ALL JUDGES ARE POLITICAL

Except When They Are Not

ACCEPTABLE HYPOCRISIES *and the* RULE OF LAW

KEITH J. BYBEE

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THE CULTURAL LIVES OF LAW

Edited by Austin Sarat

For Jennifer, Evan, and Ava

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Part I
Legal Realism: Dead and Alive

IN THE WINTER OF 2003, THE *NEW YORK TIMES* announced the triumph of "legal realism," the theory that suggests judicial decisionmaking is essentially a matter of politics.[1] The announcement occurred in the course of reporting on Justice Thomas Spargo's energetic participation in the political process. When campaigning for a New York town judgeship in 1999, Spargo handed out free cider and doughnuts, distributed coupons for free gas at a convenience store, sent free pizzas to school teachers and government workers, and bought a round of drinks for everyone at a local watering hole.[2] Once elected town justice, Spargo kept up his political activities by speaking at partisan fundraisers and, more famously, by participating in obstreperous protests at the Miami-Dade County Board of Elections, with "the aim of disrupting the recount process" after the 2000 presidential election.[3] Spargo's political enthusiasm earned him a judicial promotion. In 2001, he was elected to the State Supreme Court in Albany County.

Spargo's politicking was less popular in other quarters. The New York State Commission on Judicial Conduct charged Spargo with violating the state rules governing judicial behavior. In response, Spargo filed suit claiming that the state code of judicial conduct was unconstitutional. The federal district court agreed. Applying the United States Supreme Court decision *Republican Party of Minnesota v. White*, the court ruled

that Spargo was free to be as politically active as he had been.[4] Thus the *New York Times* was prompted to declare a conquest for legal realism, a victory for "the jurisprudential philosophy that calls for a frank acknowledgement of the role politics and other real-world factors play in judicial decisionmaking."[5]

Interestingly enough, Spargo himself was among the first to call legal realism's victory into question. Although he thought that the ruling was "absolutely good" because it freed judges to be more involved in the political life of their communities, he otherwise believed that the decision pushed a political understanding of the courts too far. "When people think of Tom Spargo," Spargo said, "many would consider my reputation as a kind of partisan hack lawyer or Republican law expert. But when you get on the bench, then all that is behind you. . . . [F]rankly, I have not had a political thought in any of the work that I've done as a judge." It was one thing to acknowledge that politics played a part in judicial life, but it was altogether something else to argue that judicial decisionmaking was all politics. When it came to legal realism, Spargo seemed to suggest, it was best to accept a little bit, but not too much.[6]

Spargo's ambivalent reaction to his own exoneration seemed hard to believe. How could he consistently lay claim to the roles of both politician and judge? He had assiduously courted voters through frankly political electioneering. On the basis of his behavior, one could easily infer that Spargo was a judge who could be counted on to represent the interests of his political supporters. Yet, if this were true, then Spargo had misled litigants and the general public by claiming to be unbiased. By trying to have it both ways, simultaneously playing partisan politics and claiming judicial impartiality, Spargo risked looking like a hypocrite: his courtroom behavior appeared to be an act, an effort to affect a degree of neutrality and open-mindedness which he did not possess. He claimed to give litigants a serious hearing, but his behavior suggested that he was just giving them the pretense of being heard.[7]

In principle, Spargo easily could have avoided landing in such a bind. He could have stuck to a single role and thus eliminated the appearance of hypocrisy. For example, he could have responded to his courtroom victory by insisting that judicial decisionmaking is a thoroughly political enterprise. The goal, Spargo might have claimed, is not to pre-

tend that judges operate on the basis of neutral legal principles but to recognize that judges are political actors with power over controversial policy questions. As a result, Spargo could have argued that open judicial politicking is a welcome sight. Vigorous judicial elections contested by aggressively political candidates allow voters to select and control the officials responsible for making legal policy. Reasoning along such lines, Spargo might have sincerely defended his actions as a critical contribution to democratic politics.[8]

