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PROPOSED REFORMS TO TEXAS JUDICIAL SELECTION: PANELIST REMARKS

BRIAN T. FITZPATRICK*

I am going to set the stage by providing a little background about the various methods that States around the country use to select their judges. I am also going to remind us of many of the considerations that we like to think about when we are deciding which of these methods is best. And I am going to push upon you a new consideration that is sometimes not thought about in these discussions as well as share some data regarding this last consideration. But let's start with some background about the selection methods.

There are basically four different ways that States select their judges around the country.¹ The original method in all of the States was political appointment.² Almost all the States did the same thing the federal government did from the beginning. And while some of them did not have life tenure, all the States relied either on the legislature, the executive, or both to pick their judges.³ A handful of States still follow the political appointment method today.⁴

In the early 1800s, States began to switch to partisan elections and away from political appointment; by the time of the civil war, the vast majority of States were using partisan elections to pick their judges.⁵ And today there are still quite a few States that use partisan elections to pick their judges.⁶ In the progressive era, after deciding that politics was a bad thing, States developed the idea of nonpartisan elections for judges—taking party identification off the ballot.⁷ And a number of States today are

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1. 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).

2. 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. *Id.*

4. See Brian T. Fitzpatrick, *The Case for Political Appointment of Judges*, THE FEDERALIST SOCIETY, Apr. 2018, at 6 (highlighting that only four states select judges for their highest courts with political appointments).

5. Fitzpatrick, *supra* note 2, at 859-60.

6. *Id.*

7. *Id.*

using non-partisan elections.⁸ It is close to the most popular method today.

The only method that may be more popular today is the commission method—the method that came about last in our history.⁹ Sometimes it’s called “merit selection.” Other times it is called the Missouri Plan because Missouri was the first state to adopt the plan in 1940.¹⁰ This method basically asks a commission to decide who is worthy to be placed on the bench.¹¹ In practice, the commission will send a small number of names, usually around three, to the governor, and the governor will pick one of those names.¹² The chosen candidate will then stay on the bench until the term is up.¹³ Once the term is up, most of these States will then use something called the retention election to decide whether to retain the judge.¹⁴ It is an election with no opponent. Rather, voters are asked yes or no: Do you want to retain the judge?

Today, this commission-based system is used for high-court judges in almost half of the States.¹⁵ It is the most popular method implemented, followed by non-partisan elections, partisan elections, and then political appointment. These are the four methods that are still used around the country today.

In my experience, when considering which of these methods should be adopted, people weigh various factors in their minds. We want *independent* judges.¹⁶ We also want our judges to feel somewhat *accountable* to the people or the political process for the decisions they make; this restricts the judges from doing whatever they want to. We of course want *competent* judges—people who understand the law and write well. Furthermore, a lot of people want racial, ethnic, and gender *diversity* on the courts.¹⁷ Of course people want honest judges—individuals of *integrity*. And we want the judges to work in a system that people see as *legitimate*.¹⁸ These

8. *Id.*

9. Fitzpatrick, *supra* note 1, at 1729–30.

10. Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675, 678 (2009).

11. *Id.*

12. *Id.*

13. *Id.* at 678-79.

14. *Id.*

15. Fitzpatrick, *supra* note 1, at 1729–30.

16. Fitzpatrick, *supra* note 2, at 846.

17. Malia Reddick, Michael J. Nelson, and Rachel Paine Caufield, *Racial and Gender Diversity on State Courts—An AJS Study*, JUDGES’ J., at 28.

18. Tom R. Tyler and Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 705, 712–13

are the typical factors that people seek out for people that comprise our judicial system.

But there is another factor that is not often considered in these discussions, but one that should be widely discussed. This factor can be described as *ideological skew*: Are the courts filled with judges with very different ideological views, very different values, very different worldviews from the people who live in their States? Now, someone may think to themselves, well, who cares if our judges have different ideological views? Different ideological views are not supposed to matter; a judge is supposed to follow the law.

But there is a vast amount of empirical evidence suggesting that a judge's policy-views, world-views, and values make a difference to how the judge decides a case.¹⁹ Not in every case, but in a lot of cases. How a judge sees the law is often driven, especially when the law is ambiguous, by a priori ideological views. And so if a State's judicial system is comprised of judges with very different views than the people in their States, a State will have legal interpretations that are very different than what the people want them to be.

Now, why should a State be concerned about this ideological skew? Well, a graph of the ideological views of the legal profession in the United States of America demonstrates why states should be concerned. This graph comes from a paper by Adam Bonica and Maya Sen.²⁰ In Figure 1 here, each bar on the graph represents a certain number of lawyers. The liberal lawyers are on the left side of the graph, and the conservative lawyers are on the right side. And the little dotted line there is your average lawyer—it will not be surprising that most lawyers will tend to be more liberal.

