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Introduction: The Effects of Selection Method on Public Officials

Clayton J. Masterman*

State and local governments have long struggled to design optimal mechanisms for selecting public officials. Centuries of experimentation have left us with several techniques: election (partisan or otherwise), political appointment, or selection by some kind of technocratic commission.¹ Despite our extensive experience with these systems, no consensus has emerged as to which system is best under what circumstances. Several questions remain unclear: What effect does selection method have on the quality of services that public officials provide? Does selection method systematically affect the ideological composition of officials? If so, does that effect matter? And what determines whether a jurisdiction adopts a particular method of judicial selection in the first instance? The articles that follow make important contributions to our understanding of each of these issues.

In *Adjudicating Death: Professionals or Politicians?*, Professors Stephen Choi and Mitu Gulati investigate whether professional medical examiners or elected coroners provide better autopsy services. Their study parallels the long running debate in the legal literature (which includes Professor Brian Fitzpatrick's piece in this Symposium) about whether appointed or elected judges better serve the public. Choi and Gulati hypothesize that professional medical examiners will make fewer errors and be more independent than their elected counterparts but may be driven more by self-interest than elected officials.² To determine whether a quality differential exists, the authors compare autopsy quantities, accreditation by the National Association of Medical Examiners, and litigation in states that have professional examiners to states that have elected coroners. The results are striking—elected coroners perform fewer autopsies, are less likely to be accredited, and

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1. See Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729, 1729–30 (2017) (discussing these four methods in the context of judicial selection).

2. Stephen J. Choi & Mitu Gulati, *Adjudicating Death: Professionals or Politicians?*, 70 VAND. L. REV. 1709, 1714 (2017).

are more likely to be sued. Their results bolster claims across the legal literature that professionals implement better policy than their elected counterparts.³

Professor Fitzpatrick, in *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, investigates the effect that judicial selection methods have on the ideological composition of the bench. Scholars have long debated what methods will result in a bench with the greatest technical capabilities, independence, and diversity.⁴ Fitzpatrick's article argues that we should also care about the ideological consequences of different selection methods and demonstrates that selection by a technocratic commission will result in a more liberal bench than a popular election would. If lawyers are more liberal than the population at large (as both popular belief and recent empirical scholarship suggest⁵), then it makes sense that a commission of lawyers will select judges that are more liberal than those the population at large would select. If true, this hypothesis adds a new layer of complexity to designing judicial selection mechanisms, as commentators generally agree (and Professors Michael Kang and Joanna Shepherd in this Symposium demonstrate) that ideology directly affects judicial decisionmaking. Fitzpatrick compares the ideological preferences of appellate judges to the preferences of the public in each state. The results are consistent with his hypothesis: states that use commissions or nonpartisan elections tend to have judges that are more ideologically skewed (generally to the left) than states that use appointment or partisan elections.⁶

In *Judging Law in Election Cases*, Professors Kang and Shepherd wrestle with a question that has long plagued legal scholars: How much does the *law* actually matter when judges decide cases?⁷

3. E.g., Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007) (discussing the role of expertise in deference doctrines in administrative law); cf. Frank Sullivan, Jr., *Assuring Due Process Through Merit Selection of Judges*, 46 IND. L. REV. 123 (2013) (arguing that merit selection of judges increases the likelihood of fair and impartial adjudications).

4. Fitzpatrick, *supra* note 1, at 1730. See generally James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87 (2013); Peter Paul Olszewski, Sr., *Who's Judging Whom? Why Popular Elections Are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1 (2004); Steve Zeidman, *To Elect or Not Elect: A Case Study of Judicial Selection in New York City 1977–2002*, 37 U. MICH. J.L. REFORM 791 (2004).

5. 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. Faculty Research Working Paper Series, Working Paper No. RWP15-001, 2015), <http://ssrn.com/abstract=2577378> [<https://perma.cc/SZ4U-LGQK>] (finding that “lawyers are quite liberal compared to the general U.S. population”).

6. Fitzpatrick, *supra* note 1, at 1733.

7. Michael S. Kang & Joanna M. Shepherd, *Judging Law in Election Cases*, 70 VAND. L. REV. 1755 (2017).

Legal realists have already convinced the public and legal commentators that the political preferences of judges influence case outcomes.⁸ But it remains difficult to measure the *extent* of that influence, in part because it is difficult to empirically identify cases where the law and a judge's politics diverge. Kang and Shepherd solve this problem by focusing on candidate-litigated election law cases, where politics are extremely salient. The authors identify a unique signal of case strength in this context: a lower court decision against a political candidate who belongs to the lower court judge's own party. Case strength increases the likelihood that state supreme court justices vote for a candidate, even when that candidate is not of the justice's party.⁹ Nevertheless, justices still display significant partisan loyalty—they were more likely to vote for a litigant with a strong case who was from their own party than they were a litigant with a strong case from the other party.¹⁰

Finally, Professors Adam Bonica and Maya Sen explore the political factors that lead states to adopt judicial reform in *Judicial Reform as a Tug of War: How Ideological Differences Between Politicians and the Bar Explain Attempts at Judicial Reform*. The authors argue that a jurisdiction's method of selecting judges is a function of the ideological distance between local politicians and the local bar.¹¹ States with politicians more conservative than the local bar are likely to adopt selection methods (like partisan elections) that do not allow lawyers to choose judges. Fitzpatrick's article in this Symposium bolsters the case that local politicians choose selection methods strategically, as he demonstrates the skew that selection methods introduce.¹² Bonica and Sen apply their framework to three prominent case studies on judicial reform: Florida in 2011, Kansas in the 2010s, and North Carolina in 2016. In all three cases, political actors instituted judicial reforms that shifted the ideological composition of the judiciary closer to that of the state's politicians than of the state's bar. This "tug of war" view of judicial selection highlights the importance of local political dynamics when evaluating judicial selection methods.

8. See Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 197–211 (2012) (reviewing the rise, fall, and rebirth of legal realist critiques of judicial decisionmaking).

9. Kang & Shepherd, *supra* note 7, at 1756.

10. *Id.* at 1774.

11. Adam Bonica & Maya Sen, *Judicial Reform as a Tug of War: How Ideological Differences Between Politicians and the Bar Explain Attempts at Judicial Reform*, 70 VAND. L. REV. 1781, 1783 (2017).

12. Fitzpatrick, *supra* note 1, at 1733.

Several common themes run through these works. It is apparent that no method of judicial selection is truly dominant. Together, Choi and Gulati's and Fitzpatrick's articles suggest that there is a quality/ideology tradeoff inherent in the choice between using technocratic commissions or popular elections to pick judges. Professionals may be technically superior to elected officials in whatever role they fill, but they are likely to have different priorities and motivations than elected officials, as they are further insulated from the public. And where members of a profession differ significantly in their ideology from the general population (as do lawyers), technocratic commissions can create ideological skew. Bonica and Sen and Kang and Shepherd show that each observation of selection methodology is not exogenous—rather, it is the product of complex interactions between precedent, selection methods, and the political preferences of different groups competing to implement preferred outcomes. Together, these four articles illustrate the importance of how officials are selected—both for examining local political dynamics as well as designing a government that provides services that the public desires. These four articles, as well as the others in this Symposium, will doubtless stimulate further debate and discussion regarding optimal methods for selecting judges and other public officials.