Alternatively, Spargo could have denounced the claims of legal realism from the outset. He could have argued that although elected politicians are necessarily obligated to represent the voters who placed them in office, judges are only required to "represent the Law."[9] The job of the judge, Spargo might have claimed, is to reason strictly on the basis of legal principle, to assimilate each dispute before the court into a coherent legal order, and to articulate a framework of rules capable of regulating subsequent judicial decisions. Spargo could have run a low-key, nonpartisan campaign and muted his political participation once on the bench. Indeed, he could have argued against the whole idea of judicial elections and insisted that a judge's loyalty to the law rightly renders him indifferent to popularity. Had Spargo sincerely cultivated a reputation for independence and impartiality, he would have eliminated the risk of being seen as a "partisan hack lawyer." He would have had no reason to contest charges leveled by the Commission on Judicial Conduct, since he would have never engaged in any judicially untoward actions in the first place.

And yet Spargo did not adopt either of these alternative strategies. Instead of choosing between the roles of active politician and impartial judge, he clung to both and defended his behavior by arguing that judges are political actors—except when they are not.

The legal realism that Spargo at once embraced and renounced has a venerable lineage. In 1897, Oliver Wendell Holmes, then a member of the Supreme Judicial Court of Massachusetts, warned his Boston University School of Law audience against supposing that "the only force at work in the development of the law is logic." "This mode of thinking is entirely natural," Holmes admitted. "The training of lawyers is the training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial

decision is mainly the language of logic. And logical method and form flatter that longing for certainty and repose which is in every mind." The natural mode of thinking about the law clearly feels right, but Holmes argued that it is in fact wrong. Certainty, Holmes famously said, "is illusion and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth of and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[10] Lawyers and judges may talk of sound logic, impersonal principle, and impartial judgment, but the law is actually driven by politics.

In the decades following Holmes's address, a loose group of scholars that came to be known as legal realists took up Holmes's remarks and fashioned them into a way of thinking about the judicial process. The realists devoted themselves to exposing the role played by politics in judicial decisionmaking and, in doing so, they called into question conventional efforts to anchor judicial power on a fixed legal foundation. The realist rejection of objective judicial reasoning proved to be quite popular and has been widely adopted. Less than one hundred years after Holmes spoke, a prominent legal historian noted that the claim "we are all realists now" had been made so often in legal scholarship that it was a kind of truism.[11]

The remarkable fact about legal realism, however, is that in spite of its impressive provenance and current popularity, it occupies an uncertain position. When one considers the context in which American courts operate, the picture of legal realism that emerges is decidedly mixed. On one hand, many Americans acknowledge that the judicial process is infused with politics; on the other hand, almost everyone seems to believe that judicial decisions are determined on nonpolitical, purely legal grounds. Spargo is far from being alone. In the public discourse about the courts, the claims of legal realism are simultaneously proclaimed from the rooftops and disavowed in the streets. The American judiciary is said to be squarely situated *in* politics, yet it is not, somehow, thought to be entirely *of* politics.

In Part I of this book, I examine the shape and significance of legal realism's ambivalent status. I find that the courts—at both the state and federal levels—are generally viewed as hybrid institutions, caught

between general expectations of impartial judicial decisionmaking and widespread beliefs about politically motivated judicial rulings. Moreover, I find that the uncertain standing of legal realism provides fertile ground for public suspicion. The political nature attributed to the judicial process often appears to be at odds with claims of judicial impartiality, naturally leading many to wonder whether judicial appeals to law are anything more than ad hoc rationalizations deployed to obscure political purposes.

One might argue that this state of affairs is not particularly significant. Conflicting public views and their attendant suspicions are, after all, matters of appearance and perception. Americans are reacting to the surface of the judicial process, and superficial assessments of how courts look may have little to do with how judges actually behave. Perhaps the public's opinion of the courts is less an inherently interesting phenomenon than a simple perceptual error in need of correction.

