

DECIDING THE DECIDERS: THE DIFFUSION OF STATE SUPREME COURT
SELECTION PROCEDURES

by

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(Under the Direction of RICHARD VINING)

ABSTRACT

States are often referred to as laboratories of experimentation. The manner in which state supreme court judges are selected is a prime example of this. Throughout the history of the United States, states have utilized a variety of methods to staff state courts of last resort. The selection of state supreme court justices has been and continues to be the subject of much controversy. Debates over what methods should be utilized to select state high court judges and the consequences of these selection schemes are prevalent. However, only partially explored are the reasons specific selection systems are chosen in the first place. This dissertation uses diffusion theory to explain the spread of judicial selection procedures. A unified model of diffusion incorporating internal and external influences is constructed to explain the spread of judicial selection systems across states over time. The three specific selection procedures analyzed in this analysis are partisan judicial elections, nonpartisan judicial elections, and the merit plan. Using data from 1832 through 2014, a series of Cox proportional hazard models are estimated to explain the factors that influence the adoption of each of these selection systems. The results indicate that both internal and external factors influence judicial selection procedures. The variables measuring conditions internal to a state do not perform consistently across the

three selection procedures analyzed. This suggests that decisions to adopt specific judicial selection procedures are not influenced by the same internal factors. Strikingly, the variable measuring the influence of neighboring states is a significant predictor across all three judicial selection procedures analyzed. Ultimately, this dissertation provides results on a rarely studied aspect of judicial selection. Additionally, this analysis provides strong support for the inclusion of external variables when measuring the spread of judicial selection procedures.

INDEX WORDS: judicial selection, diffusion, partisan judicial elections, nonpartisan
 judicial elections, merit plan

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DEDICATION

For my parents, Phil and Linda. Thank you for always believing in me. For my brother, Josh. Thank you for your constant encouragement. For my fiancé, Maggie. Thank you for your love, support, and patience. I would not have crossed the finish line without each and every one of you. I am eternally grateful.

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CHAPTER 1

INTRODUCTION

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. Hamilton believed that appointing judges to positions with life tenure constituted “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.” Jefferson thought that making judges “dependent on none but themselves” ran counter to the principle of “a government founded on the public will”. Both methods have given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining “the public’s respect... and a reserve of public goodwill, without becoming subservient to public opinion”.

Chief Justice John Roberts¹

The debate between proponents and opponents of judicial elections continues to be waged in scholarly literature, the legal profession, media outlets, and, as evinced by the above quote delivered by Justice Roberts, in the pages of Supreme Court decisions. Though Justice Roberts was authoring a First Amendment opinion upholding Florida’s prohibitions on personal solicitation of campaign funds by judicial candidates, the Justices did not shy away from questions concerning the proper method of judicial selection.² In fact, the Court took the opportunity to once again address issues related to judicial elections.³ Alas, the contentious split decision features arguments both in favor and against placing judgeships in the hands of the

¹ *Williams-Yulee v. Florida Bar*, 575 U.S. _____ (2015).

² Applying strict scrutiny, the Supreme Court ruled that states have a compelling interest in maintaining the perceived legitimacy of the judicial branch by the public and that rules regulating campaign donations are narrowly tailored to achieve this goal.

³ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) is an example of another case where this debate is raised.

voters.⁴ According to the majority, the pejorative consequences of judicial campaign spending warrant restrictions on speech in the context of judicial elections. Not one to capitulate, Justice Scalia writing for the dissent derided the majority for acquiescing to arguments he found less than compelling. Addressing the concerns of the majority, the dissenting Justices explain that the public is capable of making informed decisions and will not automatically link donation requests to quid pro quo winning votes down the line.⁵

The decision in *Williams-Yulee v. Florida Bar*, 575 U.S.____ (2015) represents one recent tangle about the consequences of judicial selection methods. The literature on this topic examines almost every aspect of judicial elections. Writing in 1986, Dubois announced that judicial selection was the most researched and talked about issue in legal scholarship.⁶ Almost 30 years later, debates about the proper method of judicial selection continue to capture the attention of the academic community with commentators weighing in on both sides regularly. At the same time, explanations for why states decide on a particular selection mechanism in the first place are rare. The reasons why states adopt specific selection schemes remain largely unexplored.

This dissertation explores the reasons behind a state's decisions to alter judicial selection methods. This approach fits within the larger policy diffusion literature that examines why

⁴ The Supreme Court ruled five to four in favor of upholding regulations on judicial speech. Justices Roberts, Ginsburg, Breyer, Sotomayor, and Kagan were in the majority with Justices Scalia, Thomas, Kennedy, and Alito in the minority.

⁵ This was not the first time the United States Supreme Court grappled with issues related to judicial elections. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) the Court struck down announce clauses prohibiting state judges from speaking on legal issues.

⁶ Dubois (1986) notes that scholarship on judicial selection dates back almost 50 years, but stresses that beginning in 1976, a dramatic increase in literature dedicated to judicial selection has occurred.

policies spread from one entity to another.⁷ Additionally, the goal of this dissertation is to combine two traditionally distinct approaches to policy adoption. Scholars traditionally focus on either internal or external characteristics that advance or inhibit policy adoption. This results in an incomplete picture of policy adoption. For this reason, this dissertation uses a unified model of policy adoption to explain why states change judicial selection procedures.

Despite calls from judicial scholars to expand theory to include internal and external forces promoting policy adoption, the research on judicial selection focuses on internal factors. For example, Stith and Root claim that “in the laboratory of American democracy, each sovereign state has the freedom to design the method by which members of its judiciary are chosen. The unique history, culture, and experiences of each state have led to the adoption of a variety of systems to select judges” (2009, 711). While there is certainly merit to the claim that conditions within a state’s borders affect policy adoption, without reflection on factors external to the state the judicial selection story remains incomplete. A growing body of research points to the actions of other states as one of the motivators of policy change, especially those states in close proximity (Berry and Berry 1990, 1992; Mintrom 1997). I take advantage of these observations and include the actions of other states (interstate factors) and internal state characteristics (intrastate factors) in my analysis. Thus, this research marries these two approaches and provides a unified model of judicial adoption across states over time.⁸ A unified

⁷ Diffusion is synonymous with spread. The study of diffusion of innovations is primarily concerned with how ideas spread across different units of analysis. According to Rogers, diffusion is “the process by which an innovations communicated through certain channels over time among members of a social system” (2003, 5).

