

The trouble with electing judges

OF ALL the ways in which America is exceptional, its practice of electing judges is one of the least obvious and most striking. The spectacle of someone who has the power to hand out death sentences making stump speeches, seeking endorsements and raising funds has long seemed odd to outsiders. Alexis de Tocqueville, whose travels around the country coincided with the spread of judicial elections, predicted that “these innovations will, sooner or later, have disastrous results.” It is a view shared by many of the judges running for office around the country.

Judicial elections are becoming a lot like any other. Tennessee’s recent race was a good example. A few days before the poll Gary Wade, the chief justice on the state’s Supreme Court, sat in his office, a room enlivened by a bearskin rug on the floor, complete with paws and snarling mouth. Mr Wade had faced the voters five times before, but this election was the first time he had to do any actual campaigning. Tennessee’s race became unexpectedly political: the three judges up for retention were hit with adverts denouncing them as Obamacare-loving liberals, though their court has never ruled on the subject. The judges responded by raising over \$1m to buy adverts of their own.

...All this means that judges are raising much more money. Wallace Jefferson, the former chief justice of the Texas Supreme Court, describes a visit to the boardroom of a Texan law firm during his most recent election campaign. He asked the assembled lawyers for their support and they responded with assurances that they would donate. But, they said, his opponent was a judge on the local circuit whom they appeared in front of frequently, so they would have to support him too.

Electing judges is a bad idea because judges are not like politicians. It is fine for a politician to make deals with voters; to say, “Vote for me and I’ll raise the minimum wage” or “Vote for me and I’ll cut taxes.” But it is an abuse of power for a judge to promise—or even hint—that he will decide future cases on any basis other than the facts and the law. Standing for election gives judges an incentive to smile on people voters like and get tough on those they hate. That is hardly a recipe for impartiality.

Vote for me and I’ll jail the people you hate

A study of rulings in 276,000 cases in Washington state by Carlos Berdejo of Loyola Law School and Noam Yuchtman of the University of California, Berkeley found that judges gave criminals sentences that were 10% longer when they were about to face re-election. Another study by the left-leaning Centre for American Progress found that races that cost over \$3m led to more rulings favouring the prosecution. At a time when many states are concluding that harsh justice is expensive and counter-productive, elected judges may prove an obstacle to reform.

Another worry, says Rebecca Love Courlis, a former chief justice of Colorado, is that as the election of judges comes to resemble the contests for any other political office, voters will start to hold judges in the same esteem as other elected politicians. In 1998 a poll for Texas’s Supreme Court found that 83% of Texans thought that campaign contributions influenced judicial decisions. More worryingly, 48% of the judges agreed. Those numbers are unlikely to have improved since.

Mr Wade won in Tennessee, helped in part by a new-found flair for campaigning: his website featured a picture of the judge with his arm around Dolly Parton, a high-school friend and local megastar. Still, de Tocqueville’s view that judicial elections were an attack “against the democratic republic itself” is worth listening to. When first introduced, elections were seen as a way to insulate judicial nominations from the perception of corruption. Now they are having the opposite effect.

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