINZ EULAU, *THE BEHAVIORAL PERSUASION IN POLITICS* (1963); ALBERT SOMIT & JOSEPH TANNENHAUS, *THE DEVELOPMENT OF AMERICAN POLITICAL SCIENCE: FROM BURGESS TO BEHAVIORALISM* (1967); Robert A. Dahl, *The Behavioral Approach in Political Science: Epitaph for a Monument to a Successful Protest*, 55 *AM. POL. SCI. REV.* 763 (1961); David Easton, *The Current Meaning of Behavioralism*, in *CONTEMPORARY POLITICAL ANALYSIS* 11 (James C. Charlesworth ed., 1967); Donald M. Freeman, *The Making of a Discipline*, in *POLITICAL SCIENCE: LOOKING TO THE FUTURE, VOLUME ONE: THE THEORY AND PRACTICE OF POLITICAL SCIENCE*, 15, 26 (William Crotty ed., 1991).

¹⁴ See Freeman, *supra* note 13, at 25–34; Davidson, *supra* note 11, at 27.

¹⁵ ISAAK, *supra* note 11, at 42.

¹⁶ *Id.*

as judges' voting decisions, are worthy of study. Thus they often ignore less quantifiable factors that also help shape the behavior of actors within political institutions. One commentator notes that "[a] consequence of this is to treat institutions as arenas for the behavioral predilections of members."¹⁷ Thus an exclusively behavioral approach ignores important institutional constraints, such as the political culture of the institution, which help shape the behavior of the actors within the institution.

The institutional approach to be taken by this Article is similar to much of the neo-institutional school now becoming more popular in the study of legislative and judicial politics in the United States.¹⁸ It is also similar to much of the interpretist approach used by many mainstream sociolegal researchers.¹⁹ It to a limited extent, resembles the less radical elements of the "postbehavioralist" approach advocated by some in the political science discipline²⁰ and it embraces the new interdisciplinary approach used by many political scientists today.²¹ This institutional approach is quite willing to "embrace the premise that the meanings of cultural and social forms are

¹⁷ Rockman, *supra* note 8, at 144.

¹⁸ For examples of the neo-institutional approach to judicial politics, see THE CONSTITUTION AND AMERICAN POLITICAL DEVELOPMENT: AN INSTITUTIONAL PERSPECTIVE (Peter Nardulli ed., 1991); Gates, *supra* note 9; Hall & Brace, *Order in the Courts*, *supra* note 9; Hall & Brace, *Toward an Integrated Model*, *supra* note 9; Epstein, *supra* note 7; Michael Strine, *New Institutionalism in Sociolegal Research: Teaching the New Dog Old Tricks* (June 16–19, 1994) (paper presented at the 1994 annual meeting of the Law and Society Association, on file with the *Ohio State Law Journal*). See generally Rogers M. Smith, *The New Institutionalism and Normative Theory: Reply to Professor Barber*, in 3 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 74 (Karen Orren & Stephen Showronek eds., 1989); Smith, *supra* note 10.

¹⁹ See, e.g., CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985); Carol J. Greenhouse, *Courting Difference: Issues of Interpretation and Comparison in the Study of Legal Ideologies*, 22 L. & SOC'Y REV. 688 (1988); Christine B. Harrington & Sally E. Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & SOC'Y REV. 709 (1988); Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 L. & SOC'Y REV. 11 (1985); Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 L. & SOC'Y REV. 165 (1987); Susan S. Silbey, *Ideals and Practices in the Study of Law*, 9 LEGAL STUD. F. 7 (1985).

²⁰ See, e.g., Christian Bay, *Politics and Pseudopolitics: A Critical Evaluation of Some Behavioral Literature*, in APPROACHES TO THE STUDY OF POLITICS 51 (Bernard Susser ed., 1992); David Easton, *Tenets of Post-Behavioralism*, in APPROACHES TO THE STUDY OF POLITICS, *supra*, at 49.

²¹ See Martin Shapiro, *Public Law and Judicial Politics*, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II 365, 371–74 (Ada W. Finifter ed., 1993).

constituted in their use."²² This Article proposes that we must improve our understandings of how political institutions actually operate by exploring the political culture and environments within the institutions.²³

Therefore, in order to understand the institutional context that shapes relations between courts and legislatures in this country, we must understand how courts are perceived by the other governmental institutions with which they interact. As March and Olsen argue, "Much of the behavior we observe in political institutions reflects the routine way in which people do what they are supposed to do. Simple stimuli trigger complex, standardized patterns of action without extensive analysis, problem solving, or use of discretionary power."²⁴ Legislators' attitudes toward the courts help explain both the legislatures' formal and informal approaches to the policymaking role of the judiciary.

II. THREE DIFFERENT GOVERNMENTAL SYSTEMS

This Article will compare legislators' perceptions of the policymaking roles of three different courts,²⁵ therefore some important structural facts about these

²² Greenhouse, *supra* note 19, at 687.

²³ See John R. Baker, *Exploring the "Missing Link": Political Culture as an Explanation of the Occupational Status and Diversity of State Legislators in Thirty States*, 43 W. POL. Q. 597 (1990). See generally GABRIEL A. ALMOND, *A DISCIPLINE DIVIDED: SCHOOLS AND SECTS IN POLITICAL SCIENCE* 138, 154 (1990).

²⁴ MARCH & OLSEN, *supra* note 9, at 21.

