THE INTERPLAY OF LEGITIMACY, ELECTIONS, AND CROCODILES IN THE BATHTUB: MAKING SENSE OF POLITICIZATION OF OREGON’S APPELLATE COURTS

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“It is one thing for a court to undertake the task of protecting the people from their government and quite another to protect the people from themselves.”1

“What exactly is the relationship between the judge and the law?”2

I. INTRODUCTION

Politics is the social activity of making choices. Politics matters because our social choices have societal consequences affecting the quality—indeed, ultimately, the very continuation—of our lives. Astute observers from Aristotle3 to Harold Laswell4 and Sheldon Wolin5 have eloquently articulated the nexus between choices and consequences. But who chooses? Who takes the political initiative? And what happens when someone “steals the initiative”?6 More specifically, what happens when, in states like Oregon, state appellate court decisions are perceived as pre-empting choices made by popular majorities? In a way, the answer to these questions is pretty obvious: Those who believe their choices have been trumped get hoppin’ mad at judges.

Yet the obvious answer also is too simplistic because it begs a more basic question: Why do those who believe their initiative has been “stolen” get mad at judges? And who are these people? More precisely, under what circumstances and in what contexts do some folks get angry with the judiciary? Clearly, this Symposium addresses the sources of and fallout from anger at appellate judges in Oregon, and proposes reforms that might mitigate the resultant damage apparently done to this state’s appellate judiciary. If we are going to understand, much less mitigate, threats to judicial independence in Oregon, we need to analyze the contexts and conditions that might fuel attacks on Oregon’s appellate judges.

This essay seeks to understand the prerequisites of politicization. It does so by exploring various scholarly explanations of what has been termed the “etiology,”8 and the

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7. Not everyone would agree that Oregon’s appellate judiciary has been “damaged.” In all likelihood, Kevin Mannix, Lon Mabon, Don McIntyre, and Bill Sizemore support limiting judicial discretion. One person’s attack on judicial independence is another’s assurance of judicial accountability—or so it seems. As we will see, the story is more complicated than a dichotomous view allows.
“dynamics” of public support for the United States Supreme Court, as well as the interactions between “institutional arrangements and contextual forces” essential to understanding state appellate court decision-making. This Essay also surveys the various types of initiatives, differentiating between ballot measures that are more—or less—likely to become “crocodiles in the bathtub.” The Essay proceeds as a synthetic endeavor, drawing on existing empirical literature to make sense of judicial politicization. It also is necessarily somewhat of an exercise in drawing modest and reasonable inferences because the preponderance of studies examining public support focus on the United States Supreme Court.

The long and short of my argument is that almost all of the time, in almost all instances, state appellate court decisions pass without notice and without remark. Unless and until vigorous public controversies generate fiercely contested initiative measures that, when judicially invalidated, raise the salience of the justices who nullified such measures. In mixed metaphorical terms, when “naked preferences” are given the form of ballot initiatives, they potentially become “political hot potatoes” that, if thwarted judicially, may morph into “crocodiles”—able to injure, and occasionally consume, the judges who invalidated them. This essay explores the dynamics of this process of judicial politicization.

12. I share Brace’s and Hall’s caveat: “[R]esults generated from single-court studies are not necessarily generalizable and may, in fact, present a very inaccurate picture of the process of judicial voting broadly considered.” Brace & Hall, Interplay, supra note 10, at 1211.
14. Not all judicial invalidation of ballot measures involves nullification following electoral passage. Judges can effectively veto a ballot measure at many stages of the initiative process. See the distinction between “before the ballot” and “the day after” in RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA ch. 6 (University Press of Kansas 2002).
15. Cass Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1689 (1984) (defining naked preferences as “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want”). Compare THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961), and Eule, supra note 1, at 1503.
17. Uelman, supra note 11.
A. Politics v. Politicization

Before launching into the following analysis, I want to head off any possible confusion by differentiating between how I use the terms “politics” and “politicization.” I understand politics as both an unavoidable and a universal human activity.\(^{18}\) Politics, per se, is not problematical—indeed, it can be understood as the defining human activity.\(^{19}\) It is a social activity that takes place in a wide variety of venues via a diversity of modes. By contrast, politicization is a pejorative, synonymous with partisanship. Even if politics entails choosing, politics is not necessarily identical with partisan side taking. In other words, although most contemporary American politics is thoroughly politicized, some important political actors still make consequential social choices in, say, a reasoned, impartial, and principled manner.\(^{20}\)

Appellate judges inescapably engage in politics—as I use that term—because they make consequential social choices\(^{21}\) in small-group institutional settings.\(^{22}\) But Americans do not think of judges as “politicians in robes.”\(^{23}\) Therein lies the rub: Generally speaking, Americans understand politics pejoratively, conflating it with partisanship, and distinguishing between politics and law. This starkly dichotomous orientation casts appellate judges as intellectual “eunuchs,” “Galahads”\(^{24}\) pristinely innocent of any “predispositions”\(^{25}\) whatsoever, whose sole task is not to make choices, but to find law (as if judges stumbled over law lying in their path). On this view, judging is, and ought to remain, “above” and/or “beyond” politics—confined wholly within The Realm of Law, conceived as the domain of immutable rules and natural rights, and apprehended to exist in sharp contrast to the political realm of partisan self interest.

This bifurcated view has the singularly unfortunate consequence of making judicial independence wholly contingent upon a profound social misperception of the judicial role. On this view, federal and state appellate judges are insulated from public accountability, to some extent as long as they conform to a mythical, “apolitical” notion of what judges do. Judges are protected from the willful effects of “occasional ill humors in the society”\(^{26}\) only insofar as they are shielded behind the myth that judges themselves do not exercise will. “Myth sustains mystique . . . [b]ut if the mask of myth falls, people can see more clearly what is going on. If an institution’s involvement in raw political

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18. ARISTOTLE, NICOMACHEAN ETHICS, supra note 3.
20. Of course, the distinction between politics and politicization is hardly a bright line. And whether that line has been crossed is a matter of debate. For instance, most of the debate over Bush v. Gore has revolved around whether the decision of the Justices in the five-vote majority was law-full or partisan. See BUSH V. GORE: THE COURT CASES AND THE COMMENTARY (E.J. Dionne Jr. & William Kristol eds., The Brookings Institution 2001); Gore Vidal, Times Cries Eke! Buries Al Gore, THE NATION (Dec. 17, 2001). Compare James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise? (unpublished paper) (on file with author).
23. This characterization is attributed to the late Washington State University political scientist Charles Sheldon. Email from Steve Frank to James Foster (00001@stcloudstate.edu) (Feb. 12, 2001) (on file with author).
24. Robert Dahl, Decisionmaking in a Democracy: The Supreme Court as a National Policymaker, 6 J. PUB. L. 279, 184 (1957) (arguing, inter alia, that presidential appointment power makes the Supreme Court reluctant to invalidate majoritarian policies).
26. THE FEDERALIST No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961). To the extent that Hamilton’s defense of judicial independence contributes to the myth of an apolitical American judiciary, it not only is disingenuous, it is mischievous.
decision-making becomes visible, people may develop contempt for it.\textsuperscript{27} When state appellate judges are apprehended as transgressing, by crossing the line demarcating The Realm of Law from the realm of politics, they may be brought up short by being punished at the polls. Ironically, then, when state appellate judges are perceived to behave “politically,” “initiative elites”\textsuperscript{28} (among others) might seek electoral sanctions, thereby politicizing the judicial process that is normatively presumed to be devoid of “politics” (partisanship).

\textsuperscript{28} Manweller, \textit{supra} note 11.