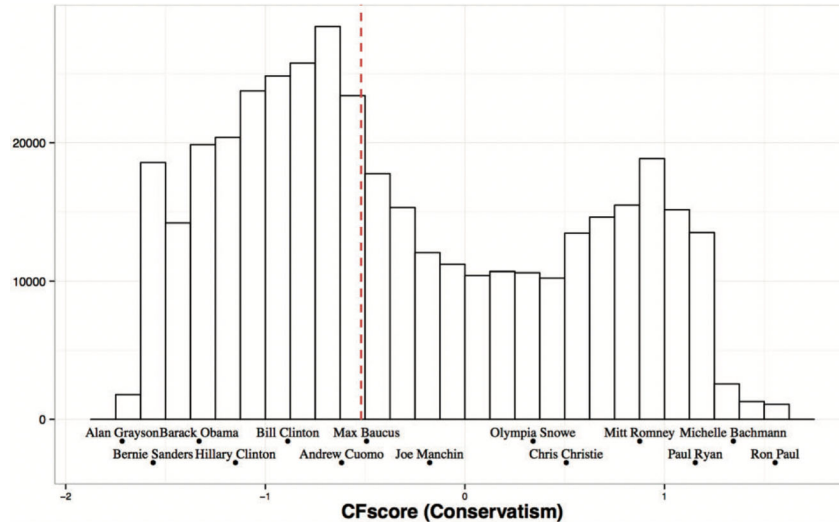
(1994); see generally Kathy Mack and Sharyn Roach Anleu, *Performing Impartiality: Judicial Demeanor and Legitimacy*, 35 LAW & SOCIAL INQUIRY 137, 138–39 (2010).

19. Fitzpatrick, *supra* note 10 at 687-88.

20. Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. of Legal Analysis 277 (2016).

Figure 1

Ideological Distribution of Lawyers



Source: Bonica et al. (2016)

So what does this mean? Well, it means a couple things. Number one, if you have a selection method that relies on the legal profession to pick judges, there will be a good chance that the legal profession is going to pick judges with an ideological distribution very similar to the dotted line—i.e., left leaning.

And of the four methods previously discussed, the commission method, tends to place a lot of power to pick judges in the hands of the legal profession. Why? Well, it is because the commissioners on the commission are often picked by the state bar.²¹ In some states, the state bar leadership will appoint individuals to those commissions.²² In other states, the lawyers in the state will vote for who should be on the commissions.²³ But when a majority of the commissioners are selected by the state bar, a lot of power is handed to the legal profession. Thus, there is concern that the commissions might select judges who are ideologically similar to them instead of ideologically similar to the people of the states.²⁴

21. Fitzpatrick, *supra* note 10, at 679.

22. *Id.*

23. *Id.*

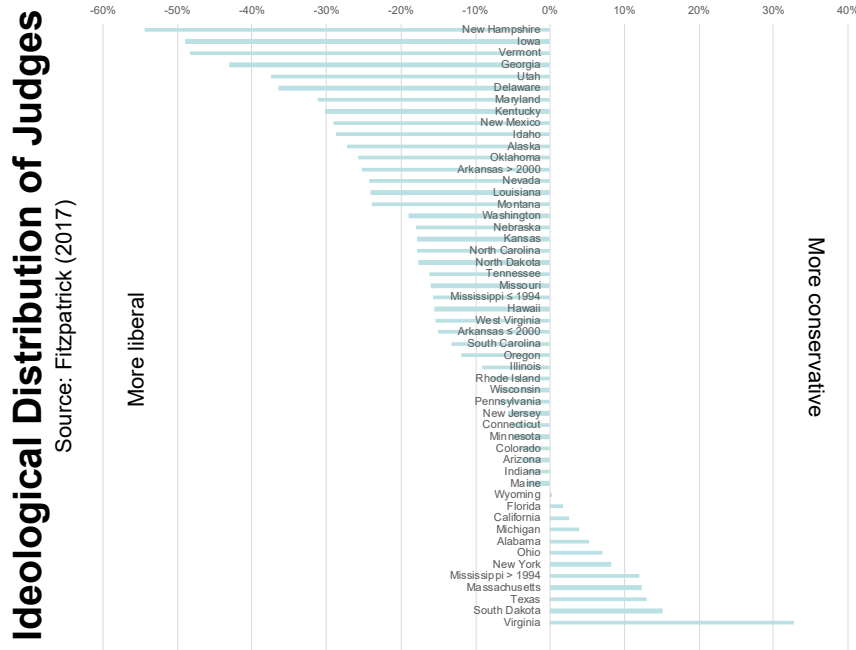
24. *Id.* at 689-90

But even without the commission, because the pool of judges will be drawn from the pool of lawyers, if states do not pay attention to ideological preferences, the chances are that a randomly picked judge out of the pool of lawyers will tend to be more representative of lawyers rather than the people of the State. Thus, if States do not screen the worldview of the potential judges, a State will replicate the current distribution of the lawyers. And this is not merely a theory anymore: I've spent several years trying to prove that selection methods that do not screen for ideology produce judges that are to the left of the people in their States.