⁸ See Berry and Berry (2007) for an overview of the prominent approaches to diffusion research. Several models are presented, but the authors stress that a unified approach is the optimal way to test the spread of innovations.

approach provides a more complete picture of judicial selection than currently exists and adds to the growing literature on longitudinal cross-state policy adoption.

The Judicial Selection Controversy

This dissertation analyzes the complete span of time during which states have experimented with judicial selection innovations. The results provide valuable insight into the reasons states alter judicial selection systems. As a result, this analysis fits nicely into the literature on judicial selection and informs those who are concerned with what happens after the adoption of certain judicial selection systems. This section provides reasons for the increased and sustained attention devoted to judicial selection.⁹

Judicial selection methods have been debated at the federal level since the Constitutional Convention and at the state level since the early 1800s. Scholarly and media attention to judicial selection has increased rapidly since the 1970s. The increased attention correlates with the increasingly vitriolic nature of judicial selection in the United States.¹⁰ State supreme court selection, which was once a low information affair, has come to resemble contests for legislative and executive positions (Canes-Wrone and Clark 2009).¹¹ Many candidates for state judicial races must now actively campaign to obtain or retain their seats. This involves fundraising,

⁹ Dubois (1990) notes the increased attention on judicial selection, but does not portend to provide a reason for this increase.

¹⁰ While there were contentious battles over Supreme Court nominees during the 1800s, since the 1960s there have been several high-profile fights over Supreme Court nominations. President Nixon's two failed nominations of Clement Haynsworth and G. Harrold Carswell and President Reagan's nomination of Judge Bork in 1987 were highly contentious and ultimately unsuccessful attempts at filling vacancies.

¹¹ Despite the increased amount of media attention and visibility of state judicial contests, voter sophistication and overall awareness of judicial candidates still lags well behind races for the other elected branches of government.

advertising, and emphasizing political issues in addition to their qualifications. Baum and Hojnacki (1992) term this “new-style” judicial campaigning.¹²

This alteration in how judicial campaigns operate has resulted in scholars and judges questioning the ability of judges to act as neutral and objective arbiters of the law (Corriher 2013; Gibson 2008). According to The Council of State Governments, judicial contests for state supreme courts raised \$206.4 million from 2000 to 2009, up from \$83.3 million the previous decade.¹³ In 2012, \$28 million was spent just on television advertising.¹⁴ The increase in campaign activity has caused concern for some and delight among others (Bonneau and Hall 2009).¹⁵

The changing landscape of judicial elections has been widely documented. According to Streb (2009), judicial races have changed more than any other type of election in the last 20 years. Two recent events that serve as focusing events highlight the high-profile nature that judicial elections can take. In 2010, three incumbent Iowa state supreme court judges lost their positions. While it is not unheard of that judicial incumbents lose bids for re-election, it is unusual for several to lose in the same election.¹⁶ Even more peculiar is that Iowa employs merit selection to determine the composition of the state high court. Compared to partisan and nonpartisan judicial elections, the defeat rate in retention elections is much lower (Bonneau and

¹² New-style judicial campaigns are the result of increased action by both candidates running for office as well as dramatically increased involvement from interest groups, both internal and external to a state.

¹³ These figures represent aggregate amounts and do not break down the amount of spending for type of judicial contest.

¹⁴ See Center for American Progress report, “Criminals and Campaign Cash: The Impact of Judicial Campaign Spending on Criminal Defendants”, October 2013.

¹⁵ Bonneau and Hall (2009) strongly advocate for judicial elections noting that from 1990 to 2004 such contests actually increase voter participation in judicial elections as is evidenced by lower voter roll-off in states with partisan elections.

¹⁶ Chief Justice Marsha Ternus, Michael Streit, and David Baker are the justices that lost their positions.

Hall 2009). The overall defeat rate in retention elections for judicial office is .01 percent (Aspin 2007).¹⁷ Thus, three judges losing retention elections simultaneously is highly unusual.

Strikingly, this was the *first* time any Iowa Supreme Court judge did not garner the simple majority required to retain office and it happened to three judges in one election.¹⁸

This raises an interesting question: How could all three judges up for retention election lose their positions? The answer begins a year earlier when a unanimous Iowa Supreme Court struck down the state's ban on same-sex marriage on equal protection grounds.¹⁹ The decision gained the attention and ire of conservative interest groups opposed to gay marriage. As a result, while the Iowa judges did not actively fundraise and defend their decision, organized interests both within and outside of the state began actively pushing for the defeat of the judges running in retention elections the following year.²⁰ The results of the 2010 election highlight the success of the movement to have the judges removed. On average, 60 percent of Iowans vote in judicial retention elections, but in 2010, 88 percent cast a vote resulting in an average affirmative vote of 45 percent to retain the three judges (International Bar Association 2013).

The defeat of all three incumbent judges in the Iowa 2010 race was heralded by those emphasizing judicial accountability and chastised by supporters of an independent judiciary. Regardless of the normative implications of this event, the Iowa 2010 retention elections are an example of new-style judicial selection. Another focusing event involves judicial contributions in a case that made its way all the way up to the United States Supreme Court. In *Caperton v.*

¹⁷ From 1964 through 2006 only 56 of 6,306 judges up for retention election did not retain their seat (Aspin 2007).

¹⁸ See "Iowans Dismiss three justices", *Des Moines Register* November 3, 2009.

¹⁹ At the time, Iowa became only the third state to recognize same-sex marriage as a result of *Varnum v. Brien*, 763 N.W. 2d 862 (2009).

²⁰ The charge to remove the three sitting judges up for reelection was led by Bob Vander Platts who lost the 2010 Republican for governor.

