Nastier, Noisier, Costlier — and Better

Why letting judges speak out during political campaigns enhances democracy and serves justice

BY JAMES L. GIBSON

In the not-so-distant past, state-level judicial elections were decent, docile and dirt-cheap affairs, even if drab and dull, and scarcely deserving of being called democratic. Today, they are, as professor Roy A. Schotland of Georgetown Law Center says, nastier, noisier and costlier, meaning that attack ads have become more commonplace, campaign activity of every sort has increased dramatically and, consequently, the need for campaign contributions to finance candidates for judicial office has increased exponentially. Few observers believe that this trend toward increasingly politicized campaigns will abate anytime soon.

Three major developments have contributed to the growing politicization of judicial elections. First, state courts have become vastly more important within the American legal system. With the U.S. Supreme Court now deciding fewer than 100 cases per year, the "court of last resort" for many legal disputes is a state court. These courts are making extremely important decisions on matters ranging from massive, class-action torts to the use of the death penalty to the state's use of eminent domain. State courts have always been important in the American legal scheme; today, not only are they highly influential, but they are recognized as such by nearly all legal observers.

ILLUSTRATION BY GARY HOVLAND

Because state-level courts are — and are seen as — important, interest groups have become vastly more involved with efforts to "reform" judicial selection and retention systems. Some groups are ideologically motivated, as in the Federalist Society's ongoing efforts to gain more influence for right-wing interests. Other groups, such as the U.S. Chamber of Commerce, are primarily motivated by economic interests. And some groups, including left-leaning trial lawyers, are motivated by both ideology and economics. Direct interest-group involvement in judicial elections — via, for instance, advertising in electoral campaigns — is certainly a new feature of state judicial elections.

Added to this volatile political brew is the U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*. At one level, this decision is very simple: It declared that candidates for judicial office, including incumbent judges running for re-election, are covered by the First Amendment to the U.S. Constitution. This simple declaration has myriad consequences, however. Once judicial candidates have free speech rights, it becomes vastly more difficult to regulate the content of their speeches, including speeches in which candidates announce their policy views on important legal issues. In the past, judicial candidates were largely forbidden from discussing anything remotely related to how they might rule on issues and cases that might come before their court in the future.

While the limits of judicial speech are still being litigated — few believe, for instance, that judicial speech rights will be extended to such statements as "If elected, I will vote to overturn the multibillion-dollar judgment a trial court awarded to smokers in their case against the tobacco companies" — at present, candidates for judicial office are free to announce their general views on important issues of legal policy. Constitutional protection now clearly protects such speech as "I believe the Second Amendment was designed to protect the right of individual citizens to bear arms" or "I believe that the emanations and penumbras of the Bill of Rights establish a right to privacy, a right that extends to private sexual behavior and having an abortion."

In short, judicial elections have become much more like other state elections. Candidates increasingly campaign on the basis of their policy views; they seek campaign contributions from citizens and groups to get their messages across to the voters; and they produce tawdry advertisements in which they attack the record and/or integrity of their opponents. Judicial elections have become ... elections.

What consequences flow from this new style of judicial election? Based on research I conducted in 2007, I contend that voters are emphatically not put off by policy talk from judicial candidates. Many legal scholars, judges and interest groups, however, argue quite the contrary.

Indeed, these developments have set off a flurry of complaints and concerns emanating from a variety of legal actors and groups, including Sandra Day O'Connor, the former Supreme Court justice who cast the deciding vote extending speech rights to judicial candidates (and who also cast the deciding vote in the 2000 presidential election — in *Bush v. Gore*). These observers believe that politicized judicial campaigns pose a serious, if not mortal, threat to the legitimacy of state judicial elections.

THOSE WHO fear that increased politicization of judicial elections threatens the legitimacy of the courts argue something like this:

Courts are inherently weak political institutions, famously lacking the power of the purse and the sword. Because courts cannot tax and spend, as legislatures can, they cannot buy the support of their constituents. Because they do not command the coercive state apparatus (i.e., the police and the military), they cannot mobilize force to ensure compliance with their decisions. All political institutions face the difficulty of getting citizens and organizations to comply with their decisions. But of all institutions, courts are the most vulnerable; judicial power is the least powerful form of power.

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Because courts are weak, they require institutional legitimacy, the belief that an institution has the right to make binding decisions for a constituency and that such decisions must be complied with. Legal observers from the framers of the American Constitution onward have extolled the necessity of courts having a store of legitimacy. In many respects, legitimacy is more efficacious than purses and swords because legitimacy provides a standing presumption in favor of compliance. At the same time, however, legitimacy is far from automatic; it is contingent, and it is fragile.

