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## SPEECH

### JUDICIAL SELECTION AND IDEOLOGY

Brian T. Fitzpatrick\*

My topic is how best to select judges. As we all know, the method we use to select federal judges—including U.S. Supreme Court justices—has not changed since 1789: The President nominates, the Senate confirms, and the judges serve for life. But the states have experimented with a variety of different methods over the years. Some states have used something like the federal method.<sup>1</sup> Some states have elected their judges by popular vote.<sup>2</sup> Some of those states have done so with party affiliation on the ballot, and some states have done so without it.<sup>3</sup> Some states have selected judges through a small commission of judge pickers.<sup>4</sup> The question I would like to pose to you tonight is: Which method is best?

I concede that this is a question we have been trying to answer for as long as we have had the United States.<sup>5</sup> The founding generation debated

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1. See Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 71 VAND. L. REV. (forthcoming Nov. 2017) (manuscript at 1), <https://ssrn.com/abstract=2722662> [<https://perma.cc/G2JE-KPZX>].

2. *Id.*

3. *Id.*

4. *Id.*; see also Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 677–79 (2009) [hereinafter Fitzpatrick, *The Politics of Merit Selection*].

5. See Fitzpatrick, *supra* note 1, at 1 n.1.

the question extensively when it drafted and ratified Article III of the U.S. Constitution,<sup>6</sup> and we have been debating it in the states ever since.<sup>7</sup>

Some people say we want a method that ensures “independent” judges.<sup>8</sup> Some people say we want a method that keeps judges “accountable.”<sup>9</sup> Some people say we want a method that picks “competent” judges.<sup>10</sup> Some people say we want a method that finds judges with “integrity.”<sup>11</sup> Some people say we want a method that will ensure judges have “legitimacy.”<sup>12</sup> Some people say we want a method that picks “diverse” judges.<sup>13</sup> I suspect many people would say we want “all of the above.” My hope tonight is that I can add something new to the theory of what makes a selection method a good one.

My thesis is this: In addition to all of the other things that we have been told that we should care about in assessing which selection method is best—independence, accountability, competence, integrity, legitimacy, diversity—in addition to all these things, I think we should consider something else, whether the selection method picks too many conservatives or too many liberals. My thesis is that we should care about whether a method skews the judiciary towards one side of the ideological spectrum or another.

Why should we care? We should care because the personal ideological views of our judges influence their decisions on the bench. Liberal judges tend to reach liberal outcomes, and conservative judges tend to reach conservative outcomes<sup>14</sup>: not in every case—perhaps not even in many cases—but in enough cases to make a difference. In cases where the law is ambiguous, judges consciously or subconsciously consult their own

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6. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 9 (7th ed. 2015).

7. See Fitzpatrick, *supra* note 1, at 1 n.1.

8. See Luke Bierman, *Beyond Merit Selection*, 29 *FORDHAM URB. L.J.* 851, 853–54 (2002).

9. See *id.*

10. See *id.* (proposing method that selects “well-trained” judges).

11. 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).

12. See Bierman, *supra* note 8, at 853.

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

14. See Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 687–88 (discussing the correlation between ideological preferences of judges and the outcomes of cases they hear).

world views.<sup>15</sup> We have known this for 100 years, ever since the Legal Realist movement.<sup>16</sup> There are now stacks and stacks of books and academic papers demonstrating that judges with different ideological views make different decisions in predictable ways.<sup>17</sup> If certain judge-selection methods systematically favor one political perspective, then our courts will reach more outcomes reflective of that perspective, despite the fact that the law is the same.<sup>18</sup> If we care about legal and policy outcomes, then we should care about this.

Yet, before I began writing on this topic a few years ago,<sup>19</sup> no scholar had ever asked whether we should consider the ideological consequences of one method of selection versus another. I think the reason for this was because no one had ever thought—or maybe they thought it, but did not want to say it—that one method would systematically pick more judges of one ideology over another, everything else being equal. Why, for example, would nonpartisan elections pick more Republicans or more Democrats than, say, gubernatorial appointments? Why would commission selection pick more Republicans or more Democrats than, say, partisan elections?