A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009), the primary issue the Court resolved was the constitutionality of a judge deciding a case involving a plaintiff who had donated substantially to their election campaign.

The genesis of the case occurred when Caperton filed suit against Massey Coal alleging that the latter had unlawfully voided a contract and engaged in fraudulent behavior in 1998.²¹ The West Virginia trial court ruled in favor of Caperton and awarded \$50 million in compensatory and punitive damages in 2002. Massey Coal appealed the decision to the supreme court. Before the West Virginia Supreme Court had an opportunity to rule on the case, the state held partisan judicial elections for the state supreme court. During the election, Don Blankenship, CEO of Massey Coal Co., spent a reported \$3 million to unseat incumbent Justice Warren McGraw and replace him with Brent Benjamin. The 2004 election resulted in the Blankenship backed candidate unseating incumbent McGraw. Alleging a conflict of interest, Caperton attempted to have Benjamin recuse himself from the case. Massey Coal Co. was now before the court with a substantial amount of money at stake while, at the same time, a judge they supported with \$3 million dollars was to have a say in the outcome. The effort to recuse Justice Benjamin was unsuccessful. Justice Benjamin ended up being part of the 3-2 decision overturning the damages awarded to Caperton.²² On appeal to the United States Supreme Court, Justice Benjamin's decision to not recuse himself did not find support with a majority of the

²¹ As a result of the cancelled contract, Caperton went bankrupt.

²² Even though Benjamin refused to recuse himself, the West Virginia Chief Justice Spike Maynard did recuse himself after photographs were published of him on vacation with Blankenship.

Justices. Writing for a 5-4 majority, Justice Kennedy stated that this was a violation of Caperton's due process rights.²³

Similar to the situation in Iowa, this chain of events provides fodder for both sides of the judicial selection debate, although the debate is far from settled. As for West Virginia, the sequence of events sent shockwaves through the political system. West Virginia Governor Joe Manchin established a commission to investigate the implications of judicial reform with an emphasis on ending partisan elections and converting to the Missouri Plan.²⁴ Ultimately, West Virginia opted to abandon partisan judicial elections in favor of nonpartisan elections in 2015, a topic that will receive considerable attention in the Chapter 6. These issues are directly related to the manner in which state supreme court judges are selected.

The Importance of State Supreme Courts

The scholarly attention to state supreme courts is ample and growing. The bulk of legal activity occurs at the state level (Murphy et al. 2005). The average person involved with the legal system is exposed to state courts rather than the federal system of justice. Common reasons for interacting with the court system including jury duty, traffic tickets, and divorce proceedings all take place within state courts (Streb 2009). This means that most litigants operate in a system governed by state rules and regulations.²⁵ According to Justice Brennan, "Too often, I think, that focus tends to divert attention from the vital role of the state courts in the administration of

²³ According to the majority opinion, campaign contributions of \$3 million create a substantial probability of bias.

²⁴ Throughout this dissertation, the Missouri Plan and Merit Plan are used interchangeably to describe the system of selecting judges by governor nomination from a judicial commission followed by a retention election. Oftentimes, the merit system is called the Missouri Plan because Missouri was the first state to adopt such a scheme in 1940.

²⁵ According to the Bureau of Justice Statistics, federal courts hear far fewer cases compared to state courts. In 2005 and 2006, state courts had approximately 100 million active cases compared to less than 500,000 in federal court.

justice. Actually, the composite work of the courts of the fifty states has greater significance in measuring how well America attains the ideal of equal justice under law for all” (Brennan 1979, 2). As a result, state supreme courts are fertile ground for an exploration of judicial issues. Dubois emphasizes that “a potentially fruitful but partially explored dimension of the study of state policy innovations concerns the patterns of reform in the organization, structure, and personnel of state court systems” (1990, 23). Scholars have expanded the literature on state courts considerably during the last 25 years. Nevertheless, systematic examinations of *why* states settle on a method of judicial selection are sparse. While much is known about policy adoption, little is known about the forces that promote or inhibit changes in judicial selection.

The task of examining state courts is justified as state courts are involved in influential decisions that affect millions of people per year. The Supreme Court decides an average of 75 cases per year. The vast majority of judicial decisions each year are from state and lower federal courts. As a result, until the federal Supreme Court speaks on an issue, state courts of last resort often determine policy. These state court decisions can have important and wide-ranging results. Education policy, tort reform and, until recently, same sex marriage have been decided by state supreme courts (Park 2011). The American Bar Association places the importance of legal decisions front and center when addressing the need to reform state court selection schemes. In analyzing the merit plan and the potential for alteration in Missouri, Stuteville asks “why should judicial selection be of concern to the citizens of the state of Missouri? The issue of judicial selection is important beyond the legal community because state judges have the opportunity to influence policy and the lives of citizens. The degree to which judges influence policy and exercise discretion is debatable, but opportunities for influence exist” (2014, 12).

Examples of state court influence abound and the issues that state courts resolve often have long-standing and important consequences for the citizens living in their respective states. For example, much has been made of the landmark Supreme Court decision *Obergefell v. Hodges*, 576 U.S. ____ (2015). Though this decision resolved the question of the constitutionality of state bans on same-sex marriage, it is prudent to remember that in 2013 the Supreme Court left that issue to states to resolve.²⁶ And that is exactly what state supreme courts had been doing since the Massachusetts Supreme Judicial Court decided that such bans were unconstitutional.²⁷ While these cases eventually moved their way into federal courts, state courts were responsible for several important decisions on whether or not the right to marry extended to people of the same sex.

The aforementioned issues were part of state supreme court cases allowing the state courts latitude in determining policy in the absence of a federal Supreme Court ruling. State courts also have significant leeway over criminal policy, even in situations where the United States Supreme Court has spoken. For example, the Warren Court is widely known for the expansion of rights afforded to those accused of crimes. Between 1953 and 1969, the Supreme Court handed down landmark decisions involving the right to counsel, how to handle evidence improperly collected, and the admissibility of confessions.²⁸ In these seminal cases, the United

²⁶ *Hollingsworth v. Perry*, 570 U.S. ____ (2013).