²⁵ The data supporting this Article comes from semistructured interviews with over 75 members and staff in the United States House of Representatives conducted during the summer of 1989, from more formally structured interviews with 129 of the 132 total members of both houses of the Ohio General Assembly conducted during the spring of 1988, and from semistructured interviews with 64 members of both houses of the Massachusetts General Court (32% of the total membership) during the spring of 1991 [hereinafter Miller, Interviews]. Notes were taken during the interviews and details were added to the notes immediately following the interviews. Robert L. Peabody et al., *Interviewing Political Elites*, 23 POL. SCI. & POL. 451 (1990) (identifying this method as the preferred technique for interview documentation). This process was very similar to the system that Kingdon used to interview Members of Congress in his landmark work. JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* (3d ed. 1989). The congressional interviews focused on members of three committees in the United States House: the Judiciary Committee, the Interior and Insular Affairs Committee (recently renamed the Resources Committee), and the Energy and Commerce Committee (recently renamed the Commerce Committee). The tabulations of responses, contained in this Article, reflect the attitudes of around two-thirds of the members of these three committees. These three committees were chosen, in part, because their individual interactions with the courts have been discussed elsewhere in the literature. See, e.g., Mark C. Miller, *Congress and the Constitution: A Tale of Two Committees*, 3 CONST. L.J. 317 (1993); Mark C. Miller,

three systems should be noted at this point. The structure of the federal government is quite familiar and will not be described in great detail here. The structures of the Ohio and Massachusetts governments, however, may be less familiar. The three legislatures in this study (the United States Congress, the Ohio General Assembly, and the Massachusetts General Court) are quite similar in many important respects. Both the Ohio and Massachusetts state legislatures are highly professionalized institutions which are evolving toward the congressional model; both are heavily lobbied by various interest groups in their states.²⁶ Based on factors such as length of legislative sessions, frequency of turnover, legislator salaries, and staffing, Jewell rates the Ohio and Massachusetts legislatures as two of the most professionalized state legislatures in the country.²⁷ In 1988, the Council of State Governments (CSG) included Ohio and Massachusetts in a listing of the nine full-time professional state legislatures in the United States, based on length of session, salary levels, and occupational self-definition of members.²⁸

Congressional Committees and the Federal Courts: A Neo-Institutional Perspective, 45 W. POL. Q. 949 (1992) [hereinafter Miller, *Congressional Committees and the Federal Courts*]; Mark C. Miller, *Courts, Agencies, and Congressional Committees: A Neo-Institutional Perspective*, 55 REV. POL. 471 (1993); Mark C. Miller, *Lawyers in Congress: What Difference Does It Make?*, 20 CONGRESS & THE PRESIDENCY 1 (1993).

All of the tables in this Article reporting congressional data are based on combined responses from Members of Congress and from key legislative aides who stated that they could speak for their bosses on these issues. As Aberbach stresses, "Staffers are undoubtedly better informants [than committee members] about many aspects of committee life because their work time is devoted almost entirely to the committee's tasks, and they play a crucial role in most of the decisions made." JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 227 (1990). Other respected scholars have also used staff responses as surrogates for the responses of the Members of Congress themselves. See, e.g., STEVEN S. SMITH & CHRISTOPHER J. DEERING, *COMMITTEES IN CONGRESS* (2d ed. 1990); Charles S. Bullock, *Motivations for U.S. Congressional Committee Preferences: Freshmen of the 92nd Congress*, 1 LEGIS. STUD. Q. 201 (1976); Richard L. Hall, *Participation and Purpose in Committee Decision Making*, 81 AM. POL. SCI. REV. 105, 124 (1987). All of the congressional staffers were carefully chosen and were asked background questions concerning their title and responsibilities in the office, the length of time they had worked for their employer, and how regularly they spoke on behalf of their bosses. The staffers were also asked to clearly distinguish their own personal opinions from the opinions of their employers.

²⁶ See CORNELIUS DALTON ET AL., *LEADING THE WAY: A HISTORY OF THE MASSACHUSETTS GENERAL COURT 1629-1980*, at 347 (1984); RICHARD G. SHERIDAN, *GOVERNING OHIO: THE STATE LEGISLATURE 137-57* (1989).

²⁷ MALCOLM E. JEWELL, *REPRESENTATION IN STATE LEGISLATURES* 7 (1982).

²⁸ COUNCIL OF STATE GOVERNMENTS, *27 THE BOOK OF STATES* 78 (1988-89).

While both the Ohio and Massachusetts legislatures resemble their federal counterpart in many ways, the three court systems are quite different, especially in their procedures for selecting judges. Of course, federal judges, who are appointed by the President for life terms after being confirmed by the United States Senate, are often selected based on their policy preferences.²⁹

The court system in Massachusetts follows the usual three-tiered trial and appellate court structure, although the organization of the lower courts in the state is quite complex. In Massachusetts, the state supreme court is officially known as the Supreme Judicial Court (SJC). The state judges at all levels are appointed by the Governor for life terms,³⁰ with confirmation by the anachronistic and obscure Governor's Council.³¹ Created in colonial times as the people's envoy to the Royal Governor, today the Council has few formal duties beyond confirming the Governor's judicial and quasi-judicial appointees (such as coroners, notaries public, justices of the peace, and the solicitor-general) and approving gubernatorial pardons. The Council consists of eight members elected from special districts for two-year terms and the Lieutenant Governor.³² Because the Governor's Council confirms judicial appointments, lawyers are the most likely occupational group to run for Council seats. Only two states (Massachusetts and New Hampshire) still maintain a governor's council³³ and many individuals in Massachusetts are calling for its abolition.³⁴

²⁹ See generally HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (2d ed. 1985) (outlining merit-based criteria for selecting justices); LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 114-29 (2d ed. 1990); Sheldon Goldman, *Federal Judicial Recruitment*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT*, *supra* note 9, at 189 [hereinafter Goldman, *Federal Judicial Recruitment*]; Sheldon Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 *JUDICATURE* 313-16 (1985); Sheldon Goldman, *Reagan's Second Term Appointments*, 70 *JUDICATURE* 324, 326 [hereinafter Goldman, *Reagan's Second Term Appointments*]. See generally Elliot E. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 *YALE L. & POL'Y REV.* 270 (1983).

