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**The Judge as Politician: Review of
*In Defense of a Political Court***

Terri Jennings Peretti

Princeton University Press, Princeton: 1999.

Reviewed by: Nicole Robichaud

In the wake of the recent *Marshall* decision of the Supreme Court of Canada on aboriginal treaty rights, much media attention has been focused on the issue of what role the Court should play in Canadian governance. The idea of an unelected group of judges deciding issues of national importance, and overturning decisions of the elected legislators, is one that has been debated in all Western democracies. In her new book *In Defense of a Political Court*, Terri Jennings Peretti provides a challenging new perspective to the already vast body of American constitutional law theory. Although written in the context of the United States, the overall themes of the book are equally relevant to Canada's own debate.

Peretti's thesis is that the U.S. Supreme Court is and should be a political court. She challenges the prevailing view that the Court must be apolitical and objective, deciding cases on the basis of overarching constitutional principles. Instead, Peretti argues that there is no objective meaning to the constitution that judges must interpret and apply. Rather, judges should and do decide according to their own political beliefs and values. She argues that this is consistent with democratic theory, and serves to enhance political representation. Checks and balances within the political and judicial system serve to ensure that the Court's views ultimately reflect those of the American public. Further, Peretti asserts that the Court helps give voice to those interests that would otherwise be shut out of the political sphere, thereby contributing to and enhancing consensus-building in a pluralist democracy. Peretti's controversial argument is one that will certainly be rejected by some readers and academics. Nevertheless, this well written piece provides a compelling challenge to our traditional ways of thinking of the judiciary, and provides a valuable contribution to this ongoing constitutional debate.

The Argument

In Part I, chapters one through three, Peretti canvasses the major schools of constitutional law theory. The first she addresses is what she terms the “neutralists” – the conventional theorists who believe that the constitution can and must be objectively interpreted and applied by judges. The second school is Critical Legal Studies, who perceive constitutional interpretation as inherently subjective. Finally, Peretti discusses the “Skeptics”, those who also believe interpretation to be subjective, but who favour political checks on judicial power to remedy this subjectivity. The underlying assumption of all these schools of thought, argues Peretti, is that a political court, one in which judges decide according to their personal political values, is undesirable and undemocratic. Peretti devotes Part II of the book to challenging this assumption.

Part II begins with chapter four, in which Peretti argues that when justices decide according to their political values, they are in fact performing a political representation function. Justices are selected by elected officials largely based on their policy biases and by deciding according to these policy preferences, they are carrying out the will of the elected representatives who appointed them. Indirectly then, the justices serve to represent the political will of the people. Peretti goes on to canvass a host of empirical data to support her contention that justices are, in fact, selected largely based on their political views, and that they do, for the most part, decide cases based on those views.

In chapter five Peretti argues that policy-voting by judges also brings with it two other democratic benefits. Firstly, it activates and makes effective political checks on the Court, such as public opinion, technical legal constraints, political checks, and self-restraint. For example, in order to effectively carry out his/her policy preference, a justice must still obtain support of other justices on the court, and of politicians who have a variety of powers over the Court (e.g. impeachment, appointments, statutory reversals). Secondly, Peretti argues that a policy-motivated judge will anticipate and accommodate political opposition, thereby contributing to consensus-building in society.

Chapter six addresses one of the main arguments of conventional constitutional scholars: that the Supreme Court derives its legitimacy

from the notion that it is apolitical. These scholars have long asserted that public reverence for the court is a direct function of its perceived impartiality and objectivity. Drawing on empirical studies, Peretti contends that this argument is in error, and that Americans do not strongly revere the Court at all. Rather, there exists only limited public awareness of the Court. Further, support for the Court depends largely on support of the political values underlying its decisions. Legitimacy of the Court is therefore derived more from public support of its decisions, than it is from the notion that it is apolitical.

In chapter seven, Peretti revisits democratic theory, and asserts that her view of the political court is consistent with democratic theory. She argues that conventional scholars are mistaken in two respects. Firstly, they overestimate the influence of majoritarian preferences on the political actors in government, and understate it on the judicial actors. Secondly, they view the American political system as majoritarian and legislative-centred, as opposed to pluralist. Peretti embraces the pluralist view of democracy, where consensus is built by giving voice to competing interests through a variety of non-hierarchical political institutions. A political court helps this system by providing another arena for these interests, some of which might otherwise go unheard.

In her conclusion in chapter eight, Peretti reiterates her thesis that the court needs to be political in its decisions. She further sets out four criteria that ensure that a political court will function effectively: 1) a properly working selection process; 2) a Court that is honest about its policy making; 3) the availability of opportunities for the people and legislators to respond to the court; and 4) justices who possess the desire and ability to listen and respond. Through the application of these criteria the Court can serve a valuable political function in pluralist democracy.