²⁷ See *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003). This decision struck down state bans on same sex marriage as a violation of the Massachusetts Constitution.

²⁸ See *Gideon v. Wainwright*, 372 U.S. 335 (1963) for the Court's decision on the right to counsel in felony cases. Also, see *Miranda v. Arizona*, 384 U.S. 436 (1966) for the Court's stance on the admissibility of confessions and *Mapp v. Ohio*, 367 U.S. 643 (1961) for the incorporation of the Exclusionary Rule.

States Supreme Court incorporated rights that had previously only been available to defendants in federal court.²⁹

Due to a confluence of factors, including negative public reaction to these decisions and membership change on the Supreme Court, the Court began to carve out exceptions to these rules enhancing the power of the federal government to the detriment of the accused. For example, in *United States v. Leon*, 468 U.S. 897 (1984) the Supreme Court narrowed the Exclusionary Rule by creating the Good Faith Exception. This provides greater latitude to judges when determining if evidence should be prohibited during the trial process. Due to the concept of judicial federalism, which permits state courts to offer more but not less protection to citizens in their own states, states have the option to either recognize this exception to the Exclusionary Rule or adopt a more strict rule absent exceptions.³⁰ These are important decisions that remain within the purview of state supreme courts despite rulings at the federal level.

Despite the abundance of civil rights examples, state supreme courts are also active in the area of economic policy. According to Sobel and Hall, “in addition, decisions made within state judicial systems also have important effects on the cost of doing business in a state” (2007, 69). The authors explicate that liability rules have impacted medical malpractice rates as well as car insurance and workers’ compensation rates. Sobel and Hall conclude that “it is clear that the judicial system is important for economic activity, and thus so is the selection mechanism that is used to determine the membership of state courts” (2007, 69). A detailed examination of the

²⁹ The process of incorporation involves the United States Supreme Court applying protections of the Bill of Rights to the states. This is sometimes referred to as selective incorporation because the Court has applied these rights to the states on a case-by-case basis with the most recent example occurring in *McDonald v. Chicago*, 561 U.S. 742 (2010).

³⁰ Additional exceptions to the Exclusionary Rule include independent and inevitable discovery, permission to use the evidence to impeach the credibility of a witness, and use of evidence during grand jury proceedings.

important issues that state courts consider is well beyond the scope of this analysis.³¹ These issues and examples are used to provide context for this analysis and illustrate that the manner in which state supreme court judges ascend to the bench merits consideration.

Issues concerning the right to marry, criminal law, and economic policy are only a sample of the important policies that state courts consider. There are numerous other policy areas that are largely under the discretion of state supreme courts, including voting laws. Recently state supreme courts have ruled on limiting early voting, voter identification requirements, and registration procedures. Additional policy areas include redistricting and the way to determine one person one vote, standards for determining if a defendant sentenced to death is mentally disabled, school funding, family law, right to die issues, affirmative action policies, and almost all criminal matters.

Given the significance and breadth of state supreme court influence, it is important to understand the influence that selection methods have on judicial decision-making and the composition of the bench in these courts. Much ink has been devoted to the in the perennial debate over decision-making models and their ability to explain judicial decisions. Three prominent models explain decision-making.³² The attitudinal model posits that judges are primarily motivated by their sincere policy preferences. On the opposite end of the spectrum, the legal model assumes that the overriding motivation for decisions is fidelity to the law where judges are acting as unbiased interpreters of the law. Last, but not least, is the strategic approach

³¹ See Glick (1992) for a detailed analysis of how states have adopted and rule on right to die cases in the wake of *In the Matter of Karen Quinland* (355 A.2d 647, 1976). Also, see Center for American Progress Report (2013) “Criminals and Campaign Cash: The Impact of Judicial Campaign Spending on Criminal Defendants” for a detailed discussion of how state supreme courts alter sentencing behavior based on how members of the bench are selected.

³² These models originally emerged to explain behavior at the Supreme Court level, but have been expanded to the lower federal and state courts.

that falls somewhere in the middle. The strategic approach assumes that judges wish to create policy as close to their sincere preference as possible, but act strategically by altering their behavior to adjust for the actions of other actors (Epstein and Knight 1998, Schubert 1965).

While the attitudinal model has much success at the federal Supreme Court level, the application of this model in lower and state courts is more strained. For example, state court judges may face review from higher courts, have ambition for higher office, and most are not afforded life tenure.³³ As a result, state court judges are more constrained. The empirical evidence indicates that state court judges act more in line with the strategic model, especially if they wish to keep their jobs (Brace and Boyea 2008; Hall 1987). Judges are less likely to overturn abortion regulations passed by the state (Brace, Langer, and Hall 1998) and overturn death penalty sentences (Brace and Boyea 2008; Hall 1987) if they are elected. On the other hand, judges are more likely to deliver higher tort rewards in general (Tabarrok and Helland 1999) and deliver greater tort award amounts to in-state litigants at the expense of out-of-state parties (Sobel and Hall 2007). These are just a few examples of how selection method influences judicial decisions, but the evidence strongly suggests that how judges attain and retain their seats influences their behavior. This serves to enhance the need to determine just how these initial selection decisions are rendered since they have long lasting consequences.

As a final note on the important role that state courts of last resort play, it is important to consider that rulings emanating from these bodies are usually the last word on the issue. Appeals to state supreme courts generally constitute the final appeal in a case (Brace, Hall, and Langer 2001). Flango and Ducat purport that “courts of last resort are the final arbiters for many state

³³ Massachusetts and New Hampshire do not have term limits following selection though there is a mandatory retirement age of 70. New Jersey supreme court judges serve an initial seven year term and then serve a for life if they are re-nominated by the governor and approved by the state senate.

level policy issues which rarely reach the federal courts. Jurisdictions of courts of last resort are state-wide and are therefore roughly comparable” (1979, 26). Also, a single judge may be more influential in a given case as they are not one decision maker among 535 like Congress (Streb 2009). General jurisdiction judges act alone and state appellate judges are part of smaller panels making decisions. Even at the state supreme court level, most state courts have supreme courts smaller than their federal counterpart. This can result in very important consequences for litigants.³⁴

Methods of judicial selection are important policies for the people who occupy judgeships and the litigants in their courts. In their analysis of merit selection, Puro, Bergerson, and Puro stress that “the Missouri Plan resulted in changes in the courts, but those changes stemmed from actions by state legislators. Thus, adoption of the plan is probably best thought of as a policy innovation, like others, which resulted from the interaction of some wider political forces” (1985, 86).