As I explain tonight, I think we have every reason to think that some methods will pick more Democrats or more Republicans than others. And I have the data to back it up.

But before we get to all that, let me begin by telling you a little more about how the various states select their judges. There are four basic methods in use today. Some states use the same method for their trial courts and for their appellate courts;<sup>20</sup> other states mix and match the methods, as Oklahoma does.<sup>21</sup> My focus tonight will be on the appellate courts.

At the founding of our country, the states selected their appellate judges much like the federal government did and still does: Judges were appointed by either the executive or the legislature—or some combination

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15. *Id.* at 688.

16. *Id.*

17. See *id.* at 687–88 and accompanying footnotes for examples of scholarly works discussing ideological preferences of judges.

18. *Id.* at 687.

19. See generally Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4.

20. See NAT'L CTR FOR STATE COURTS, METHODS OF JUDICIAL SELECTION: SELECTION OF JUDGES (2017), [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm) [<https://perma.cc/YE8D-6WX9>] (listing each state's current method for selecting both trial and appellate judges).

21. See *id.*

of the two—and the judges usually served for life.<sup>22</sup> Today, only a small number of states—states as different as New Jersey, Virginia, and South Carolina—still select their judges like this.<sup>23</sup>

In the early 1800s, the states began to abandon life tenure, and shortly thereafter, they began to abandon the appointment method in favor of partisan election.<sup>24</sup> By the time of the Civil War, most states selected their judges using partisan elections.<sup>25</sup> These elections were much like any other elections: Candidates for judicial office were nominated by the two political parties, and they squared off against one another on the ballot.<sup>26</sup> A number of states today still use partisan elections, including Oklahoma's neighbor to the south, Texas.<sup>27</sup>

But more states today use nonpartisan elections rather than partisan elections.<sup>28</sup> During the Progressive Era, many states with partisan elections made this change.<sup>29</sup> Nonpartisan elections are different from partisan elections in a couple of ways. First, the parties may not have the power to nominate the candidates; anyone can run in a nonpartisan election.<sup>30</sup> Second, the ballot does not show any party affiliation associated with the candidates;<sup>31</sup> thus, if voters do not already know a lot about the candidates when they enter the voting booth, they will not know who is a Republican and who is a Democrat when they cast their vote. As I said, many states today still use this method, including Oklahoma's neighbor to the east, Arkansas.<sup>32</sup>

The most popular method of today is what I call the commission

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22. Fitzpatrick, *supra* note 13, at 477; Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 855, 857 (2012) [hereinafter Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation*].

23. See NAT'L CTR FOR STATE COURTS, *supra* note 20.

24. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation*, *supra* note 22, at 859.

25. *Id.* at 860; Fitzpatrick, *supra* note 13, at 477.

26. See Fitzpatrick, *supra* note 13, at 477–79.

27. See NAT'L CTR FOR STATE COURTS, *supra* note 20.

28. See *id.*

29. Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 27–28.

30. See Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L.J. 23, 23 (1986) (noting that Michigan requires the nonpartisan nomination of judges, except for state supreme court justices, who are nominated by political parties). *But see id.*

31. Fitzpatrick, *supra* note 1, at 1.

32. See NAT'L CTR FOR STATE COURTS, *supra* note 20.

method.<sup>33</sup> It is also known as the Missouri Plan or “merit selection.” In this method, a small commission of persons creates a list of names—usually three names—that it sends to the Governor.<sup>34</sup> The Governor is required to appoint one of these names to the bench.<sup>35</sup> Sometime thereafter, in most commission states, there is an uncontested retention referendum where the public votes “yes” or “no” on whether to keep the judge appointed by the Governor on the bench; if the public votes “no,” the commission is usually tasked again with sending the Governor names for a replacement.<sup>36</sup>

The commission obviously has a lot of power in this system. So the important question is, who gets to sit on the commission? The states compose their commissions in different ways, but most of them give a big role to the legal community.<sup>37</sup> In some states, the state bar leadership appoints a number—sometimes even a majority—of the members.<sup>38</sup> In other states, the lawyers in the state vote on whom the state bar puts on the commission.<sup>39</sup> The rest of the commission is usually selected by public officials, such as the governor or the legislature.<sup>40</sup> As you probably know, Oklahoma is a commission state.<sup>41</sup> Your commission has fifteen people, and six of them are selected by the state bar.<sup>42</sup> Nearly half of the states today use the commission method.<sup>43</sup>

