The Politics of Judicial Selection

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Some of Stuart Nagel’s earliest work has a continuing significance to research on the selection of state court judges. His research provides answers to why partisan election of judges, in spite of the flaws of this selection system, remains a major system for selecting state court judges. And Nagel’s early research offers important insight about contemporary issues in the selection of judges such as the differences between elected and appointed judges and the role of race and ethnicity in judicial decision-making.

Introduction

One of the most important policy issues in state judicial politics involves the method for selecting judges. One method of judicial selection is partisan election of judges in which judicial candidates run on the ballot with a party label. Another is nonpartisan election in which judges run for office without a party label. Today, as when Stuart Nagel wrote on this topic in the 1960s, political parties are often involved in nonpartisan elections, and judicial candidates’ party affiliations are frequently readily known even if the party affiliation of the judicial candidate is not printed on the ballot (Nagel, 1961, p. 850; Champagne, 2001b, pp. 1418–1420). Another common system of selection is appointment by the governor. Much less common is legislative selection of judges. Finally, there is a system often called merit selection of judges in which the governor must appoint judges from a list chosen by a blue ribbon panel. After serving briefly as a judge, the appointee must then run for election on a retention ballot in which there is a “yes” or “no” vote on the retention of the judge. There are also hybrid systems peculiar to individual states. For example, in Illinois judges run initially in contested elections with the party label and then run in subsequent elections in retention elections. In New Mexico, judges are initially appointed by the governor and then run in their first election in contested elections and in later elections in retention elections. And there is also variation within states. Even in Missouri, for example, the first state with merit selection of judges, judges in smaller counties are still chosen...
by partisan election (American Judicature Society, 2002). There is much controversy over the appropriate method for the selection of judges, but the most controversial and most criticized method for selecting judges is the partisan election of judges. Of the major systems of state judicial selection, partisan election of judges has resulted in the largest number of competitive elections for judgeships. It also produces the highest defeat rate for incumbent judges (Hall, 2001, pp. 317, 319). One reason for those defeats is that voters often are unaware of down-ballot candidates and so, rather than voting for a judicial candidate because of qualifications or proven ability, ballots are cast on the basis of name attractiveness or, more likely, party affiliation. Indeed, this pattern of voting has led writers on judicial selection to discuss the effects of the “name game” on judicial voting, in which candidates are elected or defeated on the basis of name familiarity and “party sweeps,” in which voters in a competitive party environment will vote incumbent judges out of office solely because those judges are affiliated with the unsuccessful party in that particular election cycle (Schotland, 2001, pp. 855–856; Champagne, 2001b, 1416–1417). Although some nonpartisan judicial elections and even some retention elections have been notoriously expensive, partisan election states have tended to have some of the most expensive judicial campaigns in recent years—especially in Alabama and in Texas (Schotland, 2001, pp. 862, 866).

The Partisan Cue

Yet partisan election of judges has persisted as a major system of judicial selection, in spite of the criticisms of judicial reformers and in spite of problems with the costs of campaigns, defeats of incumbents, and lack of voter awareness of judicial candidates. Nagel’s earliest work—published over 40 years ago—offers an explanation for the persistence of partisan election of judges as a major system of judicial selection in the states.

In much of Nagel’s early research, he was interested in assessing the nonlegal causes of judicial decisions by exploring the effects that the social backgrounds of judges had on judicial decisions. By the early 1960s, there had been research on the background characteristics of judges, and there had also been quantitative research on the judicial voting behavior of judges. What had not been done was research that correlated the background characteristics of judges with their judicial decisions. In a precomputer era, working with no mechanical assistance more sophisticated than a card sorter, Nagel began trying to identify statistical relationships between backgrounds and judicial decisions. His strongest correlation was between judges’ political party affiliations and their judicial decisions, such that Democratic judges tended to decide cases in a more liberal direction than did Republican judges (Nagel, 1961, pp. 843–846). And although other research later found that the effect of party on judicial decisions varied from state to state (Adamany, 1969, p. 57), still the effect of party on judicial decisions was a finding replicated time and again. Indeed, one recent analysis of 140 articles written on the link between judges’ party affiliations and performance on the
bench confirmed that “party is a dependable measure of ideology on modern American courts” (Pinello, 1999, pp. 219, 243).