The United States has a dual court system composed of the federal and state courts. The federal Supreme Court is the product of Article III of the United States Constitution. Regarding federal judicial selection, procedures for filling vacancies are set by the Constitution. Though filling federal court positions in practice is complex, the Constitutionally proscribed procedures are relatively straightforward. The President nominates a candidate, at which point the selection is sent to the Senate. The Senate Judiciary Committee holds hearings and votes on the nominee. If the nominee is approved, the entire Senate votes resulting in confirmation or rejection.

³⁴ This power is illustrated when examining the practice of district level judges in Alabama reinstating the death penalty following the refusal of the jury to do so.

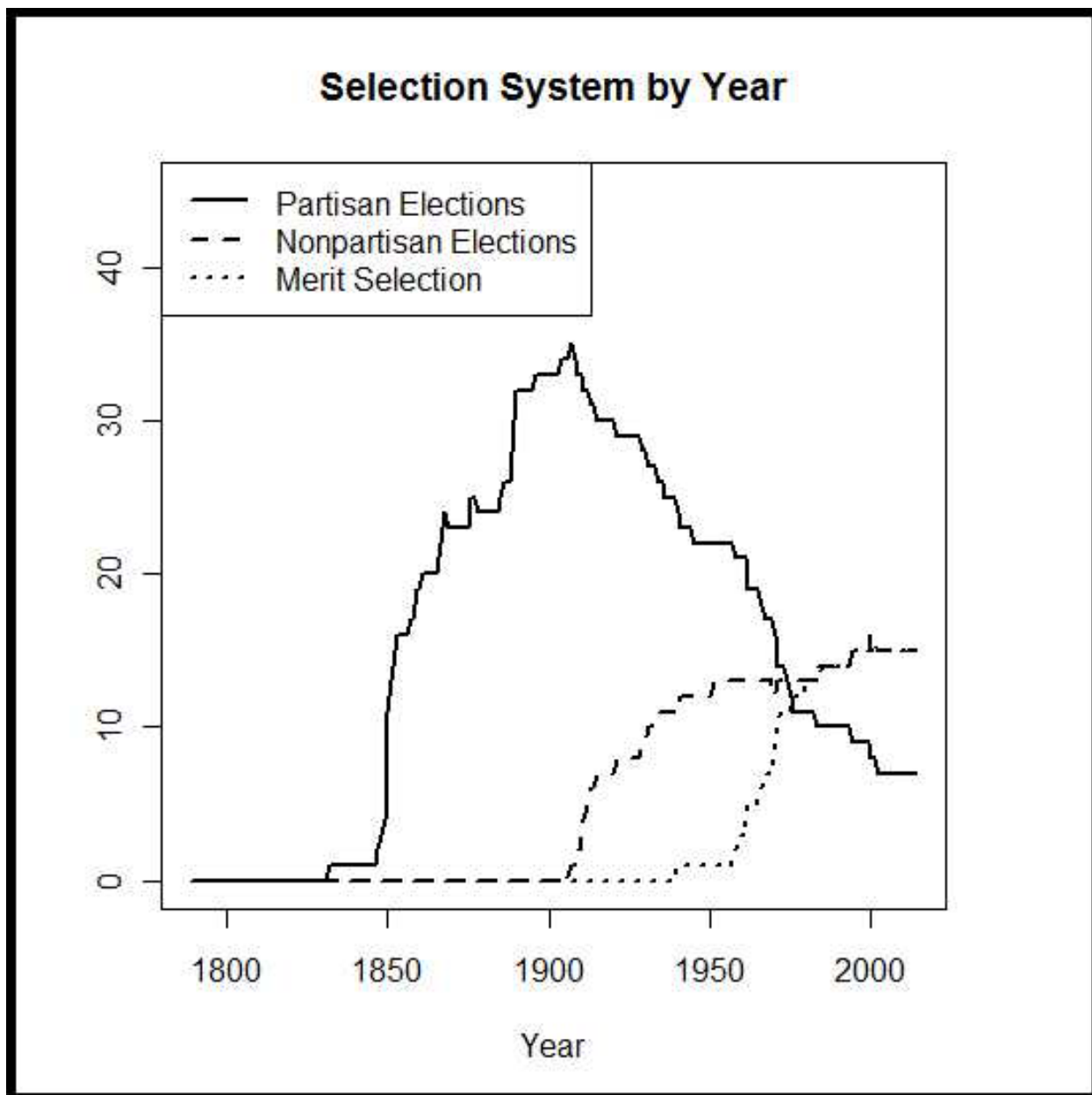


Figure 1.1. States Using Partisan, Nonpartisan, and Merit Selection Across Time

As displayed in Figure 1.1, compared to the federal structure of courts, states have utilized a variety of judicial selection systems across time. Most states, though not all, periodically alter the manner in which state high court judges attain their seats. What is not known are the reasons for the variation among the states regarding the process for selecting state