Now back to my thesis. I have believed for some time that one of these methods—the commission method, your method—systematically skews courts to the left by picking more liberal judges than the other methods. I

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33. *See id.*

34. *See* Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 678 (citing NAT’L CTR FOR STATE COURTS, METHODS OF JUDICIAL SELECTION: JUDICIAL NOMINATING COMMISSIONS (2017), [http://judicialselection.com/judicial\\_selection/methods/judicial\\_nominating\\_commissions.cfm?state](http://judicialselection.com/judicial_selection/methods/judicial_nominating_commissions.cfm?state) [<https://perma.cc/3PGV-62QL>] (providing detailed information on nominating procedures for commission states)); Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL’Y 386, 386 (2008).

35. *See* NAT’L CTR FOR STATE COURTS, *supra* note 34.

36. *See* Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 678–79 (citing NAT’L CTR FOR STATE COURTS, *supra* note 34).

37. *Id.* at 679.

38. NAT’L CTR FOR STATE COURTS, *supra* note 34; *see also* Ware, *supra* note 34, at 387 (noting that a majority of the nominating-commission members for the Kansas Supreme Court are selected by the bar).

39. NAT’L CTR FOR STATE COURTS, *supra* note 34.

40. *E.g., id.*; *see also* Ware, *supra* note 34, at 387 (noting that four members of Kansas’s nominating commission are selected by the governor).

41. *See* NAT’L CTR FOR STATE COURTS, *supra* note 20.

42. OKLA. CONST. art. VII-B, § 3(a).

43. *See* NAT’L CTR FOR STATE COURTS, *supra* note 20.

wrote an article in 2009 in the Missouri Law Review that made this claim.<sup>44</sup> Why did I think this? I thought this because of two facts. First, as I just said, lawyers dominate the membership of the commissions; second, lawyers are more liberal than the general population.<sup>45</sup> If you add these two facts together, it means that the judge pickers in the commission system are more liberal than the judge pickers in the other systems: the general public, the legislature, and the governor.

Why does this matter? Well I thought it mattered for much the same reason that it matters whether the judges themselves are liberal or conservative. Judge pickers—no matter who they are—consciously or subconsciously want to pick judges who share their ideological views.<sup>46</sup> Judge pickers care about outcomes in judicial cases, and they want judges who will deliver the right outcomes<sup>47</sup>: not all the time, maybe not even most of the time, but enough of the time to make a difference.

That was my hypothesis anyway. And, in 2009, I collected data from two commission states Missouri and Tennessee, and the data showed that the persons sent by the commissions to the governor for appointment to the bench were much more liberal than the general public in those states.<sup>48</sup> Two-thirds of the nominees in Tennessee had voted more often in Democratic primaries than Republican primaries.<sup>49</sup> Almost ninety percent of nominees in Missouri had given more money to Democratic candidates than to Republican candidates for public office over the course of their lives.<sup>50</sup>

But my study in 2009 was very limited. I only looked at two states; there are many more commission states; maybe things are different elsewhere.<sup>51</sup> I looked at whom the commission nominated to the Governor, not who eventually took the bench; maybe the commission sent enough conservatives to the Governor—even if not very many—that conservative Governors could still fill courts with conservative jurists.<sup>52</sup> And I looked only at commission states; maybe the benches in states with other systems

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44. Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 676.

45. Fitzpatrick, *supra* note 1, at 2–3.

46. See Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 676, 686–87.

47. *Id.*

48. *Id.* at 693–98.

49. *Id.* at 693–94.

50. *Id.* at 696–98.

51. *Id.* at 692.

52. *Id.*

were also dominated by left-leaning judges.<sup>53</sup>

In light of these limitations, several years ago I began collecting a more ambitious set of data. Along with a large team of research assistants, I gathered data on all appellate judges who served in each of the fifty states between 1990 and 2010. I looked at the campaign contributions these judges had made over the course of their lives and assessed whether each of them had given more to Democratic candidates for public office or more to Republicans. I then compared the percentage of left-leaning appellate judges in each state to how left- or right-leaning the population was in each state, as measured by whether the population in their states tended to vote for Republicans or Democrats for Congress and the state legislature. The results of this research will be published in the *Vanderbilt Law Review*,<sup>54</sup> but tonight I am going to give you a sneak peak of what I found.