³⁰ See Samuel B. Hand et al., *The New England Judiciary: Courts in Transition*, in *NEW ENGLAND POLITICS* 158 (Josephine F. Milburn & Victoria Schuck eds., 1981). Although not constitutionally required, since 1991 the Governor by executive order has used so-called merit selection nominating commissions to help select candidates for the state bench. See LYLE WARRICK, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (2d ed. 1993).

³¹ See Robert L. Turner, *A Council Whose Time Has Passed*, *BOSTON GLOBE*, Feb. 27, 1992, at 19.

³² See DONALD LEVITAN & ELWYN E. MARINER, *YOUR MASSACHUSETTS GOVERNMENT* 32-33 (9th ed. 1980).

³³ *Id.*

The legislature plays no formal role in the judicial selection process in Massachusetts and has little informal influence in the selection decisions.³⁵ The entire selection process receives very little attention in the state legislature or in the media, although very rare newspaper articles do occasionally discuss the judicial selection process.³⁶ As one Massachusetts state representative commented in an interview with this author, "It is hard to understand who judges are and what they do in a life tenure state. We need better [public relations] for the courts. Their decisions can't be made in a vacuum."³⁷

In Ohio, on the other hand, state judges are elected from top to bottom in technically nonpartisan elections following nomination from partisan primaries. During the general election campaign in Ohio, the two parties widely distribute party voting cards listing the judicial candidates of their party.³⁸ The media in Ohio covers most judicial races, especially those for seats on the Ohio Supreme Court, as extremely partisan events. In reality, the Ohio courts, and especially the Ohio Supreme Court, are extremely partisan bodies whose decisions tend to change depending on which party controls the bench.³⁹

These three judicial selection systems can also be compared according to the articulation level of the selection process: the number of participants in the initiation, screening, and affirmation stages of the recruitment process.⁴⁰ Using Sheldon and Lovrich's terminology, the Ohio judicial selection system is a highly articulated system because many actors, including interest groups, the parties, the media, and the voters, play key roles in the various judicial recruitment stages.⁴¹ The federal selection system is generally a moderate articulation system because of the relatively modest number of actors

³⁴ See Mark C. Miller, *Lawmaker Attitudes Toward Court Reform in Massachusetts*, 77 JUDICATURE 34 (1993); Turner, *supra* note 31. See generally Renee Loth, *Weld's Hunt for Judges: He's Biding His Time to Find Women and Minorities*, BOSTON GLOBE, July 7, 1991, at A19.

³⁵ See Miller, *supra* note 34.

³⁶ See, e.g., Loth, *supra* note 34.

³⁷ Miller, Interviews, *supra* note 25.

³⁸ See Kathleen Barber, *Ohio Judicial Elections: Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762 (1971); Lawrence Baum, *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L.J. 645, 652-70 (1988).

³⁹ TARR & PORTER, *supra* note 2, at 124.

⁴⁰ Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Assessing Judicial Elections: Effects upon the Electorate of High and Low Articulation Systems*, 38 W. POL. Q. 276, 277 (1985) [hereinafter Sheldon & Lovrich, *Assessing Judicial Elections*]; Charles H. Sheldon & Nicholas P. Lovrich, Jr., *State Judicial Recruitment*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT, *supra* note 9, at 161, 171 [hereinafter Sheldon & Lovrich, *State Judicial Recruitment*].

⁴¹ See Sheldon & Lovrich, *Assessing Judicial Elections*, *supra* note 40.

potentially involved in all stages of recruitment to the federal bench. Of course, the federal selection system can become much more highly articulated at the affirmation stage when there are highly controversial nominations to the United States Supreme Court.⁴² Still, few actors participate at the initiation and screening stages. Overall there are a moderate number of political actors involved in the various stages of the federal selection system. The Massachusetts selection system is a very low articulation system, because very few actors participate in any of the recruitment stages.⁴³ This author's current study suggests that the more highly articulated is the selection system, the more active are the courts in that system.

III. THE FEDERAL COURTS: MODERATELY ACTIVE POLICYMAKERS

The fact that the United States Supreme Court and the other federal courts are seen by legislators as key players in the federal policymaking process is quite expected, especially for political scientists who study American courts. For example, McCloskey has defined judicial activism as "the Supreme Court's propensity to intervene in the governing process."⁴⁴ Direct conflicts between the Congress and the courts over constitutional policy issues, however, remain relatively rare,⁴⁵ and are certainly less frequent than conflicts between the President and the Congress.⁴⁶ A great deal of existing research has centered on the extraordinary events in which the Congress as a whole has voted to overturn or to modify a federal court decision.⁴⁷ Generally, the Congress seems to win these infrequent direct conflicts with the federal courts. As

⁴² See, e.g., LAWRENCE BAUM, *THE SUPREME COURT 25-64* (4th ed. 1992); Goldman, *Federal Judicial Recruitment*, *supra* note 29; David M. O'Brien, *The Reagan Judges: His Most Enduring Legacy?*, in *THE REAGAN LEGACY: PROMISE AND PERFORMANCE* 60 (Charles O. Jones ed., 1988).

⁴³ See Miller, *supra* note 34, at 34-40.

⁴⁴ ROBERT G. MCCLOSKEY, *THE MODERN SUPREME COURT* 338 (1972).

⁴⁵ See, e.g., Jonathan Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Beth Henschen, *Congressional Response to the Statutory Interpretations of the Supreme Court*, 11 AM. POL. Q. 441, 454 (1983); Beth M. Henschen, *Judicial Use of Legislative History and Intent in Statutory Interpretation*, 10 LEGIS. STUD. Q. 353 (1985) (noting that since 1937 interactions between the Supreme Court and the Congress have not involved constitutional policy).