Table 1.1. State Supreme Court Judicial Selection Systems

State	Selection Systems in Use
Alabama	Appointment: 1819-1866 Partisan: 1867-2015
Alaska	Merit: 1959-2015
Arizona	Partisan: 1912-1973 Merit: 1974-2015
Arkansas	Partisan: 1864-1999 Nonpartisan: 2000-2015
California	Partisan: 1850-1910 Nonpartisan: 1911-1934 Hybrid: 1935-2015
Colorado	Partisan: 1876-1965 Merit: 1966-2015
Connecticut	Appointment: 1788-2015
Delaware	Appointment: 1787-1976 Hybrid: 1977-2015
Florida	Appointment: 1845-1852 Partisan: 1853-1861 Appointment: 1862-1884 Partisan: 1885-1970 Nonpartisan: 1971-1975 Merit: 1976-2015
Georgia	Appointment: 1788-1867 Partisan: 1868-1877 Appointment: 1878-1895 Partisan: 1896-1982 Nonpartisan: 1983-2015
Hawaii	Appointment: 1959-1978 Hybrid: 1978-2015
Idaho	Partisan: 1890-1933 Nonpartisan: 1934-2015

Table1.1. (Continued)

Illinois	Appointment: 1818-1847 Partisan: 1848-2015
Indiana	Appointment: 1816-1850 Partisan: 1851-1969 Merit: 1970-2015
Iowa	Appointment: 1846-1856 Partisan: 1857-1961 Merit: 1962-2015
Kansas	Partisan: 1861-1957 Merit: 1958-2015
Kentucky	Appointment: 1792-1849 Partisan: 1850-1974 Nonpartisan: 1975-2015
Louisiana	Appointment: 1812-1851 Partisan: 1852-1863 Appointment: 1864-1993 Partisan: 1904-2015
Maine	Appointment: 1820-2015
Maryland	Appointment: 1788-1850 Partisan: 1851-1940 Nonpartisan: 1941-1969 Hybrid: 1970-2015
Massachusetts	Appointment: 1788-2015
Michigan	Appointment: 1837-1849 Partisan: 1850-1938 Nonpartisan: 1939-2015
Minnesota	Partisan: 1859-1911 Nonpartisan: 1912-2015
Mississippi	Appointment: 1817-1831 Partisan: 1832-1867 Appointment: 1868-1913 Partisan: 1914-1993 Nonpartisan: 1994-2015

Table 1.1. (Continued)

Missouri	Appointment: 1821-1848 Partisan: 1849-1939 Merit: 1940-2015
Montana	Partisan: 1889-1934 Nonpartisan: 1935-2015
Nebraska	Partisan: 1867-1961 Merit: 1962-2015
Nevada	Partisan: 1864-1914 Nonpartisan: 1915-2015
New Hampshire	Appointment: 1788-2015
New Jersey	Appointment: 1787-2015
New Mexico	Partisan: 1912-1988
New York	Appointment: 1788-1846 Partisan: 1847-1975 Hybrid: 1976-2015
North Carolina	Appointment: 1789-1867 Partisan: 1868-2001 Nonpartisan: 2002-2015
North Dakota	Partisan: 1889-1908 Nonpartisan: 1909-2015
Ohio	Appointment: 1803-1849 Partisan: 1850-1910 Nonpartisan: 1911-2015
Oklahoma	Partisan: 1907-1966 Merit: 1967-2015
Oregon	Partisan: 1859-1930 Nonpartisan: 1931-2015

Table 1.1. (Continued)

Pennsylvania	Appointment: 1787-1849 Partisan: 1850-1912 Nonpartisan: 1913-1920 Partisan: 1921-2015
Rhode Island	Appointment: 1790-2006 Hybrid: 2007-2015
South Carolina	Appointment: 1788-2015
South Dakota	Partisan: 1889-1920 Nonpartisan: 1921-1979 Merit: 1980-2015
Tennessee	Appointment: 1796-1852 Partisan: 1853-1970 Merit: 1971-1973 Partisan: 1974-1993 Merit: 1994-2015
Texas	Appointment: 1845-1865 Partisan: 1866-1868 Appointment: 1869-1876 Partisan: 1876-2015
Utah	Partisan: 1896-1944 Appointment: 1945-1950 Nonpartisan: 1951-1984
Vermont	Appointment: 1791-2015
Virginia	Appointment: 1788-1849 Partisan: 1850-1863 Appointment: 1864-2015
Washington	Partisan: 1889-1907 Nonpartisan: 1907-2015
West Virginia	Partisan: 1863-2014 Nonpartisan: 2015

Table 1.1. (Continued)

Wisconsin	Partisan: 1853-1912 Nonpartisan: 1913-2015
Wyoming	Partisan: 1890-1971 Merit: 1972-2015

supreme court judges. The variation at the state level coupled with the lack of research into these patterns makes this policy area ripe for analysis. Flango and Ducat (1979) reinforce this assertion claiming that “although there are variations in selection procedures, state courts operate within the context of the American federal system and share a common language, history, and tradition. Accordingly, cross-national research which controls for diverse customs and laws must be instituted. The American states are an ideal laboratory for non-experimental, comparative research” (26). As Table 1.1 illustrates, in addition to the different selection systems that have been used, several states have experimented with different methods during their lifespan. While a minority of states have relied on a single system of judicial selection, most states alternate between different methods over time.

Judicial Selection Trends Over Time

Though a more detailed examination of each selection system will be presented in the following chapters, a brief preview of judicial selection methods is appropriate to preface this analysis. Currently, 38 states use some form of election to select state judges.³⁵ State judicial selection systems have not remained static throughout history. On the contrary, the composition of state supreme courts has been determined by a variety of methods over time. Changing methods of judicial selection is an ongoing cycle (Canes-Wrone and Clark 2009). Some states

³⁵ This is unique to the United States, as most other countries do not rely on any type of election to staff the bench.

experiment periodically with different systems and these different selection systems have measureable results. As a result, the motivation for change demands attention. The majority of states have made alterations, and at times, complete overhauls of their systems of judicial selection. There have been three prominent transition periods over time.

The first transition that occurred involved a shift away from appointment schemes, both legislative and executive, to partisan elections (1850s-1890s).³⁶ The thirteen original states and every state entering the United States until 1832 had appointment schemes.³⁷ The drafters of early state constitutions were well aware of the hazards of vesting complete control of the judiciary to the executive (Hanssen 2004). As a result, legislatures in the majority of the original states retained appointment and removal control over the judicial branch.³⁸

Enthusiasm for this plan of judicial selection was short-lived. During the early years of the country, states grappled with high debts and deficits leading to popular dissatisfaction. As a result, states faced pressure to reform their governing strategies. Included in these reform efforts was a push to increase the power of both the executive and judicial branches at the expense of the legislative branch.³⁹ Judicial reform came primarily in the form of altering who filled judicial positions.