First, the vast majority of the states have judiciaries that are to the left—sometimes far to the left—of the public. This can be seen in Figure 1, which is one of the figures from the article I will publish in the *Vanderbilt Law Review*.<sup>55</sup> Roughly forty states have judiciaries more liberal than their populations. Very few states have more conservative judiciaries, and when they do skew right, they skew to a lesser degree than that of the left-skewed states. Oklahoma is one of the left-skewed states. It is not the most left-skewed, but it is skewed pretty far to the left. There is a twenty-five-percentage-point difference between the percentage of left-leaning appellate judges and the percentage of left-voting citizens. Thus, if the public in Oklahoma were 50–50, then the appellate judges in Oklahoma would be 75–25.

Second, I grouped the states by method of selection. Figure 2 is the average skew exhibited by the states with each of the four selection methods.<sup>56</sup> The commission system skews left, as I predicted. But so do nonpartisan elections. Even partisan elections skew some to the left. Only appointment by elected officials gets the judiciaries close to the public.

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53. *Id.*

54. *See generally* Fitzpatrick, *supra* note 1.

55. *Id.* at 12–13 tbl.1.

56. *Id.* at 14 tbl.3.

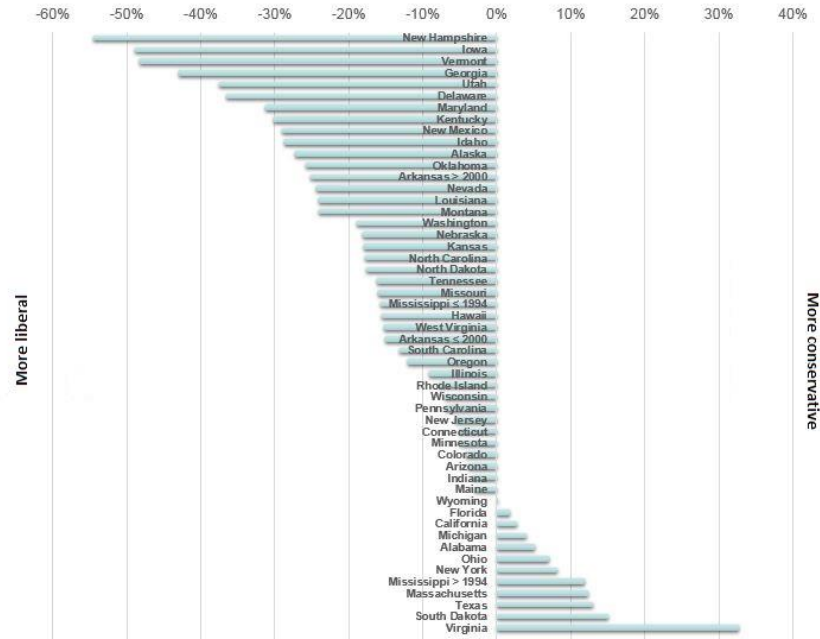


Figure 1

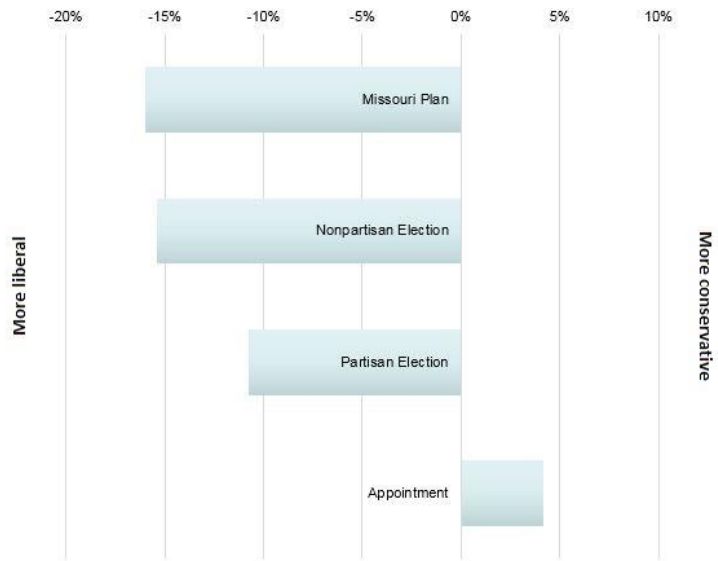


Figure 2



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I did not think that nonpartisan election states would show as much skew as commission states. This surprised me. And it has led me to think about a second mechanism that can produce leftward skew: the underlying leftward skew of the pool of potential judges.

Judges must come from the pool of lawyers, and as I said, lawyers are more liberal than the general public.<sup>57</sup> Thus, if a selection method *does not* screen for ideology, it will tend to replicate the ideology of the pool of potential candidates. This is why I believe nonpartisan elections produce just as much skew as the commission system. Nonpartisan elections make it difficult for the public to screen for the ideology of judicial candidates.<sup>58</sup> Therefore, the public ends up just passing on to the bench the same underlying ideological distribution that the legal profession itself exhibits.

This also means that I may very well be wrong about what is going on in commission states. Maybe the members of the commission are not trying to find liberal judges. Maybe they are not considering ideology at all—even subconsciously. But, because the pool of judicial candidates—i.e., lawyers—is so far skewed to the left, it does not matter. We end up in the same place: with left-leaning judiciaries.

We do not see the same thing in appointment states or as much of the same thing in partisan election states because those mechanisms allow the judge pickers—the public, the legislature, and the governor—to screen for ideology.<sup>59</sup> Thus, those systems produce judiciaries that look much more like the political leanings of the people in their states.

