

Ardent advocates

by Bert Brandenburg and Rachel Paine Caufield

In Defense of Judicial Elections, by Chris W. Bonneau and Melinda Gann Hall. Routledge. 2009. 200 pages. \$30.95.

Amid growing concern about trends in judicial elections, a backlash has stirred. In *Defense of Judicial Elections* is the work of two ardent advocates of elections, professors Chris Bonneau and Melinda Gann Hall, who have little patience for good-government concerns with the system of partisan judicial contests they endorse. Although the book is marketed as a comprehensive argument, it actually focuses on a very limited slice of the debate about whether and how to elect judges. The authors have compiled substantial data, and present some interesting empirical analysis. But the book's conclusions frequently race past the data and the authors spend considerable effort bashing potential opponents instead of engaging their arguments.

Throughout, the authors rely heavily on caricaturing other positions and erecting straw men to attack. "The independence argument really is an argument for independence from the electorate," they avow. "Appointment schemes are simply not the miracle cure for any ills of judicial elections." "It would seem that the real concern of judicial reform advocates is not campaigning or television per se but the increasingly competitive nature of state supreme court elections." "Contrary to conventional wisdom voters appear to be quite capable of making smart political choices."

The book also suffers from mischaracterizations of existing research. For example, the authors argue that a 2007 paper on judicial performance claims that "judges

chosen in elections, particularly in partisan elections, are *better* than judges chosen by other methods" (emphasis by Bonneau and Hall). In fact, the authors of the 2007 study specifically warn that, "our evidence does not prove that elected judges are superior to appointed judges." Such presumptions and preferences—featuring statements like "any objections to electing judges cannot be made on empirical grounds"—dominate the book.

"The costs of campaigns should not be a cause of concern," the authors announce, "unless there is convincing evidence of adverse effects on candidate entry, quality recruitment, or other important aspects of the political process." This framing statement, which reduces the role of courts to assume that they are simply agents to deliver campaign outcomes, illustrates the book's lack of attention to the implications of over-politicized judicial campaigns for democratic government. Absent is any consideration of the courts' core functions in checking other branches of government, their unique place within the separation of powers, or their role protecting due process rights and other constitutional liberties. Also conspicuously absent is any discussion of the concerns of litigants, the very people who submit their lives, liberties, and livelihoods to courts that they count on to be fair.

The book also wishes away broad concerns about the influence of campaign cash on courtroom decisions. Surveys consistently show that 70 to 80 percent of the public believes that campaign donations affect judicial decisions. As Professors James L. Gibson and Gregory A. Caldeira recently wrote, "the receipt of campaign contributions can indeed threaten legitimacy. For many citizens, contributions to candidates for judicial office imply a conflict of interest, even a quid pro quo relationship between the donor and the judge,

which undermines perceived impartiality and legitimacy." Even more chilling is how many judges believe campaign cash tilts the scales of justice: a National Center for State Courts survey shows that 49 percent of judges agree. As former Ohio Justice Paul Pfeiffer says, "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. Everyone interested in contributing had very specific interests. They mean to be buying a vote."

The data

In presenting their data, the authors too often let their assumptions carry into their methodology. Most significantly, some of the conclusions they draw suffer from the "ecological fallacy," where data for election system outcomes (the macro level) is used to imply causes or effects for individual voters' behavior (the micro level). For example, the authors say, "we know that there are no observable negative behavioral consequences for voters of vigorous competition and costly campaigns" This broad assertion goes far beyond the findings of their own data, which includes no measure of the quality of information voters have, the degree to which voters remain confident of impartial justice in the wake of politicized campaigns, or the extent to which voters know or care about the outcome of the election.

Similarly, when confronting clear data that the partisan elections they champion sap voter confidence in the courts, the authors grow imaginative and explanatory: "Rather than judicial elections creating negative feelings about courts, it seems just as likely that voters in some states start out being more negative about government and, as a consequence, choose to elect judges rather than surrender this important power to political elites." No data is offered to support this proposition.

The authors also argue that partisan elections are "cheaper" than

nonpartisan contests, which would come as news to many judicial candidates, who have raised more than \$145 million in partisan races since 1999, compared to less than \$50 million in nonpartisan states. The authors claim that this huge disparity is reversed when a regression analysis accounts for other factors. This conclusion would be more credible if they hadn't tilted the scales by lumping Michigan and Ohio into the nonpartisan category. (Other analyses have properly labeled these states as partisan for years, since high court candidates must win a partisan primary and campaign as partisans even though the party label does not appear on the general election ballot).