A national movement to enhance the democratic character of the government was occurring at the same time. While certainly not the only cause of states abandoning appointment

³⁶ Mississippi was the first state to adopt partisan judicial elections. Widespread adoption did not begin until New York adopted this method in 1847.

³⁷ Appointment was either by legislature or governor acting alone or some blended program where the governor filled a vacancy and the legislature confirmed the choice.

³⁸ This was not the only method of ensuring that the judicial branch did not become an arm of the new governors. In several states, legislators did double duty and also sat on state courts (Cranes-Wrone and Clark 2009).

³⁹ Reforms included giving the governor the veto, pardon, and appointment power in addition to the proposed judicial reforms.

in favor of partisan judicial elections, much of the research documents the influence of the Jacksonian movement on states. For example, Perry states that “the profound change (to partisan elections) was a product of the great democratic revolution in American politics that is associated with the time and personality of Andrew Jackson, and resulted directly in the innovation of electing judges of state courts for short terms” (1933, 133).⁴⁰ Perry (1933) does not dismiss the practical problems facing states prompting this conversion. Far from being inconsequential, however, liberal political thought reinforced and quickened the pace of partisan elections at the state court level. This democratic narrative in relation to judicial elections appears in several studies of early judicial activity (American Bar Association 2008; Atkins 1976; Dubois 1989; Haynes 1944). It was also present in the debates during early state constitutional conventions. Delegates invoked democratic arguments in support of switching to partisan elections (Drake 1957). Though the argument that the Jacksonian movement facilitated change is intuitively attractive, not all accounts of this transition place such a heavy emphasis on the movement. They do not discredit it either. For example Cranes-Wrone and Clark (2009) suggest caution in overestimating the democratic impulses noting that, while the initial conversion to partisan elections occurred during the Jacksonian time-period, the pace did not pick up with other states until the Jacksonian Era was waning.

Partisan elections soon led to accusations of the judicial branch being captured by political machines (Epstein, Knight, and Shvetsova 2002). In an effort to remove politics from the process, states began abandoning partisan labels on ballots. This led to the second transition

⁴⁰ Though the transition to partisan election is associated with the Jacksonian movement in conventional accounts, most agree that the true genesis of this idea originated with Thomas Jefferson.

phase, from the early 1900s until the mid 1900s.⁴¹ During this time period the Progressive movement focused on the problems associated with political corruption. If the move away from appointment to partisan elections was a product of the democratizing influence of the Jacksonian movement, the second dramatic shift was partly due to progressive impulses. Coupled with the notion that partisan elections were not the elixir they were hoped to be, calls for change arose once again.⁴² Despite the best intentions of those anticipating a more professional and independent judicial system, the sense that political machines and parties captured the judicial branch soon spread. In the minds of reformers, judicial loyalties switched from legislatures to political parties, which was not regarded as a positive development (Hanssen 2004).

The emerging cure to the problem of partisan control of the judicial branch was a simple yet innovative fix – to remove partisan labels from the ballot. The objective of this policy alteration was to divorce judges running for office from the political parties that were invested in the political composition of the court. Some suggest that this switch was a natural result of the wider social movement of the time that prioritized scientific management over the spoils system (Hanssen 2004).⁴³ While judicial reform takes center stage in this analysis, it is worth mentioning that the call for nonpartisan elections exists as but one of many other byproducts of the Progressive Era. Other innovations emanating from this period include the direct party primary, Australian ballot, and the expansion of suffrage or, at least, calls to expand voting.

⁴¹ States continue to switch to nonpartisan judicial elections. The West Virginia legislature just passed and the governor signed legislation converting partisan judicial elections to nonpartisan elections beginning in 2016.

⁴² Hanssen (2004) notes that Populism thrived in rural communities while Mugwumps were more likely to be found in urban enclaves. The distinction is important as the goals of the two groups, while not wholly dissimilar, were not identical.

⁴³ In addition to policy changes regarding selection, the judicial field professionalized in other ways as is evidenced by the creation of law school standards and the emergence of the first bar organizations during this period.

By the beginning of the twentieth century, no selection system seemed to satiate the desire to have a judicial system that was free from political manipulation while remaining accountable to the public. Partisan and nonpartisan elections were efforts at achieving this balance, though both were met with heavy criticism. Despite removing partisan labels from the ballot, party machines retained control over judicial candidates (Hanssen 2004). Nonpartisan elections suffered the same fate as partisan elections. Renowned legal scholar and former dean of Harvard Law School Roscoe Pound voiced the overall displeasure with the status quo. Pound viewed nonpartisan judicial elections as a threat to judicial independence and stated that additional reforms were needed to limit the political nature of the court.⁴⁴ The American Judicature Society was formed in 1913 with a primary mission of reforming judicial selection. Albert Kales, co-founder of the American Judicature Society, is widely credited with the creation of the merit system.⁴⁵ This plan gained traction with the legal community and interest groups, including the American Bar Organization, League of Women Voters, and Common Cause. These groups and many state bar associations championed merit adoption. This plan was not always successful. For example, in 1967 the Colorado legislature actively resisted calls to reform the system. Responding to this pushback, the Colorado state bar and the League of Women voters launched a statewide campaign in support of the merit plan that was ultimately successful (Dubois 1990). Missouri was the first state to adopt merit selection in 1940, marking the beginning of the third wave of judicial selection reform. Though diffusion was initially slow, the pace at which states adopted merit selection increased during the 1960s.

⁴⁴ In “The Causes of Popular Dissatisfaction with the Administration of Justice” (1906), the blend of judicial selection and politics was but one reason for discontent. Other sources of displeasure included backlogs, complexity, and the performance of law enforcement.

⁴⁵ Kales outlines his plan in the 1914 article “Unpopular Government in the United States.”