I should add a note here. Sometimes when I tell people about all of this, they ask me how I know that the legal profession is so much more liberal than the general public. And, I will admit, when I first started this research several years ago, there was no good data to demonstrate this. I think the conventional wisdom was, and still is, that lawyers are more liberal than the rest of the population, but it was hard to prove. It is no longer hard to prove. We now have a very impressive study from political scientists at Stanford and Harvard on the question.<sup>60</sup> They took the MartindaleHubbell database of lawyers in the United States and mashed it

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57. See Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 676.

58. Fitzpatrick, *supra* note 1, at 3–4.

59. See Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 676, 701.

60. Adam Bonica, Adam S. Chilton & Maya Sen, *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277 (2016).

up against databases on campaign contributions.<sup>61</sup> And they found that the distribution of lawyers is much to the left of the distribution of the population.<sup>62</sup> I highly commend this study. You can see how liberal your law school alumni are and how liberal your law firms are; they have it all broken down.<sup>63</sup>

I will add something else. Whenever you do empirical work like this, you are always scared you have not done it correctly. I have to rely on research assistants to collect data, and what if they were watching television and not paying attention and made a mistake? I try to minimize this possibility by asking two teams of research assistants to independently do everything, and then I look to see where the discrepancies are and resolve them—but, even still, worry about the reliability of empirical work keeps me up at night.

It was for this reason that I asked those political scientists I mentioned a moment ago to do something. I asked them to pull out of their databases all of the judges in each state and take a look at what the judges' political leanings look like. They could not do it quite like I did, but they ran the numbers, and I want to share with you what they found.

They found that almost all the states had judiciaries more liberal than the public officials in their states<sup>64</sup>—the same thing I found! So I feel better about my own study. I also asked them to group the states by selection method, and what did they find? Again, the same thing I did: Commissions and nonpartisan elections produce judiciaries further to the left of public officials than partisan elections and appointments do.<sup>65</sup> So, again, I feel better about my own results.

And what about those results? What should we do with them? Should we get rid of commissions and nonpartisan elections and turn to appointments or partisan elections instead? I do not think it necessarily follows for two reasons. First, it is not always desirable to have a judiciary that reflects the political leanings of the public. Part of what courts are supposed to do is stand up to public opinion when public opinion is

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61. *Id.* at 279.

62. *Id.* at 292.

63. *Id.* at 301–05, 307–15.

64. Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary*, HARV. UNIV., at 21 & 22 fig.6 (Sept. 4, 2015) (unpublished manuscript), [https://scholar.harvard.edu/files/msen/files/judicial\\_ideology.pdf](https://scholar.harvard.edu/files/msen/files/judicial_ideology.pdf) [<https://perma.cc/H2KX-HLZH>].

65. *Id.* at 23–27.

unconstitutional.<sup>66</sup> That is the countermajoritarian feature of judicial review. But of course we can have countermajoritarian judges on the right side of the political spectrum just as easily as we can have countermajoritarian judges on the left side of the political spectrum. Thus, the fact that we don't necessarily want judges to do what the public wants does not explain why the judges must be to the left of the public.<sup>67</sup> Moreover, constitutional law is only a small portion of what state appellate courts do. Most of their work is common law or statutory interpretation. Countermajoritarianism is not a good thing in those areas; it only frustrates the democratic will.

But, second, and even more importantly in my view, avoiding ideological skew in our courts is only one of many values we must balance in assessing the worth of a system of selection. As I said at the beginning of this discussion, the list of other qualities is a long one. I will list these qualities again here:

Independence<sup>68</sup>

Accountability<sup>69</sup>

Competence<sup>70</sup>

Diversity<sup>71</sup>

Integrity<sup>72</sup>

Legitimacy<sup>73</sup>

Ideological skew<sup>74</sup>

Maybe you care more about some of these other things than you do about skew, and maybe the commission system and nonpartisan elections score well on these other things.

Nonetheless, I will share with you my own view on this question. Personally, I do not believe that the commission system and nonpartisan elections score any better than the other systems on most of these criteria. As a result, I *do* think states should abandon these methods. By my calculations, the method that maximizes these qualities is the oldest system of them all: the appointment system. I say this for the following reasons.

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66. Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 702.

67. *Id.* at 702–03.

68. *See supra* note 8 and accompanying text.

69. *See supra* note 9 and accompanying text.

70. *See supra* note 10 and accompanying text.

71. *See supra* note 13 and accompanying text.

72. *See supra* note 11 and accompanying text.

73. *See supra* note 12 and accompanying text.

74. *See supra* notes 44–62 and accompanying text.

First, independence and accountability have very little to do with the method of selecting judges. They have more to do with the method of retaining judges.<sup>75</sup> Life tenure maximizes independence and minimizes accountability.<sup>76</sup> Reelection or reappointment maximizes accountability and minimizes independence.<sup>77</sup> I think reasonable people can strike the balance between the two in different places. I would not grant life tenure to judges, but I 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. These factors are irrelevant to that question.

Second, there is no evidence that any method of selection produces more competent judges than any other.<sup>78</sup> This surprises people—it surprises me—but scholars have looked at it every way we know how—years of experience,<sup>79</sup> ranking of law school,<sup>80</sup> productivity,<sup>81</sup> citation of opinions in other jurisdictions,<sup>82</sup> clarity of opinions<sup>83</sup>—and there is no good evidence one system produces better judges than any other. This factor is a wash.

Third, there is no good evidence that any system produces more racial or gender diversity than the others.<sup>84</sup> Scholars have looked at this up, down, and sideways. Some studies say one thing; other studies say the

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75. 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).

76. See *id.* at 133.

77. See *id.*

78. Fitzpatrick, *The Politics of Merit Selection*, *supra* note 4, at 685–86, 685 n.33.

79. 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.”).

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

81. 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).

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

83. Greg Goelzhauser & Damon M. Cann, *Judicial Independence and Opinion Clarity on 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”).

84. Fitzpatrick, *supra* note 13, at 474 n.6.

opposite.<sup>85</sup> Nothing can be concluded one way or the other. This factor, too, is a wash.

Fourth, there is a bit of evidence—it is very localized—that elections fare the worst on the integrity factor.<sup>86</sup> The evidence is that elected judges are sanctioned more often by judicial disciplinary bodies than judges in other states are.<sup>87</sup> The studies on this are not very numerous or compelling yet,<sup>88</sup> so I am not ready to give them tremendous weight. But I will count this as a slight plus for commission and appointment systems.