The finding that judges’ party affiliations were related to their judicial decisions led Phillip DuBois, in his classic book on judicial elections, to conclude that party served as a cue to voters about the ideology of judicial candidates. Absent knowledge of individual candidates, DuBois argued, voters could cast ballots in judicial races with the valid belief that Democratic judicial candidates were likely to be more liberal-leaning than were Republican judges (1980). Thus, partisan elections of judges provided valuable information to voters regarding judicial races that might not be readily obtainable, especially in judicial races with limited campaign expenditures and in an era when judicial candidates were restricted in advertising their views by the Canons of Judicial Ethics. In light of the recent U.S. Supreme Court decision, Republican Party of Minnesota v. White (122 S. Ct. 2528 [2002]), some of the restrictions on judicial campaign speech have been struck down as unconstitutional. As a result, voters may now have more direct information about the attitudes and values of judicial candidates than they did when Nagel was first writing about the relationship between political party affiliations of judges and their decisions. However, even in a modern environment of less-restricted judicial campaign speech, the party label continues to be an efficient substitute for voter knowledge of judicial candidates’ individual attitudes and values.

The Elected Versus Appointed Battles

In one study that compared the decision making of appointed and elected judges, Nagel did find some differences in the decision making of appointed versus elected judges. Most notably, he found that elected judges were more likely than appointed judges to favor labor unions in union-management cases, more likely to favor the consumer in sales-of-goods cases, and more likely to find for the employee in employee-injury cases. However, contrary to what might have been expected, in personal-injury law, appointed judges tended to favor the injured in motor vehicle accident cases over elected judges (Nagel, 1975, pp. 202–206). Of course, Nagel’s analysis was based on 1955 data, which was long before judicial election politics began to heat up in the late 1970s. It was not until 1978 that the modern era in judicial campaign politics can be said to have begun, when deputy district attorneys in Los Angeles began encouraging opposition to judges they believed were soft on crime. That activity was soon followed by major battles between trial lawyers and the defense side in tort cases in Texas, and then judicial races heated up in California, North Carolina, Ohio, Alabama, and other states. (Champagne, 2001a, pp. 1394–1396)

Another thing that happened between Nagel’s research and the new competitive era in judicial elections, of course, was that state elections in the South—including judicial elections—became not only competitive, but the Republican
Party became increasingly dominant. In contrast, when Nagel wrote in the 1960s, he identified no Republican state supreme court justice in any state of the Old South (Nagel, 1969, p. 222). Also since the 1960s, as interest groups became increasingly involved in judicial elections, opposing judicial candidates came to increasingly reflect the views of the competing groups (Champagne, 2001a, pp. 1391–1409).

Nevertheless, in spite of the significant changes in judicial elections over the years, Nagel’s comparison of the characteristics of elected and appointed judges remains important. For one thing, considerable evidence exists that Nagel was correct in pointing out that although significant differences do exist between elected and appointed judges, those differences have been exaggerated by debates within the legal community (Nagel, 1975, p. 230). Research, for example, has shown that partisanship remains in merit selection systems, exhibiting itself in the selection of prospective judges by the merit selection commission and by the actual selection of a judge by the governor. Other research has also found that merit selection judges do not have substantially different background characteristics than do elected judges (Shuman & Champagne, 1997, pp. 242–250).

However, in spite of the general pattern of similarity between elected and appointed judges, Nagel did show that in general, elected Republicans tended to decide cases more liberally than did appointed Republicans and that elected Democrats tended to decide case a little more liberally than did appointed Democrats (Nagel, 1975, pp. 201–203). Thus, although the effects of election and appointment may be exaggerated, there are enough differences between elected and appointed judges that trial lawyers have tended to favor election of judges over appointment of judges and defense lawyers in civil cases have tended to support appointive systems (Champagne, 1998, pp. 96–97).

Interestingly, in recent years, business interests, such as the U.S. Chamber of Commerce, have become very involved in judicial election politics. And when these business groups have been involved, they have overwhelmingly backed Republican candidates. At the same time, trial lawyers have tended to back Democratic candidates (Schotland, 2001, pp. 863–881). Again, Nagel’s research from the 1960s explains that pattern of electoral support. Republican judges will be more likely to support business interests, and Democratic judges will be more likely to support plaintiffs’ interests. Nagel did not find exceptionally strong relationships between the party affiliations of judges and their judicial decision making in civil cases (Nagel, 1961, pp. 843–850). However, he was writing in an era when judicial races were less competitive, when interest groups were less involved in judicial races, and when the parties were less polarized. A replication of Nagel’s research with contemporary data would likely find stronger relationships between party affiliations of the judges and judicial decision making.

Nagel also found relationships between the party affiliation of judges and their decision making in criminal cases such that Democratic judges tended to be more defense-oriented and Republican judges tended to be more prosecution-
oriented (Nagel, 1969, p. 230). Of course, today almost all judicial candidates campaign—regardless of party affiliation—with some variation of a “tough on crime” theme (Linde, 1988, pp. 2000–2001), and business groups often use commercials with a criminal justice theme, although their agenda is primarily one of tort reform (Goldberg, Holman, & Sanchez, 2002, p. 13). Still, consistent with Nagel’s findings of the early 1960s, an examination of television commercials in the most contested judicial campaigns in the 2000 elections did find a tendency for the “tough on crime” issue to lean more toward being a Republican issue (Goldberg et al., 2002, pp. 13, 16, 25–26).