⁴⁶ Charles O. Jones, *Congress and the Constitutional Balance of Power*, in *CONGRESSIONAL POLITICS* 322, 331 (Christopher J. Deering ed., 1989).

⁴⁷ See WILLIAM J. KEEFFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 367-85 (7th ed. 1992); Miller, *Congressional Committees and the Federal Courts*, *supra* note 25.

O'Brien explains, "On major issues of public policy, The Congress is likely to prevail or, at least, temper the impact of the Court's rulings."⁴⁸

While congressional responses to federal court decisions do vary depending upon which congressional committee has jurisdiction over the policy,⁴⁹ generally Members of Congress see the federal courts as a natural player in the federal policymaking process. As one Member of Congress stated in an interview,

Our system of government is a three-legged stool. If any one of the other two branches tips the policy balance, then Congress must return the balance by drafting legislation. We must always be careful not to let the courts or the agencies improperly tip the balance. It's the responsibility of Congress to prevent the stool from crashing.⁵⁰

An Energy and Commerce Committee staffer expressed a similar notion of how the Congress interacts with the courts by observing, "Congress sets the general policy, then it goes to the agencies, who have more protection to make difficult judgment calls. Then you litigate the agency decision in the courts. The courts are one step removed in the process, but they are a natural actor in the policy process."⁵¹

Table 1⁵²

How Legislators Would React to an Unfavorable Decision of Their
Respective Supreme Courts*

Legislature	Total Surveyed	File Bill/ Amend.	Attack Court	Contact Judges	Tell Others	Do Nothing
U.S. House	(N=63)	100%	5%	0%	8%	70%
Ohio	(N=126)	88%	4%	5%	4%	9%
Massachusetts	(N=64)	53%	5%	11%	55%	70%

*Individual legislators may have given up to three responses, so percentages will not add up to 100%.

⁴⁸ DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 316 (1986).

⁴⁹ See Miller, *Congressional Committees and the Federal Courts*, *supra* note 25.

⁵⁰ Miller, Interviews, *supra* note 25.

⁵¹ *Id.*

⁵² *Id.*

Table 1 indicates the range of reactions that legislators reported on the question of how they would react to an unfavorable court decision in their respective governmental system. In Table 1, because reactions to court decisions may vary depending on the circumstances, individual legislators may have given up to three different responses to this question. One response would be to file legislation or a constitutional amendment in an attempt to overturn the court's ruling. Another possible response would be to attack the courts as an institution, such as calling for the stripping of the courts' jurisdiction over the issue or threatening to cut the courts' budgets. A third response would be to contact one or more of the judges personally to express displeasure over the decision and to attempt to persuade the court to change its mind. A fourth response would be for the legislator to talk to other officials such as party leaders or lobbyists before deciding how to react to the court ruling. A final response would be to do nothing.

If the courts are seen as constituting a regular part of the governmental system's policymaking process, then one would hypothesize that the legislators in that system would be quite willing to take legislative action to overturn or to modify those judicial decisions that they perceive to be incorrect policy outcomes. As Table 1 indicates, Members of the Congress did feel that it was part of their everyday task to correct improper policy decisions by the federal courts. Thus, all the Members of the Congress interviewed could foresee circumstances under which they would introduce legislation or a constitutional amendment to overturn unfavorable federal court decisions.

However, when asked whether they considered congressional reactions to federal court decisions as a routine part of their work, or if such reactions were considered unusual, only thirty-eight percent said that congressional reactions to court decisions were routine.⁵³ As one member of the House Judiciary Committee told this author, "This committee does not often attempt to overturn even unpopular court decisions. One needs a great deal of thought and debate before overturning any court decision. We defer to the courts usually."⁵⁴ This reluctance to overturn court decisions is also revealed in Table 1, where seventy percent of the Members of the Congress said that in some circumstances they would do nothing in response to a decision from the federal courts that they perceived to be unfavorable.

⁵³ *Id.*

⁵⁴ *Id.*

Table 2⁵⁵

General Feelings of Members of the Congress Towards
the Federal Courts By Party

		Positive	Neutral	Negative
U.S. House	(N=63)	57%	30%	13%
Democrats	(N=41)	66%	29%	5%
Republicans	(N=22)	32%	36%	32%

gamma = .62 tau-b = .37

If the courts are seen as active policymakers, then one would also expect legislators' general attitudes toward the courts to vary by party. While Table 2 indicates that the Members of Congress in this study had a generally positive view of the federal courts overall, it also reveals that congressional feelings toward the courts are influenced by partisan factors, with the Democrats generally feeling more positive about the federal courts than their Republican colleagues. This response is probably true because when these interviews were conducted the federal courts were still perceived by many in the Congress as the champions of liberal causes. While general attitudes toward the courts varied by the party of the legislator, very few of the Members of Congress discussed their reactions to unfavorable federal court decisions in partisan terms. In other words, very few Members of Congress discussed the federal courts as being Democratic or Republican in their orientation as policymakers, unlike the Ohio legislators, who talked of their state courts almost exclusively in partisan terms.

IV. THE OHIO SUPREME COURT: PARTISAN POLITICS

Ohio legislators' perceptions of their courts are much different from the reactions of their federal colleagues. The Ohio courts, and especially the Ohio

⁵⁵ *Id.* Many of the tables in this Article report two statistical measures, gamma and tau-b. Both of these statistical measures of relationships give the reader a sense of the strength of the relationships between the variables in the tables. Both gamma and tau-b vary from -1 to +1. The closer each statistic is to zero, the less important is the relationship. The closer each statistic is to the extremes of -1 or +1, the stronger is the relationship between the variables. The values of gamma normally tend to be higher than the values of tau-b. The reader who is unfamiliar with these statistics should feel free to ignore these numbers or to consult a social statistics text. *See, e.g.,* HEBERT M. BLALOCK, JR., *SOCIAL STATISTICS* (2d ed. 1979). These statistics are reported primarily for those who would like to be able to draw some very rough comparisons across tables.

