The Case for Political Appointment of Judges

Part 2: State Judicial Selection Series

by Brian T. Fitzpatrick

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There are four methods of selecting state court judges in use in the United States today: partisan elections, non-partisan elections, political appointment (usually by the executive, but sometimes by a legislature), and appointment by a technocratic commission (sometimes called the "Missouri Plan" and often dominated by the bar).[1] As we know by its adoption by the founding generation, the oldest of these systems is political appointment. It was the best method then, and it is still the best method today.

At the time of the founding, the federal government and all of the states selected their judges via either executive or legislative appointment, or a combination of the two.[2] Perhaps because of this unanimity, not much attention was paid to judicial selection in the Federalist Papers. Hamilton said that selecting judges was just like selecting other federal officials, and that the reasons for vesting that power in the President (more focused accountability and fewer favors to repay) with confirmation by the Senate (to check any undue favoritism the President might show) applied with equal force.[3] Elections were dismissed out of hand as impractical; it would overwhelm the public to elect so many people.[4] Letting the bar select judges was never considered; in fact, the idea was treated as a laugh line by Benjamin Franklin during the Constitutional Convention.[5] The framers paid more attention to how best to retain judges, including a rousing debate over life tenure.

This essay will not revisit the theoretical considerations that led the founding generation to select judges by political appointment. Instead, it will seek to answer a more empirical question: given the qualities and characteristics that commentators have identified as part of a good judicial system, which method of selection maximizes those good qualities? Of course, it is difficult to find data on some of the things that we value in a judicial system[6]—indeed, for some things it may be impossible to generate data at all. Moreover, because some systems do better on some criteria than others, which system is best will depend to some extent on how one prioritizes the different criteria. Nonetheless, I hope to show that, even with these challenges in mind, political appointment is hard to beat.

Let's begin with what makes for a good judicial system. Over the years, commentators have listed qualities we should want in our judges and judicial systems. In no particular order:

1. *Independence*: Judges should have the resolve to follow the law even when the public or policymakers won't like it.[7] This is especially important when the law is clear; in ambiguous cases, we may want judges to follow the preferences of the public or policymakers (see below).
2. *Accountability*: The public and policymakers should be able to stop judges from misbehaving, including, perhaps, issuing decisions they believe are erroneous.[8]
3. *Competence*: Judges should have technical legal expertise.[9]
4. *Integrity*: Judges should be free from external corruption and should not use the office for personal gain.[10]
5. *Legitimacy*: Judicial decisions should command respect and acceptance by the public and policymakers.[11]
6. *Diversity*: There should be racial, ethnic, gender, and other demographic diversity on the bench.[12]
7. *Viewpoint representativeness*: Judges should share the policy preferences of the public.[13] This is important if you believe that judges consciously or subconsciously resolve ambiguities in the law consistently with their own world views.

What does the data say about how each of the four methods of judicial selection fare on these criteria?

First, independence and accountability have very little to do with the method of selecting judges. They have more to do

1 *See* Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 Vand. L. Rev. 1729, 1752 (2017) (showing different three ways of categorizing state selection methods).

2 *See* Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 Va. L. Rev. 839, 856 (2012).

3 *See* The Federalist No. 78 (Alexander Hamilton) ("As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.")

4 *See* The Federalist No. 76 (Alexander Hamilton) ("The exercise of it by the people at large will be readily admitted to be impracticable; as waiving every other consideration, it would leave them little time to do anything else.")

5 *See* Daniel A. Farber & Suzanna Sherry, A History of the American Constitution 55 (1990).

6 For example, one limitation with some of the studies I cite below is that they lump partisan and non-partisan election systems together. As Professor Bonneau has shown at great length, those two systems are very different. *See* Chris Bonneau, Voters' Verdicts (2015).

7 *See* Luke Bierman, *Beyond Merit Selection*, 29 Fordham Urb. L.J. 851, 853 (2002).

8 *See id.*

9 *See id.* (proposing method that selects "well-trained" judges).

10 *See* Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. Miami L. Rev. 509, 528, 530 (1978).

11 *See* Bierman, *supra* note 8.

12 *See* Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 Tenn. L. Rev. 473, 473 & n.5 (2008).

13 *See generally* Fitzpatrick, *Ideological Consequences of Selection, supra* note 1.

with the method of retaining judges.[14] Life tenure maximizes independence and minimizes accountability.[15] Reelection or reappointment maximizes accountability and minimizes independence.[16] Reasonable people can disagree about where to strike the balance between the two poles. My preferred retention method would not grant life tenure to judges, but would give them long, renewable terms. This would not make them look over their shoulders very often, but still occasionally. But how you retain judges has no necessary connection to how you select them in the first instance. Therefore, these qualities are irrelevant to our question.