A broader conflation of apples and oranges is the authors' reliance on a data set of campaigns from 1990 to 2004. This time period straddles the epochal change that occurred in 2000, when the explosion of big money in judicial races began. The book's empirical models are dominated by data from a bygone era. Furthermore, on the contentious issue of spending and advertising that the authors purport to definitively address, the data does not account for spending and advertising conducted by independent special interest groups. In fact, in some states special interest groups have begun to usurp judicial candidates as the biggest spenders in these races. In Michigan, 79 percent of all advertising in the 2004 supreme court race came from these outside groups. In the 2008 Wisconsin Supreme Court race, the two candidates were outspent 4 to 1 by the outside electioneering groups.

Hampering the arguments

Occasional testiness hampers the arguments. Selection systems other than partisan contests are referred to as "schemes." Unnamed others are attacked because they "coddle judicial reform advocates," who are "waging war on democratic processes and the rights of citizens to maintain control over their government." The

attacks go so far as to proclaim that "the electorates of the large majority of states are on the side of accountability rather than the side of judicial reform advocates working to eliminate the democratic process altogether." Aside from the odd implication that citizens who support (and vote to create) other judicial selection systems in other states must want to "eliminate the democratic process," the authors refuse to acknowledge that most citizens and their leaders on all sides of the debate are working to strike a balance between independence and accountability.

In attacking merit selection systems, the authors grow especially overbroad and careless. They write, "Voters consistently have been hesitant about replacing elections with appointive schemes and continue to reject recent efforts to move in that direction." In fact, last year voters in Greene County, Missouri, switched to merit selection, even as their neighbors in Johnson County, Kansas, rejected a well-financed effort to scrap merit selection. What voters have most often done is to reject any changes in selection of judges, both to and from merit selection. The truth is that most Americans don't share the professors' anger. Over 30 states have used merit selection for decades, and no statutory or constitutional provision establishing merit selection has ever been scrapped by voters in favor of contestable elections. (And fewer than 10 states have chosen to use the partisan elections championed by the authors). The book also contains contradictions, as when the authors first say that the National Center for State Courts recommends "the eradication" of judicial elections (which is false), then just a few pages later say instead that it prefers nonpartisan elections.

The work of judges

Aside from its methodological deficiencies, *In Defense of Judicial Elections* is the latest volley in a clash that has been raging for decades over how best to understand the work of

courts and judges. The "attitudinal" and "strategic" paradigms, which have attained the status of conventional wisdom in some political science literature, dismiss the notion that judges may, in fact, seek to faithfully apply the law. Quantitative techniques are used to reach these results, as scholars rate decisions (e.g., "liberal" or "conservative") and then classify judges accordingly.

Seeking to fit the human enterprise of judging into such models is a perilous business. Factors like differences in fact patterns or attorney representation easily get lost in the quest to quantify decisions. A host of important personal traits—like fidelity, knowledge, legal reasoning, intelligence, ego, courage, cowardice, subtlety, integrity, fairness, clarity, courtesy, patience, etc.—get set aside because they can't be quantified. Professor Brian Tamanaha, recently assessing these efforts, warned against a runaway "error of scientism: setting aside what cannot be easily measured, seeing only what can be easily measured, forgetting that the gaping holes which result are due to the limitations of their methodological techniques rather than reflections on the psychological or social phenomena they purport to explain."

The book's approach is consistent with this tendency to oversimplify the act of judging and the role of courts using limited (and limiting) data. More fundamentally, the authors' unshakeable reliance on the attitudinal model underlies their conviction that judges *should* be political, that their selection should be more political, and that partisan elections are the best way for the electorate to insure that they follow the right politics in deciding cases.

The framers of our Constitution (another source not cited in this book) knew that judges can only be impartial if they are independent. Balancing that independence with accountability in the context of judicial elections raises many complicated issues, and the authors are to be congratulated for beginning to

address some of them. But *In Defense of Judicial Elections* is at best a starting point, too often substituting advocacy for the kind of complex, multi-dimensional discussion that these issues deserve. ❧

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