Supreme Court, are seen as highly active and partisan actors in the state's policymaking process.⁵⁶ As one Ohio legislator complained,

I am personally disappointed with the amount of party politics that go on in the court's decisionmaking. I realize that people can't be separated from their "political animal." But I feel that the courts should interpret the law, not make law. Coming out of law school, I was quite naive to the amount of partisan politics that goes on at the Ohio Supreme Court.⁵⁷

Forte offers the following definition of judicial activism: "[T]he court is activist when its decisions conflict with those of other political policy-makers."⁵⁸ In Ohio, the relationship between the courts and the legislature is often confrontational because the courts are seen by the legislators as being extremely partisan. This confrontational relationship is due in part to the tradition of split-party government in Ohio. Before 1978, the Ohio appellate courts had long been controlled by Republicans. Between 1978 and 1986, Democrats controlled the Ohio Supreme Court. In 1986, Republicans regained control of Ohio's high court.⁵⁹ During most of this period, the legislature was under split-party control, with the Republicans holding the state's upper chamber and Democrats having a solid majority in the state's lower chamber. The parties alternated control of the governor's office during this time. The split-party tradition in Ohio politics adds to the highly partisan nature of the Ohio Supreme Court and adds to the costs of judicial elections in Ohio. Since the Democrats first gained control of the Ohio Supreme Court in 1978, Ohio judicial elections have become very expensive partisan fights. In 1980, the candidates for chief justice of the Ohio Supreme Court spent \$100,000 for the highly partisan campaign; in 1986, the price skyrocketed to \$2.7 million.⁶⁰

In the interviews for this Article, many Ohio legislators assumed that it was quite natural for the state courts to make policy. As one senior Ohio legislator described the situation,

⁵⁶ See John D. Felice & John C. Kilwein, *High Court-Legislative Relations: A View from the Ohio Statehouse*, 77 JUDICATURE 42, 47-48 (1993).

⁵⁷ Miller, Interviews, *supra* note 25.

⁵⁸ THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT 17 (David F. Forte ed., 1972); see also Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT xi (Stephen C. Halpern & Charles M. Lamb eds., 1982) ("a collection of original, historical, normative, and behavioral essays on the exercise of activism and restraint by the U.S. Supreme Court." *Id.* at xi).

⁵⁹ TARR & PORTER, *supra* note 2, at 124-32.

⁶⁰ Baum, *supra* note 2, at 126.

Judges in Ohio are subject to the same influences as legislators. They get wine and dine at the utilities and other interests in the same restaurants we do. All business interests seek to control their future, to press their influence, to maintain control over the court's decisions, basically to keep us out of their decisions.⁶¹

Commenting on the policymaking role of the Ohio Supreme Court, one Democratic senator stated,

The Ohio Supreme Court serves as a convenient whipping boy for the media and others who are upset with the political outcomes of their decisions. I didn't like the way [the former Democratic chief justice] handled himself, including his tactics and manipulation, but on policy questions he led the court in the right direction.⁶²

This conflict between the Ohio legislature and the Ohio courts is not unexpected, given the key role played by the parties in the nomination and election of Ohio judges, even though the judges run on technically nonpartisan ballots in the general election.⁶³ Ohio judges are certainly partisan animals. As Tarr and Porter note:

Where parties participate in selecting judicial candidates, those selected tend to be not merely candidates with party ties but partisans. Systems that provide for a limited tenure for judges and require them to run for reelection on partisan ballots may reinforce the partisan perspective that a judge has brought to the bench.⁶⁴

Another indicator of state courts' policymaking roles is the amount of attention legislators pay to the decisions of their state courts. It is expected that the more active the policy role played by the courts, the more attention legislators pay to court decisions. As Table 3 indicates, Ohio legislators report that they generally pay a great deal of attention to the decisions of the Ohio Supreme Court, certainly more attention than their counterparts in Massachusetts. Only nineteen percent reported that they pay little or no attention to the decisions of the Ohio courts. Table 3 lends further support to the argument that Ohio legislators perceive the Ohio courts as important and active policymakers.

⁶¹ Miller, Interviews, *supra* note 25.

⁶² *Id.*

⁶³ See Kathleen L. Barber, *Judicial Politics in Ohio*, in GOVERNMENT AND POLITICS IN OHIO (Carl Lieberman ed., 1984); Barber, *supra* note 38.

⁶⁴ TARR & PORTER, *supra* note 2, at 57.

Table 3⁶⁵

State Legislators' Attention to the Decisions of Their
Respective Supreme Courts

		Great Deal	Some	Not Much	None
Ohio	(N=12)	35%	46%	18%	1%
Massachusetts	(N=64)	22%	42%	33%	3%

gamma = .33 tau-b = .18

In addition, Ohio legislators are not shy about taking action to overturn or to modify Ohio Supreme Court decisions which they perceive to be incorrectly decided on policy grounds. As Table 1 indicates, eighty-eight percent of the Ohio legislators said that they would take legislative action to overturn a decision of the Ohio Supreme Court that they perceived to be incorrect. But a more important lesson from Table 1 is the fact that only nine percent of the Ohio legislators volunteered that they could foresee circumstances in which they would do nothing in response to an unfavorable Ohio court decision. In the interviews, Ohio legislators repeatedly said that state court decisions became important issues in their own re-election campaigns. Because they perceive the Ohio courts as important players in the state policy game, Ohio legislators are not at all hesitant to overturn state court decisions.