A key source of legitimacy in the American judiciary, so the argument continues, is the perception of judicial impartiality. Because citizens view courts and judges as disinterested and

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principled decision makers, their decisions are generally accepted as legitimate. Earmarked legislation passed by Congress is perceived as fair and impartial by practically no one (except perhaps the direct beneficiaries of this duplicitous largess). Judicial decisions are different. Because judges have no stake in the outcome, they are free to decide legal issues on the merits of the case, not on the politics of the litigants, and because the decisions are principled and disinterested, they are legitimate.

The direction of this argument is now undoubtedly obvious: Politicized judicial campaigns are thought by many to impugn judicial impartiality, thereby undermining the bedrock of legitimacy, making compliance with judicial decisions less likely and more costly, and even threatening the very existence of this third branch of government. The pathway from judicial speech rights to the destruction of the judiciary is a long and tortured one, to be sure, but many see American state courts as traveling headlong down this road to ruin.

THE ABOVE forecast of judicial woe and despair turns on a variety of crucial empirical assertions, the first and simplest of which is that policy pronouncements by candidates for judicial office are offensive to the American people because they view them as indicative of a loss of impartiality on the part of the judge. This is the argument of the state of Minnesota, which sought to ban policy speech by judicial candidates, and it is the argument of the dissenters in *Republican Party of Minnesota v. White* as well.

Is policy talk by candidates for judicial office off-putting to the American people? Remarkably little rigorous empirical research has addressed this issue, so it is perhaps useful to begin by sketching a logic by which such policy talk is *not* offensive.

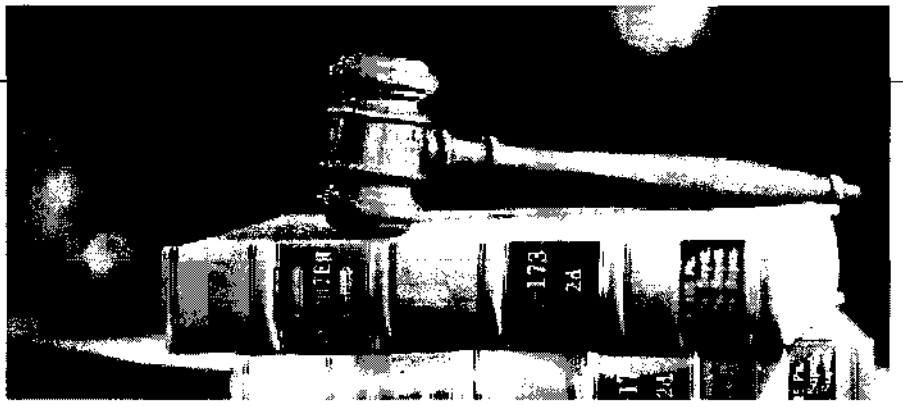
Assume for a moment that people view state courts of last resort primarily as responsible for not just *implementing* but *making* legal policy (the view, by the way, shared by virtually every political scientist in the land who specializes in judicial politics). Of course, implementation is a conventional view of judging: Legislatures pass laws, stated in general and to some degree abstract terms, and judges apply those laws to individual disputes. The driving force in this style of judging is the syllogism: a major premise (the law), a minor premise (the facts of the case) and a deduction (the decision in the case). In this model, a good judge is a well-trained legal logician. And, of course, when it comes to deduction, Democrats and Republicans, liberals and conservatives, and even men and women act identically, so these factors are of little relevance when it comes to selecting good judges.

An alternative view, however, denies the deductive structure of judicial decision making. The policy-making argument goes something like this:

Many legal controversies have no definitive solution (which, by the way, is one reason they are litigated). What is the "correct" answer to the question of whether the death penalty is cruel and/or unusual punishment? Obviously, those who wrote the Eighth Amendment to the U.S. Constitution believed they were not outlawing the death penalty. But also as obviously, "cruel" and even "unusual" are concepts determined by context. (At one point, even being drawn and quartered was not thought to be cruel.) So what do we take from the words written in the Eighth Amendment — the concrete intent of the framers or their abstract assertions of guiding principles?

Moreover, it is not just constitutional interpretation that grants judges so much discretion. The fundamental value commitment of the American common law system is to justice, and especially justice when it conflicts with legality. To the extent that we expect our judges to "do justice" in their decisions, we grant them the right to make policy decisions.

