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

JAMES C. FOSTER*

> "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 Aristotle[3] to Harold Laswell[4] and Sheldon Wolin[5] 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[7] 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

---

* Professor, Oregon State University—Cascades; Ph.D., University of Washington, 1976; M.A., California State University—Los Angeles, 1971; B.A., Lewis & Clark College, 1969. The author appreciatively acknowledges the contributions of Marcella A. Hughes, Mathew Manweller, Melinda B. Rickman, and Stephen L. Wasby in the preparation of this Essay.

1. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1585 (1990).

2. JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 133 (University of California Press 1989).

3. Aristotle saw humans as political beings and politics, the science of the city-state, as the "master science of the good." ARISTOTLE, NICOMACHEAN ETHICS, Bk. 1 (Martin Ostwald trans., Bobbs-Merrill 1962). *Compare* ARISTOTLE, POLITICS, Bk. 1 (Ernest Barker trans., Oxford University Press 1958).

4. HAROLD LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (World Publishing 1958).

5. SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT ch. 1 (Little, Brown 1960).

6. ELISABETH R. GERBER, ARTHUR LUPIA ET AL., STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY (Prentice Hall 2001).

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.

8. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992).

"dynamics"[9] of public support for the United States Supreme Court, as well as the interactions between "institutional arrangements and contextual forces"[10] 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."[11] The Essay proceeds as a synthetic endeavor, drawing on existing empirical literature to makes 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.[12]

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.[13] This remains true *unless and until* vigorous public controversies generate fiercely contested initiative measures that, when judicially invalidated,[14] raise the salience of the justices who nullified such measures. In mixed metaphorical terms, when "naked preferences"[15] are given the form of ballot initiatives, they potentially become "political hot potatoes"[16] that, if thwarted judicially, may morph into "crocodiles"[17]—able to injure, and occasionally consume, the judges who invalidated them. This essay explores the dynamics of this process of judicial politicization.

---

9. Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114 (1997).

10. Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1208 (1997) [hereinafter Brace & Hall, *Interplay*].

11. Mathew Manweller, Initiative Elites and the Courts: A Strategic New Institutionalist Approach to the State Initiative Process (2003) (unpublished Ph.D. dissertation, University of Oregon) (on file with author); Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037 (2001).

The late Otto Kaus, California Supreme Court Justice from 1980-1985, coined the metaphor of "crocodiles in the bathtub" to describe a judge's predicament of deciding controversial cases while facing re-election: "[I]t was like finding a crocodile in your bathtub when you go to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving." Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997). *See* Gerald F. Uelmen, *Otto Kaus and the Crocodile*, 30 LOY. L.A. L. REV. 971 (1997). *See also* Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. REV. 733 (1994); Paul Reidinger, *The Politics of Judging*, A.B.A. J. Apr. 1, 1987, at 52, 58.

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.

13. State judges "are infrequently challenged and rarely defeated." PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTION AND THE QUEST FOR ACCOUNTABILITY 34 (University of Texas Press 1980).

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).

It also should be noted that not all "nullifications" of ballot measures are judicial. "[*E*]*very winning initiative gives government actors an opportunity to make implementation and enforcement decisions.* When making these decisions, government actors regularly reinterpret, and sometimes reverse, electoral outcomes." ELIZABETH GERBER ET AL., STEALING THE INITIATIVE: HOW STATE GOVERNMENTS RESPOND TO DIRECT DEMOCRACY 4 (Prentice Hall 2001) (emphasis in original).

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.

16. GRODIN, *supra* note 2. *Compare* Key's and Crouch's reference to "battering rams." V.O. KEY, JR. & WINSTON W. CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 458 (University of California Press 1939).

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

---

18. ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 3.

19. HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT ch. 4 (Viking Press 1961).

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).

21. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (CQ Press 1998).

22. *Id*. Compare the various essays in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell Clayton & Howard Gillman eds., University of Chicago Press 1999).

23. This characterization is attributed to the late Washington State University political scientist Charles Sheldon. Email from Steve Frank to James Foster (t00001@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).

25. *Compare* Brace & Hall, *Interplay*, *supra* note 10, at 1206-07.

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."[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"[28] (among others) might seek electoral sanctions, thereby politicizing the judicial process that is normatively presumed to be devoid of "politics" (partisanship).

27. Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 LAW. & SOC'Y REV. 385, 387 (1974).
28. Manweller, *supra* note 11.