The Persistence of the Policy Relevance of Nagel’s Research

Although Nagel’s earliest research was done well before the emergence of the Policy Studies Organization, at a time when Nagel defined his field of interest as the public law area of political science, even his earliest research exhibits a strong interest in public policy. It was not enough, for example, for Nagel to identify a relationship between judges’ political party affiliations and their decisions, Nagel also wanted to explore the policy significance of his work. He concluded his 1961 article on the relationship between party affiliation and judicial decisions with a cautious defense of electing judges, arguing that elected judges “will tend to have more representative values than a judge chosen in any other manner” (Nagel, 1961, p. 850). He also noted that if the policy goal was to decrease the role of partisan influences on judicial decisions, lengthening judicial terms would not reduce the partisanship of judges. He reached that conclusion because about the same percentage of judges with terms longer than 8 years voted contrary to their party’s position on the court as did judges with terms shorter than 8 years (Nagel, 1961, p. 849). Today, one of the promoted judicial selection reforms is to increase the terms of judges (National Summit on Improving Judicial Selection, 2001, p. 1355). Although that reform may decrease the money, interest group, and partisan politics in judicial elections because there will be fewer elections, Nagel’s research of over 40 years ago still informs the debate over judicial selection by suggesting that the influence of partisanship in judicial decision making will not be reduced by lengthening judicial terms.

Nagel’s research on the relationship between political parties and judicial decisions may have new relevance. Although the U.S. Supreme Court limited its decision in Republican Party of Minnesota v. White (122 S. Ct. 2528 [2002]) to the constitutionality of Minnesota’s restrictions on judicial campaign speech, the previous Eighth Circuit decision in the case also addressed a ban on party endorsement of judicial candidates. Indeed, the reason the Republican Party of Minnesota was a party in the case was its desire to lift the ban on party endorsements. Still another claim addressed by the Eighth Circuit was a restriction on judicial candidates announcing their own party affiliation (Republican Party of Minnesota v. Kelly, 247 F.3d 854 [8th Cir. 2001]). Most states with nonpartisan judicial elec-
tions have such bans, and the Eighth Circuit upheld them (Schotland, 2002, p. 9). However, the U.S. Supreme Court decision was a strong hint that these bans will not survive and that political parties are likely to emerge as even more important actors in nonpartisan judicial election states. Also, as political parties become more active in nonpartisan states, more partisan judicial candidates should emerge, making the party affiliations of judges more strongly correlated with their judicial decisions.

Nagel also explored the effects of characteristics other than judges’ party affiliations on judicial decisions. For example, he examined the effects of ethnic affiliations on judicial decisions. He focused on the effect of religious affiliations and nationality on judicial decisions, finding Catholic judges to be generally more liberal in their decisions than Protestant judges and finding some relationships between liberalism and non-British backgrounds. However, Nagel clearly thought another background variable was of value in explaining judicial decision making, but at the time his article was published it was incapable of testing. Nagel suggested that the effect of race on judicial decisions would be important to test. He believed that African American judges and other judges of color would tend to be more liberal in their decision making than would White judges. However, other than two federal judges—then U.S. appeals court judges Thurgood Marshall and William Hastie—Nagel could identify no African American judges. Nor could he identify any state judges of color with the exception of two Oklahoma Supreme Court justices who were Native American (Nagel, 1962, pp. 92–110).

Even today in judicial selection research, the lack of racial minorities on courts is an important and controversial issue. In Texas, for example, as of April 2000, 85% of state appellate judges were White, none were African American, 9% were Hispanic, and 6% were “Other” (Ginsberg et al., 2001, p. 980). One issue that has emerged in judicial politics in some states long after Nagel wrote about ethnicity and judicial decisions is judicial redistricting. Essentially, the idea has been that the number of non-White state judges could be increased if the districts from which judges were elected were either smaller or were single-member districts composed of greater numbers of minority voters. The minority districts would then elect minority judges. At times, that proposal has been opposed by business interests who fear that smaller minority districts would elect judges who would be more pro-plaintiff in civil cases (in Nagel’s terms, more liberal) than judges who are elected from larger, less liberal districts (Champagne, 1998, pp. 97–99). That Nagel’s speculations about ethnicity and judicial decision making would anticipate one of the great battles in contemporary judicial politics is characteristic of that early work. It was pioneering research and involved important issues, with an eye toward policy-relevant ideas.

Though in later years Nagel’s interests would broaden and move away from background research in specific and public law research in general, that focus on research innovation regarding important issues would continue, and the interest in policy-relevant ideas would expand and flourish.
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References