The central point of the policy-making perspective is that legal disputes, especially at the appellate level, are indeterminate and not capable of being resolved via deductions. Indeed, a more revealing imagery is that of the pan balance, perhaps even the one that Lady Justice so famously holds in her left hand. In this conception, judicial controversies represent clashes of values: order versus liberty, privacy versus accountability and equality versus individuality. The process of judging is therefore one of weighing in on the relative weight one attaches to the contending values. To use a more concrete example, when a private newspaper publishes its employment want ads segregated by gender ("Help Wanted — Men") and an equal-opportunity government agency seeks to prohibit the publication of such ads, a value conflict is generated between free press rights and equality rights. Such disputes can only be decided by calculating the relative value of the conflicting and contending rights. Relative value, unlike deductive logic, does indeed depend upon whether one is liberal or conservative.



If lawsuits require that judges make public policy — indeed, even that they apply their own values in deciding cases — then the legitimate criteria for selecting judges broaden significantly. The best legal training in the world, coupled with the most Solomon-like judicial temperament, cannot provide an answer to the question of whether women have the right to an abortion. Instead, such judgments turn inevitably on judicial ideologies and philosophies. The key and crucial question of judicial elections is this: If judges *must* (not can, but *must*) rely on their own pre-existing judicial attitudes in making decisions on the bench, do voters have the right to know about these attitudes and to base their voting decisions on policy agreement with the candidates for judicial office?

IT APPEARS that voters themselves do indeed believe that they have a right to hear the policy views of candidates for judicial office before they give them their votes. In a national survey conducted in 2007, I showed that voters in states electing judges do not equate policy pronouncements with partiality and that judges who make such policy statements are nonetheless believed to be able to serve as fair and impartial arbiters if they are awarded a seat on a state court of last resort. Though that research did not specifically address the matter, it is even conceivable that voters believe not just that there are no negative consequences of disclosing policy positions but that failure to disclose may be inappropriate for judicial candidates. Many legal elites seem to equate policy pronouncements with partiality and bias, but it appears that most of the American people do not.

This does not mean, however, that all aspects of judicial elections are acceptable to the American people. This same 2007 survey revealed that most Americans believe that the current system of interest groups making campaign contributions to those seeking public office — judicial, legislative and executive — is corrosive because it seems to create a *quid pro quo* relationship between interest groups and office holders. But campaign contributions and judicial speech should not be conflated, as they seem not to be in the minds of most Americans. My research indicates that the former does indeed pose a threat to judicial legitimacy; the latter clearly does not.

Many who observe judicial elections complain that campaigns have also become nastier, by which they mean that the rough-and-tumble campaign advertisements so common in races for other public office are becoming commonplace in judicial races. The available empirical evidence, however, suggests that nastiness, by itself, does little to undermine judicial impartiality and legitimacy. Moreover, if judges are policy makers, making value judgments when deciding cases, to assert that judges ought to be immune from (or even legally protected from) criticism is illogical in a democratic polity. There are surely limits to the perceived appropriateness of negative and attack ads — and in judicial elections as elsewhere, perhaps the antidote to bad speech is more not less speech — but in general those who believe that criticism of judges and their decisions impugns fairness and impartiality appear to be mistaken, at least when it comes to the American people.

I would certainly be the first to concede that available empirical evidence is entirely insufficient for drawing firm conclusions about all of the effects of judicial campaign activity on perceptions of judicial impartiality and the legitimacy of the third branch. We suspect but do not know, for instance, that nonpartisan electoral systems, generally bereft of crucial information about candidates for judicial office, exacerbate the effects of attack ads. Social scientists are only in the early days of figuring out the multitude of consequences of campaign activity.

But the void in our knowledge should not be filled by supposition, assumption or ideological deduction — and especially not by hasty and even stealthy efforts to "reform" systems of selecting and retaining judges in the U.S. Perhaps most important, a mythical view of judging, which proposes that judges are nothing more than legal technicians, should not be allowed to structure our thinking about the methods we use to select and retain judges. Nor should special influence be ceded to organized interest groups (e.g., the American Bar Association) when it comes to structuring judicial selection systems.

Judges are not simply "politicians in robes." But they are politicians, and states that have decided to elect their judges must protect the sanctity of democratic elections and not allow them to become sham elections like the ones so obvious in many parts of the world today. In the end, Justice Thurgood Marshall was correct when he opined in *Renne v. Geary*: "(T)he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."

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