The following statements are fairly typical of the passion that Ohio legislators express when discussing Ohio court decisions. One Ohio legislator, commenting on possible reactions to an unfavorable decision by the Ohio Supreme Court, stated, "I would issue a press release to scare the court to their senses. I don't hesitate to overturn court decisions. The courts are just another political group, in my opinion."⁶⁶ Another Ohio legislator stated,

If the courts issue a bad opinion, I'd go and talk to [first name of a Ohio Supreme Court justice] first. They are really aloof and disconnected with the legislature. They have a great deal of power, but most judges are unknown and are not understood by the people. I'd make sure they understand how wrong they are.⁶⁷

⁶⁵ Miller, Interviews, *supra* note 25.

⁶⁶ *Id.*

⁶⁷ *Id.*

Table 4⁶⁸State Legislators' Evaluations of Their
Respective Supreme Courts

		Excellent	Good	Fair	Poor	NR*
Ohio	(N=127)	9%	58%	26%	2%	5%
Massachusetts	(N=63)	16%	38%	17%	3%	26%

*NR=No rating because legislators refused to give rating.

During the interviews, the state legislators were asked to give a job performance rating to their respective state supreme courts. Table 4 compares the overall job ratings of their respective state supreme courts by Ohio and Massachusetts legislators. The majority of Ohio legislators gave the Ohio Supreme Court a "good" rating. Note that only five percent refused to rate the court's job performance, another indicator of the amount of attention that the Ohio Supreme Court receives in the Ohio legislature.

Table 5⁶⁹Ohio Legislators' Evaluation of Ohio
Supreme Court by Party

		Excellent	Good	Fair	Poor
All Democrats	(N=67)	3%	51%	43%	3%
All Republicans	(N=51)	17%	77%	6%	0%

gamma = .81 tau-b = .45

However, the performance ratings of the Ohio Supreme Court are certainly influenced by the legislators' party affiliations. As Table 5 indicates, Republicans gave much higher ratings to the Ohio Supreme Court than did their Democratic colleagues in Ohio. It is no coincidence that when these interviews were conducted the Republicans had just regained their traditional majority on the Ohio Supreme Court. As one Republican Ohio legislator commented,

I think the Ohio Supreme Court is doing a pretty good job today because my party is controlling the court. It's a change like night and day from when

⁶⁸ *Id.*

⁶⁹ *Id.*

the Democrats had control. The previous court [controlled by Democrats] made laws. Today's court [controlled by the GOP] just interprets them.⁷⁰

The real conflicts between the Ohio Supreme and the Ohio legislature do not necessarily involve the court overturning recent legislative enactments.⁷¹ Instead, the Ohio Supreme Court has begun to tackle issues that the legislature has ignored, such as workers' compensation decisions and other social issues that the Ohio legislature had refused to address for many years because of the split-party nature of the Ohio General Assembly. Because the legislature could not come to an agreement on these sensitive partisan issues, the concerned interests turned to the Ohio courts for relief. In the 1980s, the Democratic Ohio Supreme Court became very activist on liberal social, consumer, and labor issues. According to Tarr and Porter,

A long line of precedent pertaining, *inter alia*, to restrictions on suits against state and local governments and limitations on medical malpractice claims and on the rights of tenants, consumers, and workers injured during the course of employment was reversed. Virtually overnight the court became "pro-labor and highly urban" in orientation.⁷²

These generally liberal social decisions generated a great deal of criticism from many members of the more conservative Ohio legislature. This judicial activism on social issues is probably the key reason the Ohio legislators perceive the Ohio courts in highly partisan terms.

Thus, the Ohio courts became more activist and more visible in part because they needed to prove to the voters that the change in party control of the Ohio Supreme Court had produced important substantive changes in policy outcomes. The highly partisan judicial selection system used in Ohio helps produce highly partisan state judges who feel that they need to play an activist role in the state's policymaking process in order to get themselves re-elected and to help their fellow partisans in the other institutions of state government get elected as well.

V. THE MASSACHUSETTS COURTS: A PASSIVE ROLE

Jacob entitles his essay on comparative state politics, *Courts: The Least Visible Branch*.⁷³ Although it was not his intention, Jacob could easily have

⁷⁰ *Id.*

⁷¹ See Glick, *supra* note 3, at 87, 100-01.

⁷² TARR & PORTER, *supra* note 2, at 128-29 (citation omitted).

⁷³ Jacob, *supra* note 2.

been referring to the Massachusetts Supreme Judicial Court (SJC). Unlike the activist and partisan policymaking role played by the Ohio courts, the Massachusetts SJC is perceived by its legislature as an extremely passive actor in state politics. The Massachusetts courts are much less likely than their counterparts on the federal or Ohio benches to become involved in purely political policy battles in the state. As one Massachusetts senator explained it, "The state courts [here] are less activist than the federal courts. The state courts understand their role and feel more obligation to follow precedent and statutes. The federal courts are legislating; the state courts are not."⁷⁴

In general, the Massachusetts legislators were quite surprised that academics would even be interested in their state courts. The decisions of the SJC receive very little attention in the media and in the legislature. As Table 3 indicated, Massachusetts legislators do not pay much attention to court decisions in their state, certainly less attention than the Ohio legislators pay to their courts. A Massachusetts representative who also practices law in the state argued, "Comparatively speaking, the courts in Massachusetts are not very political. Of course the courts here are somewhat influenced by politics, but not nearly as much as in other states."⁷⁵ Echoing these words, a Massachusetts representative concluded, "Generally, there is a much quieter bench in Massachusetts than in some other states."⁷⁶