Second, there is no evidence that any method of selection produces more competent judges than any other.[17] This is a surprising result, but scholars have looked at it every way we know how—years of experience,[18] ranking of law school,[19] productivity,[20] citation of opinions in other jurisdictions,[21] clarity of opinions[22]—and there is no good evidence one system produces better judges than any other.[23] This quality is a wash.

Third, there is no good evidence that any system produces more racial or gender diversity than the others.[24] Scholars have looked at this up, down, and sideways. Some studies say one thing, other studies say the opposite.[25] Nothing can be concluded one way or the other.[26] This quality, too, is a wash.

Fourth, there is a bit of evidence—it is very localized—that elections fare the worst on the integrity factor.[27] The evidence is that elected judges are sanctioned more often by judicial disciplinary bodies than judges selected by other methods.[28] The studies on this are not very numerous or compelling yet, so I am not ready to give them tremendous weight.[29] But I will count this as a slight plus for commission and political appointment systems.

Fifth, there is fairly strong evidence that elections fare worse on legitimacy than the other systems do.[30] This is because of campaign contributions. When scholars ask the public what they think about judges sitting on cases where one of the lawyers or one of the litigants gave the judge money, the public does not trust the judge's decision.[31] The same reaction has been found when the judge benefited from independent expenditures from one of the lawyers or one of the litigants.[32] I do not think you can run an election—even a nonpartisan election—without campaign contributions or the right to make independent expenditures. Thus, this is another plus—a bigger plus—for the commission and political appointment systems.

If you have been keeping track, there is something of a tie thus far between commissions and political appointments. The first two criteria were irrelevant; the next two were a wash. The fifth was a small plus for commissions and political appointments. The sixth was a large plus for them.

To decide between these two systems, therefore, it comes down to the last factor: viewpoint representativeness. There is emerging evidence—a study I did[33] and one done by two political scientists[34]—that shows that the views of judges selected by commission systems are further away from the public's views in

14 *See* Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 Fordham Urb. L.J. 125, 132–35, 139–41 (2007) (discussing the effects of retention elections on judicial independence and accountability).

15 *See id.* at 133.

16 *See id.*

17 See Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 U. Mo. L. Rev. 675, 685 n.33 (2009).

18 Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 Judicature 228, 233 (1987) ("[T]he frequency of prior judicial experience is about equal in all selection systems.").

19 *Id.* at 231–32 (explaining that region, not selection system, is the best explanation for differences in the number of judges who attended prestigious law schools in different states).

20 Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. Econ. & Org. 290, 296 (2010) (measuring productivity based on number of opinions written).

21 *Id.* (measuring out-of-state citations as a proxy for the quality of judicial opinions).

22 Greg Goelzhauser & Damon M. Cann, *Judicial Elections and Opinion Quality in State Supreme Courts* 14 St. Pol. & Pol'y Q. 123, 136 (2014) (showing that "there is no substantively meaningful difference in opinion clarity across judicial retention systems").

23 The latest study is Greg Goelzhauser's Choosing State Supreme Court Justices (2016). He concludes: "[o]verall, the results suggest that no selection system enjoys a systematic advantage over any other system." *Id.* at 82.

24 *See* Fitzpatrick, *supra* note 13, at 473 n.6.

25 See Sherrilyn A. Ifill, *Through the Lens of Diversity: The Fight for Judicial Elections After* Republican Party of Minnesota v. White, 10 Mich. J. Race & L. 55, 85 (2004) ("Studies that have examined the effect of appointment versus election of judges on diversity have produced conflicting results.").

26 See again the latest study from Professor Goelzhauser: "No selection system produces more or less diverse state supreme court justices across categories." *Supra* note 24 at 106.

27 *See* Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 Tenn. L. Rev. 501, 538 & n.243 (2008).

28 *Id.*

29 *See id.*

30 *See, e.g.*, Damon M. Cann & Jeff Yates, These Estimable Courts: Understanding Public Perceptions of State Judicial Institutions and Legal Policy-Making 44–45 (2016); James L. Gibson & Gregory A. Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey*, 10 J. Empirical Legal Stud. 76, 78–79 (2013).