Fifth, there is fairly strong evidence that elections fare worse on legitimacy than the other systems do.<sup>89</sup> 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.<sup>90</sup> The same reaction has been found when the judge benefited from independent expenditures from one of the lawyers or one of the litigants.<sup>91</sup> I do not think you can run an election—even a nonpartisan election—without

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85. See Sherrilyn A. Ifill, *Through the Lens of Diversity: The Fight for Judicial Elections After Republican Party of Minn. 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.”).

86. See Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 538 (2008).

87. *Id.* (first citing Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977–2002*, 37 U. MICH. J.L. REFORM 791, 808–10 (2004) (stating that New York's elected judges are more likely to be disciplined than those who are appointed); and then citing CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990–1999 (2002) (explaining that the percentage of elected judges who are disciplined is higher than judges who are appointed)), [http://cjp.blogs.ca.gov/files/2016/08/statistical\\_study\\_1990-1999.pdf](http://cjp.blogs.ca.gov/files/2016/08/statistical_study_1990-1999.pdf) [https://perma.cc/2CFK-PE6T].

88. See *id.* (first citing Zeidman, *supra* note 87, at 808–10 (stating that New York's elected judges are more likely to be disciplined than those who are appointed); and then citing CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990–1999 (2002) (explaining that the percentage of elected judges who are disciplined is higher than judges who are appointed)), [http://cjp.blogs.ca.gov/files/2016/08/statistical\\_study\\_1990-1999.pdf](http://cjp.blogs.ca.gov/files/2016/08/statistical_study_1990-1999.pdf) [https://perma.cc/2CFK-PE6T].

89. 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).

90. See Gibson & Caldeira, *supra* note 89, at 78–79, 95–96.

91. *Id.* at 78.

campaign contributions or the right to make independent expenditures. Thus, this is another plus—a bigger plus—for the commission and appointment systems.

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

It therefore comes down to the last factor, the one that I have urged us to add to our calculus tonight: ideological skew. As I have explained at great length, there is emerging evidence—my study and the one done by the political scientists—that shows that commission systems are skewed away from the public in a way that appointment systems are not. These studies break the tie in my view: I think the appointment system is the best one.

Indeed, in my state of Tennessee, we had a commission system for four decades, but in light of this emerging research, we recently decided to change it to an appointment system.<sup>92</sup> Our current governor has now made three appointments to the Tennessee Supreme Court under the new system,<sup>93</sup> and I think most observers have been happy with his selections.

I have heard that many people in Oklahoma would like to make the same change that we did in Tennessee.<sup>94</sup> But I have also heard that many people want to keep things the way they are.<sup>95</sup> Some of these people may

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92. See Dave Boucher, *Amendment 2 to Change Judicial Selection Passes*, THE TENNESSEAN (Nov. 4, 2014, 11:00 PM), <http://www.tennessean.com/story/news/politics/2014/11/05/amendment-change-judicial-selection-leads/18499123/> [<https://perma.cc/X9NP-8FET>] (explaining the Tennessee Plan and describing the voting distribution).

93. *Judges Appointed by Bill Haslam*, BALLOTPEDIA, [https://ballotpedia.org/Judges\\_appointed\\_by\\_Bill\\_Haslam](https://ballotpedia.org/Judges_appointed_by_Bill_Haslam) [<https://perma.cc/MF9T-5P4N>].

94. 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> [<https://perma.cc/77PS-EZQ9>] (discussing the need for change in Oklahoma's judicial appointment system); 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/> [<https://perma.cc/W8L6-M2RV>] (stating that a conservative coalition in Oklahoma is seeking to replace the appointment system with an election system for appellate judges).

95. See Rick Green, *Bill Would Let Oklahoma Voters Change How Some Judges Are Selected*, THE OKLAHOMAN (Mar. 4, 2016, 12:00 AM), <http://newsok.com/article/5482696> [<https://perma.cc/3R8N-CS8U>] (“House Democratic Leader Scott Inman said it’s a huge

be in this very room tonight. I look forward to hearing what they think about all of this. Thank you very much for inviting me.

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mistake to alter a process for selecting judges that was developed in response to an infamous Oklahoma scandal over bribery and fixed court decisions.”).