The overall impression left by the Massachusetts interviews is that the Massachusetts legislature does not spend a great deal of time reacting to state court opinions because, traditionally, the state courts play a very passive role in the state's policymaking process. For example, Glick's work from the late 1960s found that only one of the justices on the Massachusetts SJC perceived policymaking as a proper role for the court.⁷⁷

During the Massachusetts interviews, only thirty-seven percent of the legislators spontaneously mentioned any policymaking role for the SJC whatsoever, and only fifty-two percent could even mention a specific SJC decision when asked to do so. As one Massachusetts representative noted, "For us to react to the courts, it takes a combination of media attention and strong public sentiment. Usually we don't react at all to court decisions because the courts create little controversy in this state."⁷⁸ Most of the legislators who mentioned a specific SJC decision discussed the court's rulings on applying the state sales tax to services or rulings on the beverage bottle deposit and

⁷⁴ Miller, Interviews, *supra* note 25.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ HENRY R. GLICK, SUPREME COURTS IN STATE POLITICS 34 (1971) (using the term "lawmaker" instead of policymaker).

⁷⁸ Miller, Interviews, *supra* note 25.

recycling system in the state. These issues are not highly salient to the general public, although some legislators did mention the court's highly controversial ruling in the 1980s which struck down the state's death penalty.⁷⁹ In the United States House of Representatives and the Ohio General Assembly interviews, virtually every member mentioned the policymaking role of their respective courts and all mentioned a specific court case, usually one with broad ranging policy ramifications.

As indicated in Table 3, well over a third of the Massachusetts legislators reported that they paid little or no attention to decisions of the Massachusetts SJC. Another clear indicator of the differences between court-legislative interactions in Massachusetts and Ohio is the fact that only five percent of the Ohio members refused to give a performance rating to the Ohio Supreme Court, as indicated in Table 4, but fully twenty-six percent of the Massachusetts legislators refused to rate their state supreme court. As one Massachusetts representative said, "The federal courts have more impact in Massachusetts than the state courts do. Federal judges have often forced the legislature to act, but I have no opinions on state judges. I have no contact with them, and they don't really affect my daily work."⁸⁰ Most of the Massachusetts legislators who refused to rate the job performance of the SJC said that they did not possess enough information about the decisions of the court to give it a rating. Repeatedly, members in Massachusetts stated that the courts or court decisions were not issues in their campaigns. In Ohio, the exact opposite was true. Thus, the Massachusetts legislators do not pay much attention to the courts in their state because they do not perceive the courts as important policymakers.

Table 1 indicates that Massachusetts legislators were the least likely to introduce legislation or constitutional amendments attempting to overturn an unfavorable decision of the SJC. Only fifty-three percent would do so. Fully seventy percent of the Massachusetts legislators said that they would do nothing in response to an unfavorable state court decision. Additionally, fifty-five percent seemed somewhat confused by the question, responding that they would have to talk to someone else before taking action. One Massachusetts senator, commenting on possible responses to an unfavorable decision from the Massachusetts SJC, stated, "There is a great deal of inertia in response to the SJC, except in the most central areas, that is, the most important issues politically. There aren't many of those cases in this state."⁸¹ A lawyer-legislator in Massachusetts said, "How do I react to an unfavorable court decision? With frustration. The courts are the final arbiter. They are the final

⁷⁹ *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984).

⁸⁰ Miller, Interviews, *supra* note 25.

⁸¹ *Id.*

interpreter of the law and of the constitution. In this state, the decision of the court is final."⁸² Another Massachusetts representative stated, "We have no power to change a court decision or [to change] how the courts operate. That is not within our responsibilities."⁸³

Part of the reason that the Massachusetts state courts do not play an active role in policymaking is that since the 1950s the Democratic Party has controlled most of the apparatus of state government.⁸⁴ As Tarr and Porter argue,

In one-party states, political elites (which would include the justices) characteristically share an ideological consensus, often times supporting institutions and practices that diverge from prevailing national norms. . . . Rather than seeking to develop an independent policy role, the state supreme court typically serves an important but subordinate role in defending state values.⁸⁵

A Massachusetts representative supported this view by declaring, "The Governors in this state have generally been in the mainstream of thinking in Massachusetts, and they have appointed mainstream judges. Thus the Massachusetts courts are very much in step with the legislature."⁸⁶ Along these lines, a Massachusetts representative noted, "The courts have never been a major factor in the politics of this state."⁸⁷ Another Massachusetts representative agreed, saying, "In the history of Massachusetts, the legislature has had little reaction to the courts."⁸⁸ The legislature does not view itself in a contentious mode with the courts, maybe with the Governor, but never with the courts."⁸⁹

Given the one party dominance of the Massachusetts state government, one would expect that the legislators' job performance ratings of the state courts would vary by their party affiliations. Table 6 indicates that, like their federal and Ohio counterparts, party also affects how the legislators in Massachusetts perceive the workings of their state courts. But recall that twenty-six percent of the Massachusetts legislators refused to give any job performance rating for the courts. Thus, while Democrats in Massachusetts gave higher ratings to the state courts than did the Republicans, a sizable proportion of the legislators did not

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See DALTON ET AL., *supra* note 26, at 443.

⁸⁵ TARR & PORTER, *supra* note 2, at 56.

⁸⁶ Miller, Interviews, *supra* note 25.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

think that they had enough information about the courts to rate them at all, serving as further evidence that the Massachusetts courts are not perceived as important policymakers.