In particular, I have collected campaign contribution data for all of the people who have served as appellate judges in each state between 1990 and 2010—a total of more than 3000 different appellate judges. I looked to see whether those appellate judges donated more money to Democrats or Republicans over the course of their lives—regardless of whether it was before they were on the bench or after they were on the bench. And then I compared the distribution of the political preferences of the judges in each state to the people in that state. Were the people voting more for Democrats or more for Republicans in state races and federal races?

My results are in Figure 2. The middle line on this chart—the 0% line—reflects when judges and the people are the same, the same distribution of Democrats and Republicans. Bars to the left are states where the judges are more liberal than the people. Bars to the right are states where judges are more conservative than the people.

Figure 2

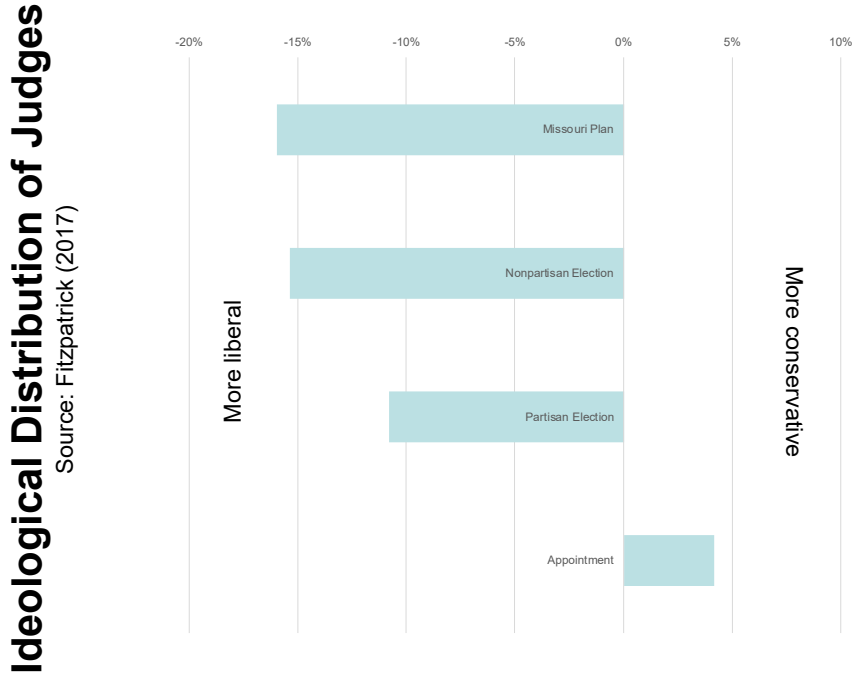


A couple of things to note. First of all, in the vast majority of states, the judges are more left leaning than the people. And again, it’s not surprising because lawyers are left-leaning. And if we don’t pay attention to that, we end up with judges who are left leaning. Very few states have judges who are right leaning, but I will tell you one of those states is Texas. On the graph, the third state from the bottom is Texas, and is one of the very few states where the judges have been more conservative than the people.

We can also group this data by selection method rather than by state. I do that in Figure 3. Here, we can test whether selection methods that either rely on the legal profession to pick judges or on non-partisan elections with no ideological screening produce a left leaning skew. Figure 3 confirms the presence of a skew. The top bar is the commission method; the second bar non-partisan elections; the third bar is partisan elections; and the fourth bar is political appointment. As discussed, the 0% line depicts judges perfectly aligned with the public’s ideological views. According to the graph, the Missouri Plan and non-partisan elections have the biggest skew—and a leftward skew—away from the public. The system that is the

closest to the public is political appointment. Partisan elections fall in between the two extremes.

Figure 3



It should be noted that I did not test any of this data for statistical significance. But Adam Bonica and Maya Sen have tested similar data and they found the differences between selection methods to be statistically significant.²⁵ In my view, we therefore ignore this data at our own peril.

25. See generally Adam Bonica and Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Introduce Ideology Into Judicial Selection*, 60 J.L. & ECON. 559 (2017).