Although I agree that Americans are making judgments about appearances, I disagree that such judgments are either unimportant or simply mistaken. In part, my disagreement is motivated by the fact that the public's views are supported by scholarship: research suggests good reasons to believe that the modern judicial process really is an uneasy mix of legal and political factors. Beyond the validation provided by scholars, the public's views merit attention in their own right. Judicial legitimacy has long been understood to derive from what judges do *and* from how they look doing it. Public confidence in the judiciary ultimately depends not only on the substance of court rulings but also on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle. Public suspicion of the courts is therefore worth paying attention to because it threatens judicial capacities. Litigants may not respect court orders when they suspect that a judge is advancing a political agenda. Indeed, citizens may be led to doubt the authority of government as a whole when they suspect a powerful institution is misrepresenting its manner of operation.[12]

But this is only part of the picture. As I will argue over the course of this book, the public's half-politics-half-law understanding of the courts not only chips away at judicial legitimacy but also forms an essential part of the current legal order. Public skepticism about whether judges actually mean what they say is potentially corrosive, but it also points to

an enabling dynamic that makes possible the exercise of legal power. My overall goal is to illustrate and critique the means by which suspicions of judicial hypocrisy feed into the legal process, producing a rule of law that facilitates mutually beneficial accommodations among individual citizens and at the same time sustains hierarchies across different groups.[13] I take the first step toward my overall goal by describing how legal realism today is simultaneously accepted as conventional wisdom and decried as an inaccurate distortion.

Law and Politics in the State Courts

The fact that Justice Spargo staked his claim to conflicting political and judicial roles in a highly public fashion is unusual. But the circumstances that gave rise to Spargo's behavior are hardly unique to him. The overwhelming majority of state appellate judges in the United States (an estimated 87 percent of appellate judges in thirty-nine states) must, like Spargo, stand for election. Many of these judicial elections, like the elections in which Spargo ran, are not only openly partisan but increasingly indistinguishable from ordinary political contests.[14] Judicial campaigns around the country have become more expensive and now set new records in almost every election cycle. In 2004, the race for the Illinois Supreme Court cost more than did eighteen of the thirty-four contests for the United States Senate held that year.[15] In 2006, the race for chief justice of the Alabama state supreme court was at once "the most expensive in state history" and "the most expensive campaign anywhere in the nation."[16] These increasingly expensive judicial elections regularly feature extensive television advertising and the active participation of single-issue interest groups and political parties. As a result, many candidates seeking judicial positions must think about how to woo campaign donors, court constituencies, and craft a winning message. The Supreme Court's decision in *White*, the ruling that struck down limits on judicial campaigning and served as the basis of Spargo's legal victory, only promises to accelerate the prevailing trend.[17]

At the same time, judicial candidates who have successfully managed their political campaigns are widely expected to act in an unbiased, distinctly non-partisan way once they are in office. Polls show that sub-

stantial majorities of Americans believe state courts should be shielded from politics and allowed to make decisions based on an independent reading of the law.[18] Consistent with popular belief, an overwhelming majority of state judges report that the "making of impartial decisions" is one of the most important responsibilities they have.[19] A majority of the Supreme Court justices appear to concur: although the high bench cleared the way for more openly political judicial campaigns in *White*, the Court has also ruled that the risk of bias in a judicial election may be so great as to violate the Constitution's Due Process Clause.[20] Whatever claims state judicial candidates may make, and whatever constituent support these judicial candidates may win, the Court ultimately requires judges to guard against partiality. This does not mean, of course, that a state judge must approach controversies without any pre-existing beliefs about what the law requires. As a practical matter, judges inevitably come to the bench with some preconceived legal views. The expectation of judicial impartiality does not ask judicial candidates and sitting judges to abandon their legal preconceptions, so much as it calls upon them to not let preconceptions "harden into prejudgments," preventing them from giving fair weight to the facts, law, and arguments that will be presented in the cases before them.[21] The American Bar Association considers this ideal of judicial impartiality to be so broadly shared that it is an "enduring principle." "Judges occupy the role of umpires in an adversarial system of justice; their credibility turns on their neutrality. To preserve their neutrality, they must neither prejudge matters that come before them, nor harbor bias for or against parties in those matters. They must, in short, be impartial, if we are to be governed by the rule of law rather than by judicial whim."[22]

Many state judges thus appear to be suspended between conventional expectations of impartial judicial conduct and the growing electoral necessity of shrewd political calculation and frankly partisan behavior. Whether or not they publicly agree with Justice Spargo, these state judges find themselves compelled to play the roles of savvy politician and neutral jurist, forced to act as if they believe in a bit of legal realism, but not too much.[23] Like Spargo, state judges attempting to straddle the divide between politics and law strain credulity: their political behavior calls into question their legal commitments, suggesting that the discussion of

law in state judicial decisions is merely a pose designed to disguise the pursuit of partisan interests.

