



The Politics of Judges

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Terri Jennings Peretti, *IN DEFENSE OF A POLITICAL COURT*. Princeton University Press, 1999. 371 pp. \$27.50.

Many judges won't like this book, but it might profit them to read it. Terri Jennings Peretti argues (1) that judge make decisions based on their politics and not on some neutral principles of law; (2) that judges are not particularly independent of the influence of legislatures and hence must tailor their decisions to congressional politics; and (3) that this situation is a very good thing. As most consider the first two premises false and virtually everyone considers them pernicious, the argument is obviously an intriguing one. And I will suggest that it contains a substantial residuum of truth. *In Defense of a Political Court* focuses on federal judges, but its arguments surely apply as well to state courts, though elected state judges already must see themselves as part of the political process.

Ms. Peretti begins by reviewing the concept of traditional neutral legal principles, the cynical claims of critical legal studies, and the majoritarian case for provisional review of Supreme Court decisions by representative bodies. While she embraces none of the theories, some of her sympathies lie with the "Crits." She proceeds with her argument that judges are fundamentally political animals, in every sense of that word.

Peretti's arguments synthesize some very well established strains of political science research. The prominent democratic theorist, Robert Dahl, argued decades ago that the courts were not truly independent but would defer to the majoritarian will on all salient issues.¹ More recently, those studying the court propounded something they called the "attitudinal model," which maintained that judges decided cases according to their ideological or political objectives, rather than neutral principles.² More recently, political scientists have combined the models and argued that judges make political decisions within the constraints imposed by the legislative and executive branches.³

The political scientists support their claims with a formidable body of research. Most law professors are unfamiliar with their data, but there are literally scores of studies demonstrat-

ing that a federal judge's decisions can be predicted by knowing the party of his or her appointing president. Peretti reviews this research, noting that politics is central to the selection of federal judges and that their decisions on the bench likewise correspond with politics (in the ideological sense, not the party loyalty sense). She views the Court as a representative body, in a sense. Judges are selected indirectly (much like the U.S. Senate used to be) and have relatively slow turnover, at least on the Supreme Court. Hence, the Court's makeup and its decisions respond to political trends but more slowly than do the other branches.

The political science research, including that emphasized by Ms. Peretti, does not reflect a full understanding of the judicial role and is exaggerated in its claims.⁴ Social scientists focus their empirical vote studies on the most controversial issues (such as civil liberties) at the Supreme Court level, and may fail to account for the fact that decisions categorized as political may actually be legal, in reflection of a legal philosophy about constitutional interpretation. A broader perspective with greater understanding of the law would show that judges are not so pervasively political as is often claimed.⁵

The exaggerated claims of the political science research do not warrant its summary dismissal, however. There is simply too much evidence that cannot be dismissed. If judges were deciding cases apolitically, the outcome would not fit the pattern of the research results. For example, a study of my own found that circuit court judges are more likely to grant *Chevron* deference to agency decisions that fit their ideology than those that do not.⁶ In major cases with a significant policy component, judges are pretty clearly influenced by ideology, more than they are driven by neutral legal principles.

Peretti's second point is that judges are constrained, rather than independent. She considers the tools that Congress may use to constrain the courts, from impeachment to jurisdictional control, to control of judicial salaries, budget, and staff. Moreover, judicial decisions often require the affirmative action of other branches for their implementation, and compliance is uncertain. Peretti's policy-motivated judges clearly have to consider the response from other branches if they are

Footnotes

1. Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as National Policy-maker*, 6 J. PUB. LAW 279 (1957).
2. A classic exposition of this theory is found in JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).
3. A good example of this research is Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73

N.Y.U. L. REV. 1377 (1998).

4. I have reviewed and critiqued this research in Frank B. Cross, *Political Science and the New Legal Realism*, 92 NW U. L. REV. 285-308 (1997).
5. For example, a study of district court judges' rulings on the constitutionality of the sentencing guidelines, an issue without a clear ideological divide, found that other factors better predicted case outcomes. See Sisk, Heise & Morriss, *supra* note 3.
6. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 YALE L.J. 2155 (1998).

to see their policies advanced. This reflects the current strain of institutional research in political science.⁷

Judges may take offense at these suggestions. Most judges probably feel little fear of impeachment and are undeterred by the remote threat that Congress may limit basic federal jurisdiction. In recent years, though, the federal courts have increasingly gone to Congress with their hat in hand. Judges have pleaded for more resources in staff, courthouses, etc. Increasingly, the chief justice has gone to the legislature and begged that federal jurisdiction be limited, as his judges feel overburdened with their caseload. There are clear anecdotal examples of where the courts have compromised in reaction to political pressure. As in the case of the political decision-making theory, the vast bulk of judicial decisions are of little interest to the legislature and therefore unconstrained. Yet the legislature may seek to pressure the judiciary on controversial issues, which may be among the most important ones before the courts.

After concluding that judges are ideological, Peretti does not criticize them, as Robert Bork has. After declaring that judges are relatively dependent on and responsive to the legislature, Peretti does not seek to stiffen their respective spines. Instead, she argues that the constrained ideological court is ideal. She notes that the so-called accountable branches are far from being perfectly majoritarian. The courts provide another institution that can interact with the legislature and the executive, adding to the dialogue of governing. While courts won't "go to the mat" to fight the legislature, they do put up some resistance to policies with which they disagree and might even mobilize citizens in support of their position. She urges that "the Court possesses the capacity for serving as a particularly profitable redundancy in the policymaking process, by invoking interests and values overlooked in other branches and by being sensitive to unintended or harmful policy consequences in individual cases." Peretti supports her position by noting that most Americans, according to research, believe that the judiciary is ideological and is relatively happy with that fact.

The key conclusion, aptly if incompletely made by Peretti, is that courts are government institutions that exercise political power, much like the legislative and executive branches. She describes judges as "politicians who share in the difficult but noble task of political leadership, in generating consensual solutions to the often vexing and contentious issues of the day." This must be true, at least in part. A certain politics is intrinsic in the nature of judging—even the most impartial judge deciding the most mundane of cases is exercising political power. The classical, formalist judge is still exercising governmental power. The common law, once seen as distinct from politics, has become central to politics, as tort law commands considerable attention from legislatures.

Of course, a great deal of litigation has little or no ideological component and of relatively little concern to the legislative or executive branches of government. A flaw in much of the

political science research on courts is its tendency to dwell on the most controversial cases that come before the United States Supreme Court, at the expense of the representative bulk of litigation and other courts, which probably have more societal significance. Perretti's book shares this flaw, but the flaw does not doom its value. The unrepresentative, politically charged cases are an extremely significant portion of what courts do, even if they are not common.

The traditional view of judging both exalts and demeans the judiciary by rendering judges nonhuman. Some approaches treat judges as if they were saints, others treat judges as ciphers or machines producing mathematically formalistic results. These traditional perspectives, sometimes held up as an ideal, are not realizable. Even if judges strive for this ideal, they will come up short. While I see some merit in striving for the classical ideal, Perretti dissents. She finds the ideal a naïve one that will produce inferior results. Her argument is an interesting one, well supported, and deserving of a hearing.



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7. For a good review and study of decision-making at the Supreme Court and institutional influences see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).