Table 6⁹⁰

Massachusetts Legislators' Evaluation
of Massachusetts Supreme Judicial Court
by Party

		Excellent	Good	Fair	Poor
All Democrats	(N=29)	28%	59%	14%	0%
All Republicans	(N=18)	11%	39%	39%	11%

gamma = .61

tau-b = .36

The passivity of the Massachusetts SJC may not be apparent from other measures. For example, on Caldeira's 1975 reputational scores, the Massachusetts SJC ranked fifth among the states, while the Ohio Supreme Court only ranked twenty-first.⁹¹ On the 1920 reputational scores, Massachusetts ranked first while Ohio ranked twenty-third.⁹² The number of other states that cite these two state courts are almost equal, with forty-seven states citing the Massachusetts SJC and forty-six states citing the Ohio Supreme Court.⁹³ But the longstanding strong reputation of the Massachusetts SJC could be deceiving. According to Glick's work, Massachusetts ranked tenth in the absolute number of challenges to the constitutionality of state statutes in the 1981-1985 time period, but only twenty-fifth in the percent of state laws declared unconstitutional.⁹⁴ And on Canon and Baum's overall tort doctrine innovation scores for the post-World War II period, Massachusetts ranked forty-eighth among the states and Ohio ranked eighteenth.⁹⁵ The Massachusetts SJC is highly respected elsewhere in the nation, but the Massachusetts legislature perceives the court as an extremely passive policymaker.

⁹⁰ *Id.*

⁹¹ Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 89 (1983).

⁹² *Id.* at 92.

⁹³ Gregory A. Caldeira, *Legal Precedent: Structures of Communication Between State Supreme Courts*, 10 SOC. NETWORKS 29, 37 (1988).

⁹⁴ Glick, *supra* note 3, at 100-01.

⁹⁵ Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 977 (1981).

One reason for the passive role played by the Massachusetts courts is the fact that the entire judicial selection process receives very little attention in the state legislature or in the media. Because the Massachusetts judges are appointed for life terms without any real input from the voters or from the legislature, these appointments are not perceived by state legislators to have important policy consequences. In part, because the Massachusetts courts have been traditionally passive in the policymaking process in this one-party state, the relatively invisible and apolitical selection system seems to perpetuate this passivity.

VI. CONCLUSIONS

As perceived by their respective legislators, the Ohio Supreme Court plays a very active and partisan role in the state's policymaking process, the federal courts play a moderately active policymaking role, and the Massachusetts SJC plays a very passive role in that state's policymaking process. These differences should not be too surprising, given Tarr and Porter's conclusions that "[t]he form, content, type, and effect of state supreme court policymaking is as richly varied as the politics of the fifty states."⁹⁶ The particular differences in the policymaking roles of the courts in this Article are due in part to differing political and legal cultures, but one is also struck by how the differences in judicial selection systems seem to affect the policymaking role of the respective courts. Although Sheldon and Lovrich argue that highly articulated judicial selection systems promote both judicial independence and accountability,⁹⁷ this research suggests that the more visible and political the selection system, meaning the more highly articulated is the selection system, the more active role the courts play in the policymaking process.

Other research has found that differences in judicial selection systems do not lead to differences in background characteristics of judges⁹⁸ or to differences in the esteem held for the judges by the public or by legal professionals.⁹⁹ In fact, Jacob reflects much of the academic thinking on the subject when he writes, "examination of selection procedures, however, does

⁹⁶ TARR & PORTER, *supra* note 2, at xvi.

⁹⁷ Sheldon & Lovrich, *State Judicial Recruitment*, *supra* note 40.

⁹⁸ See Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges*, 6 L. & SOC'Y REV. 579-94 (1972); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987); Elliot E. Slotnick, *Review Essay on Judicial Recruitment and Selection*, 13 JUST. SYS. J. 109 (1988).

⁹⁹ Erik Wasmann et al., *Perceptions of State and Local Courts: A Comparison Across Selection Systems*, 11 JUST. SYS. J. 168 (1986).

not demonstrate that any particular formal selection procedure leads to better judges."¹⁰⁰ Yet varieties in the articulation level of the judicial selection systems, such as the number of political actors involved in judicial selection, affect whether and how a court's role as a policymaker is perceived by its respective legislature. Thus, this research confirms Gates and Johnson's conclusions that "although selection systems do not produce judges with widely varying backgrounds, the systems themselves may influence the decision making of judges and their relationship to the political system."¹⁰¹

The three governmental systems in this study certainly vary in the number of actors who participate in the initiation, screening, and affirmation stages of the judicial recruitment process. The highly articulated Ohio judicial selection system, which allows for a large number of players at the various judicial recruitment stages, helps produce the highly partisan and activist policymaking role of the Ohio Supreme Court. The moderately articulated federal selection system, with relatively few actors at the initiation and screening stages, helps produce a court system that is perceived on Capitol Hill to be an active participant in the federal policymaking process, although less active and less confrontational than the Ohio courts. The very low articulation of the Massachusetts judicial selection system, where very few actors participate in any of the judicial recruitment stages, helps produce a very passive court.

In part, because federal judges are selected on the basis of their policy preferences, the Congress perceives the federal courts as regular participants in the policymaking process. Still, congressional reactions to federal court decisions are generally considered to be unusual events. Because Ohio judges must frequently run for re-election with the support of their political parties, Ohio legislators perceive them to be highly activist partisans. Because Massachusetts judges are often chosen for other than policy reasons, and because they possess life appointments, Massachusetts legislators perceive them to be almost invisible in the policymaking process. While the Ohio, Massachusetts, and federal legislatures are very similar in many respects, they have dramatically different perceptions of the policymaking roles of their respective judicial colleagues. Thus, this Article has provided evidence that an important institutional factor, the articulation level of the judicial selection system, greatly affects interactions between courts and legislatures as well as the policymaking role of the courts.

¹⁰⁰ Jacob, *supra* note 2, at 269.

¹⁰¹ AMERICAN COURTS: A CRITICAL ASSESSMENT, *supra* note 9, at 159.