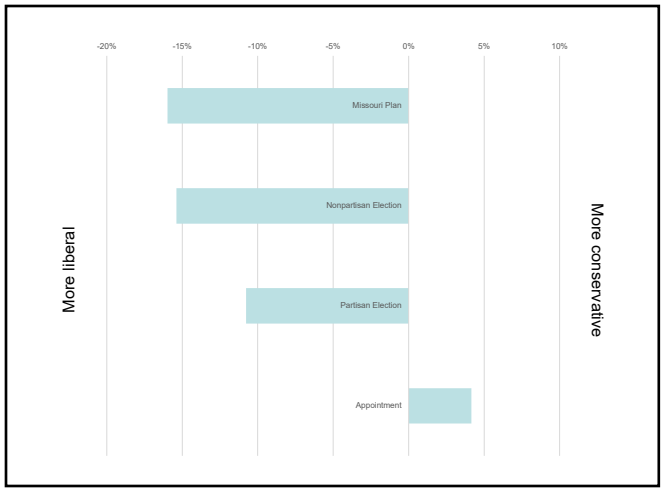
31 Gibson & Caldeira, *supra*.

32 *Id.*

33 *See* Fitzpatrick, *Ideological Consequences of Selection, supra* note 1.

34 *See* Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary* 2 (Harvard Kennedy Sch., Working Paper No. RWP15-001, 2015), http://ssrn.com/abstract=2577378.

their states than those of judges selected by political appointment. Consider this graphic from my study. Organized by selection method, it shows what percentage of state appellate judges gave more campaign contributions in their lives to the Democratic Party versus what percentage of voters in their states voted for the Democratic Party in U.S. House of Representative elections between 1990 and 2010. Bars to the left reflect systems where the judges are more liberal than the electorates in their states; bars to the right reflect systems where the judges are more conservative.



The graphic shows that judges who are appointed by public officials reflect the political preferences of the electorate better than any other system, whereas judges in commission states reflect those preferences *worse* than any other system. Why is this the case? The leading hypothesis is that, because the lawyer population is so much more liberal than the general population, if the lawyer population is not screened for ideology during judicial selection, then the population of judges will look just like the population of lawyers. The commission system and non-partisan elections do not screen as well for ideology as partisan elections and political appointment; even worse, the commission system reinforces the existing leftward bias in the lawyer population by asking the bar itself to do the screening. [35] These studies break the tie: political appointment wins.

It is interesting, then, that political appointment is the least popular method in our states today. At last count, only four states select judges for their highest courts with political appointment, whereas 24 states use a commission system, 15 use non-partisan elections, and seven use partisan elections.[36] The four states using political appointment are California and New Jersey, which use gubernatorial appointment, and South Carolina and Virginia, which use legislative appointment.[37] Six other states—Delaware, Maine, Maryland, Massachusetts, New Hampshire, and Tennessee—use a commission system, but the commission serves only at the pleasure of governor and can be abolished at any time.[38]

Although political appointment states comprise a small minority, that may be changing. My state of Tennessee became the first state to abolish a Missouri Plan a few years ago when it vested judicial appointments in the governor with confirmation by the legislature.[39] Kansas did the same thing for some of its appellate judges.[40] Oklahoma and other states are considering this as well.[41] If these trends continue, the future of judicial selection may look much more like the past than it does the present, and that will be for the best.

35 *See* Fitzpatrick, *Ideological Consequences of Selection, supra* note 1.

36 *See id.*

37 *See id.*

38 *See id.*

39 *See* Dave Boucher, *Amendment 2 to Change Judicial Selection Passes*, The Tennesseean (Nov. 4, 2014), http://www.tennessean.com/story/news/politics/2014/11/05/amendment-change-judicial-selection-leads/18499123/.

40 *See* Jessica M. Karmasek, *Kansas Court of Appeals judges now picked by governor, with Senate confirmation*, Legal NewsLine (Mar. 28, 2013, 2:00pm), https://legalnewsline.com/stories/510514947-kansas-court-of-appeals-judges-now-picked-by-governor-with-senate-confirmation.

41 *See* Trent England, *Shift Power from the Elites to the People: Reform the Judicial Nominating Commission*, Oklahoma Council of Public Affairs (Jan. 1, 2017, 3:07 PM), http://www.ocpathink.org/article/shift-power-from-the-elites-to-the-people-reform-the-judicial-nominating-commission; Lucia Walinchus, *The Never-Ending Battle over Selection of State's Most Powerful Judges*, Oklahoma Watch (Aug. 5, 2016), http://oklahomawatch.org/2016/08/05/the-never-ending-battle-over-selection-of-okla-judges/.