"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.

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Initiative Elites and the Courts: A Strategic New Institutionalist Approach to the State Initiative Process (2003) (unpublished Ph.D. dissertation, University of Oregon) (on file with author); Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA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

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

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.