The notion that state judges are political is indeed commonly held. The very same polls that highlight the public's faith in the impartiality and fairness of state judges also reveal clear public awareness of the influence of political considerations.[24] Consider, for example, thirteen separate surveys of public opinion about state courts that were conducted in the twenty-year period from 1989 to 2009.[25] All of these surveys contained similar questions about judicial fairness and similar questions about the impact of politics on judicial decisionmaking. Averaging across all thirteen polls, 67 percent of those surveyed agreed that their state judges were generally impartial, while 70 percent thought that politics was at work in the judicial process.[26] In all different parts of the country and across significant periods of time, Americans consistently value the fairness of state judges and yet doubt the degree to which state judicial decisions can be explained simply by pointing to the law.[27]

Judicial Elections

Given all of the preceding, one might conclude that partisan elections are at the root of the problem in the states. Election is the most common method of state judicial selection, and when conventional expectations of impartial judging are mixed with partisan electoral contests, judicial candidates must concede (at some level) that judging is political even as they insist that their own judging will be conducted without regard for politics. Perhaps state judges might be spared the task of treading such an "elusive and perhaps illusory line" if they were selected for office in a different way.[28]

The most prominent alternative means of judicial selection in the states—an alternative specifically designed to insulate judges from partisan politics—was first introduced by Missouri in 1940. Under the "Missouri Plan," nonpartisan commissions recruit and evaluate judicial candidates and then recommend rosters of possible appointees to the governor. Those appointees selected by the governor may remain on the bench for subsequent terms subject to noncompetitive retention elections in which voters are asked only if they approve of the incumbent. Thirty-four states currently use some variant of the Missouri Plan to select cer-

tain judges and require at least a portion of their judges to face retention elections.[29]

Judicial retention elections usually have a low public profile and are often far less expensive than other forms of judicial election.[30] A large percentage of the judges subject to retention believe that such elections effectively reduce partisan politicking in the selection process.[31] In fact, judges who have faced retention elections not only agree that such elections mute partisan politics but also overwhelmingly favor keeping retention elections in place—a level of support that undoubtedly is propped up by the fact that sitting judges survive retention elections at very high rates (one study found that over a thirty-four year period judges were retained in all but 52 of 4,588 elections).[32]

The sleepy, low-risk environment of a noncompetitive retention election arguably bolsters the appearance of judicial impartiality. After all, if the lesson of partisan judicial elections is that judges "who campaign like politicians become, in effect, politicians," then the largely campaign-free retention elections should prevent judicial candidates from looking political.[33] By sharply limiting the pressure to pander to a popular audience, retention elections would appear to promote the highest standards of judicial integrity and professionalism.[34]

Yet judges subject to noncompetitive retention elections actually find that they are not entirely removed from either political influence or public suspicion.[35] The merit-based appointment process itself may involve substantial politicking and lobbying behind the scenes.[36] Conventional partisan electioneering is generally at a low ebb in retention elections, but a high percentage of judges nonetheless report that these contests still affect their behavior, leading them to be more sensitive to public opinion, to avoid controversial rulings, and to curry favor with the local bar.[37] Large-scale statistical studies confirm that judicial behavior is powerfully shaped by retention elections.[38] Public opinion appears to have taken note: polls show that individuals living in states with noncompetitive retention elections are just as likely to believe "judges' decisions are influenced by political considerations" as individuals living in states with partisan judicial elections.[39] The Missouri Plan combination of merit appointment and retention elections does often convert judicial selection into a low-key affair. But this highly constrained process does