Critique

Overall, Peretti's work is well written and argued. Although slightly repetitive at times, her argument is structured in a clearly organized and coherent manner. Her propositions are frequently supported by substantial empirical data. Further, her fluid writing style make the work easily accessible to both student and scholar. The biggest source of potential criticism and controversy will no doubt be the thesis of the work itself. Putting aside for a moment the

prescriptive aspect of her argument, however, it is difficult to disagree with the descriptive aspect of it: that personal policy preferences of judges underlie most judicial decisions. With the Supreme Court of Canada, as with the U.S. Supreme Court, voting patterns on the courts frequently indicate the justices decide based on underlying political philosophies at least as much as on judicial reasoning. Peretti also has a strong argument in her assertion that laws and constitutions are capable of a variety of meanings which may change over time. These varying interpretations reflect different policy preferences, all of which are capable of justification through sound judicial reasoning. It is the prescriptive aspect of her argument that is the more controversial.

Peretti's notion that unelected judges should be able to decide based on their own political views flies in the face of the prevailing notion of the proper duty of the courts. As Peretti acknowledges, the fundamental underpinning of virtually all constitutional law theory is that the role of the Supreme Court justices is to objectively interpret the law and the constitution, putting aside any personal views or preferences. By casting this notion aside, Peretti puts into question almost all existing theories and justifications of our judicial system. At a minimum these justifications will have to be rethought if we are to accept her argument.

To the extent that Peretti challenges most existing constitutional theory and celebrates the existing subjectivity of judicial reasoning, she may be ignoring the possibility that our current system functions as well as it does because it is premised as being apolitical. While Peretti asserts that a political court is not one in which judges decide arbitrarily or on emotion, if the notion of the political court were to become accepted, arguably decisions would increasingly be decided in just this fashion. It may be the fear of public reprisal for not appearing to be apolitical that causes the judiciary to follow public opinion and keep the arbitrariness of their decisions in check. If judges were to be given free rein to decide according to their own policy preferences, who is to say they would not start ignoring public opinion and deciding cases based on their own whims?

A further problem with Peretti's argument relates to chapter five, in which she asserts that a variety of constraints ensure that the Court's views ultimately reflect those of the people. Here she seems to overstate the importance of both the formal and informal checks on the court.

With respect to the formal political checks, such as impeachment, constitutional amendment, and appointment, it seems doubtful that these are in reality as constraining as she seems to think. The first two are very rarely invoked, and while the appointment process in the United States is a highly politicized one, appointment of a conservative judge is no guarantee that they will continue to vote in a conservative manner for all decisions. Further, since judges are appointed for life, it is quite plausible the court could be composed of justices representing popular opinion of fifteen or twenty years ago, as opposed to that of today. In Canada, the argument is perhaps even weaker. Here judges are virtually never removed from office, and the appointment process is a closed one.

With respect to the weight of public opinion on the court, Peretti asserts that it plays a strong role, and that judges actively anticipate and accommodate opposition to their views. It is not clear that this is, in fact, the case. In Canada, recent Supreme Court and appellate decisions on native fishing rights and child pornography, both of which led to public outcry rather than approval, would seem to suggest the opposite, that justices will ignore public opinion for the sake of legal principles.

Another weakness in Peretti's argument is in her assertion of the political court's contribution to a pluralist democracy. In stating that the Court can give voice to groups that may otherwise be ignored by the political system, she seems to ignore the reality that for many groups the cost of taking a case to the Supreme Court is prohibitive. As a result, while some groups may have a better chance of being heard in the judicial arena than the legislative one, there are probably at least as many groups who have no hope of being heard by the judiciary. While they may also have no voice in the legislative sphere, they are at least able to have influence through the ballot box, if nothing else.

Perhaps the most unsatisfying aspect of Peretti's argument, though, is in her conclusion. Having argued throughout that the court should be political and that all the previous theorists are in error, she fails to effectively take the next step to address the issue of where the judiciary, and constitutional theorists, should go from here. While she does set out criteria to ensure a political court works effectively (a properly working selection process; a Court that is honest about its policy making; the availability of opportunities for the people and legislators to respond to the court; and justices who possess the desire and ability to listen and respond) she does little to elaborate on this. She does not address

whether or not the appointment process should become more politicized, for example, and if so, what the implications are for otherwise strong candidates who may not feel comfortable entering a political arena. Further, if judges are to be more open about their political preferences, where does this leave the traditional method of legal reasoning? Are judges meant to just discuss the policy reasons why they prefer a particular outcome? And finally, what are the implications for lower court judges? Is only the Supreme Court to be a political court? If not, an individual litigant's fate could be determined by the political leanings of the lower court judge that just happens to be sitting on the case.

In the end, however, Peretti's provocative and compellingly argued piece does provide a strong challenge to our traditional way of thinking about the role of the Supreme Court, both in Canada and the United States. While not without its weaknesses, Peretti's argument is strong for at least openly acknowledging what many lawyers and scholars have known for years: judicial decisions are not rendered in a purely objective manner, and that judges' personal political views are frequently the real reasons for the outcome in any given case. This is certainly a good first step in coming up with a workable theory of the role of courts which does away with some of the naive idealism of traditional constitutional theory. Whether or not one agrees with Peretti that we should embrace this political court wholeheartedly, one cannot deny that her work provides a valuable contribution to the debate.