



The Difficulty in Evaluating the Life Positions of State Judges

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Missouri election ballots contain choices for judges as well as candidates for other positions. Often, Missouri Right to Life is asked to provide some type of guidance on the pro-life position of judges and judicial candidates for state-court positions. Unfortunately, guidance on a judicial candidate's pro-life views is often beyond anyone's capability, for the necessary information is often not available. Most judges, if not all, will not answer questionnaires on the ground that answering may violate the canons of judicial conduct.

Some incumbents and candidates for judicial office have legislative backgrounds. Their legislative votes may provide insight on what they believe about abortion, cloning, and/or other pro-life issues. A few judges may have worked in or with advocacy groups on either side of these issues, serving as lawyers or board members. Maybe they have given speeches or written articles on issues of the day that shed light on their beliefs. It takes some digging to find written news about such things. Confering with local pro-life folks who may know the judges personally is always a good idea, just as with legislative candidates. However, the reliability (or not) of sources of information must also be considered in this day and age. And it is sad but true to point out that a candidate's religious affiliation means nothing in regard to life issues. Just consider the incumbent President as of the date of this essay.

When an incumbent judge is up for re-election or retention, one would want to look up his or her judicial rulings in the past to see if any include rulings on life issues. This was usually a dead end in previous years, because litigation in state courts on life issues was sparse. Only end-of-life cases like Terri Schiavo's or cases involving frozen embryos were commonly filed in state courts. That will probably change now that the Supreme Court has overturned *Roe v. Wade* and closed the doors of federal courts on most abortion-related litigation. But it will still take a number of years before judicial rulings of state judges on life issues are no longer rare and can be looked up at election time.

A complication about judicial rulings is that judges below the level of a state supreme court are not free to rule however they may want. All state judges are bound by U. S. Supreme Court rulings on federal law. All state judges on lower levels are bound by applicable decisions of the state courts at higher levels. The subordinate role of intermediate and trial judges makes their rulings sometimes exercises more of obedience than of independent reasoning. That can make it difficult to evaluate their rulings. Let me present a hypothetical situation that is based on a case that came up in St. Louis more than a decade ago.

A circuit judge who I believe to have been pro-life (he would wear "baby feet" in his lapel at some lawyers' meetings) was presented with a case in which a party sought to define the proper scope of a statute that limited a certain abortion procedure. The question before him was



whether the statute applied before viability. The judge took an unexpected turn in the case and ruled that the U. S. Supreme Court precedents required that a health exception must be found in the statute before the statute could be considered constitutional, no matter whether the baby is pre-viable or viable. (Recall how wide the health exception was under *Doe v. Bolton*; almost any abortionist could find a mental health or social reason that would qualify.) Then the judge swerved again to find that such an exception was not explicit in the statute but was implied in less-than-explicit language. He concluded that the law was valid, subject to the health exception, and that it applied to pre-viable babies.

Did that ruling mean the judge was pro-abortion because the health exception under Supreme Court rulings before *Dobbs* was so broad that it effectively "gutted" the statute? Or was his ruling pro-life because he found the remaining restriction to apply at all stages of development? Didn't the judge have to follow his best reasoning about the interaction of the statute with the U. S. Supreme Court's then-reigning precedents concerning the health exception, no matter what his personal beliefs were? So in this situation, should the trial judge to be considered as pro-life or pro-abortion? There are no simple answers to these questions.

For all of these reasons, it is quite difficult to evaluate judges on their past record in a fashion similar to how we evaluate legislators. When other good information is lacking, a different approach, using a rule of thumb, may be the best we can do.

For judges on retention ballots (i.e., "Should Judge X be retained in office?"), one should consider which governor first appointed the incumbent to the bench. If it was Governor Nixon, it is more probable than not that the judge is pro-abortion ("pro-choice"). If the judge was first appointed by Governor Blunt, Greitens, or Parson, it is more probable than not that the judge is pro-life. The Missouri Blue Book (paper or on-line versions) contains biographies of these judges, when they were first appointed, and the years of each governor's term. One can identify who was the sitting governor during the year of the judge's first appointment to the bench and gauge his or her positions on life issues accordingly. The rule is "rough justice" at best, and it may perhaps be unfair to some judges, but it is as accurate a measure as any that is available at the present time.

Missouri Supreme Court and Appeals Court Judges are appointed and appear on retention ballots. Circuit and Associate Circuit judges in the Kansas City area (Platte, Clay, Jackson Counties), St. Louis area (St. Louis City and St. Louis County), and Springfield area (Greene County) are also appointed under the same system.

Judges in the circuit courts in the other 109 counties in Missouri are elected the old-fashioned way, by partisan elections. The candidate's political party may provide some clues, but as with religious affiliation, party affiliation is not a very reliable indication of where people stand on life issues. We must uncover whatever other information is available, if any.