Research Problem and Current Study

I explore factors that influence the likelihood a state alters judicial selection mechanisms. Thus, the primary question is *why* does a state alter judicial selection mechanisms. While some scholars have considered why this occurs, few empirically examine the influences that promote or discourage this decision. It has been suggested that judicial selection reform is the product of state legislators and members of the legal community seeking a mutually beneficial solution to the problems associated with various forms of judicial selection (Milligan and Pohlman 1968). Despite this claim, no rigorous effort is made to assess the veracity of such a rationale.

Almost 50 years ago, Walker (1969) extended an invitation to policy scholars to study the spread of innovations between states. Though many have accepted this invitation, this approach has not been applied to judicial selection. Walker provided a novel approach to diffusion analysis by suggesting that policy was not only the result of internal state characteristics such as social and economic indicators.⁴⁶ Rather, policy decisions are inherently political and thus political factors must be part of the equation. Over time, political factors were incorporated into the study of policy adoption. Berry and Berry (1990) built upon Walker's framework and found that in addition to political factors, the influence and actions of other states must be taken into consideration. This dissertation analyzes the spread of judicial selection policies across the states over time with an eye towards internal and external determinants of change.

I analyze data from 1832 through 2014 in an effort to explain the horizontal diffusion of specific judicial selection methods. Diffusion studies use both cross-sectional and longitudinal

⁴⁶ Walker stresses that he is not investigating how new ideas are created, but rather how states learn of these ideas and adopt them.

data. A flaw in the longitudinal diffusion literature is that the time-span of the data is oftentimes arbitrary and based on data availability. This dissertation utilizes data that was collected to test the entire life of a particular judicial selection technique. Consequently, the data in each selection chapter begins when the first state adopts a new method of judicial selection. Thus, for the analysis of partisan judicial elections the start time is 1832, the year Mississippi adopted partisan elections for state supreme court judges. The original dataset constructed for this dissertation includes every state for every year until they adopt a particular judicial selection method. For example, the partisan dataset includes 182 total years and 2,278 state-years.

This dissertation proceeds as follows. Chapter two summarizes the extant research and the contributions of this analysis. Chapter three outlines the research design, data, and methods utilized in this study. The fourth, fifth, and sixth chapters contain a quantitative analysis explaining the switch to partisan elections, nonpartisan elections, and merit selection respectively. Chapter seven serves as a compendium of this project and provides suggestions for future research on this topic.

CHAPTER 2

LITERATURE REVIEW AND CONTRIBUTIONS

We emphasize the importance of understanding that states are not independent from one another; the actions of one state can and do affect subsequent actions by other states. State lawmakers do not exist in a vacuum, rather they pay attention to what others are doing, especially with regard to controversial laws such as criminal hate crime laws. This insight resonates with theoretical work in the institutional perspective in that, under conditions of uncertainty, political units are likely to look outward toward others for cues on what actions to take. This highlights the importance of treating both intrastate and interstate characteristics when studying the determinants of laws and policies.

Ryken Grattet, Valerie Jenness, and Theodore R. Curry⁴⁷

Research on the determinants of judicial selection method change is undeveloped.

Current research disproportionately focuses on the results of judicial selection. The empirical studies that focus on factors that influence a state to change judicial selection methods are dated. Therefore, this area of research can benefit greatly from improvements in methodology and recent data. An additional limitation of the extant scholarship on the adoption of new judicial selection regimes is that it is mainly descriptive (Haynes 1945; Hanssen 2004), normative (Park 2011), dated (Dubois 1986; 1990; Puro, Bergeson, and Puro 1985), or a combination of all three. Empirical studies of judicial selection are focused on investigating the effects of judicial reform, not the causes. Some studies attempt to determine the impact of selection schemes on voters (Bonneau and Hall 2009; Gibson 2008). Others have assessed the result of selection methods on the diversity of judges (Alozie 1996). While these studies are conducted with empirical rigor

⁴⁷ Grattet, Ryken, Valerie Jenness, and Theodore R. Curry. 1998. "The Homogenization and Differentiation of Hate Crime Law in the United States, 1978-1995: Innovation and Diffusion in the Criminalization of Bigotry." *American Sociological Review*. 63(2): 286-307.

and provide illuminating results, they do not test the causes that expedite judicial selection reform. Thus, part of this chapter reviews the limited number of empirical studies of the determinants of judicial selection decisions.

Equally important for this project is the voluminous research examining policy diffusion. Studies of the spread of ideas across the states are prolific. However, few scholars have applied diffusion theory to decisions regarding the choice to alter state supreme court selection systems. The literature analyzing policy dissemination provides a theoretical foundation for this dissertation. The diffusion research summarized in this chapter varies in terms of subject matter and methodology. This chapter presents both political science and diffusion literature as these two fields are synthesized to explain judicial selection policy adoption.

Measuring State Policy Adoption in Political Science

Policy formation and patterns of adoption are frequently studied by political scientists. However, diffusion analyses were largely the product of the economic and sociology fields until the 1970s (Rogers 1995). Walker (1969) was among the first to criticize the typical approach used to explain state-level policy change. Walker stressed that policy decisions take place in political systems. Thus, political factors must be incorporated into models analyzing policy formation and spread at the state level. Despite Walker's recommendations, diffusion research has yet to fully appreciate the call to include political variables.⁴⁸

Another critical observation made by Walker is that states influence one another. He measures regional patterns of diffusion by grouping states into census regions. Later studies developed different measures to capture the impact that states have one another. The conclusion

⁴⁸ Similar to the research on the diffusion of policy adoption itself, political scientists were slow to take advantage of Walker's recommendation to include external factors in their analysis.

that states influence one another was a major contribution to the political science literature on policy diffusion.⁴⁹

With this theoretical foundation in place, political science scholars continued to analyze policy adoption. Building on these ideas is Berry and Berry's (1990) analysis of state adoption of lotteries. They theorize that conditions within and beyond a state's borders act as an impetus for the adoption of a state lottery. The inclusion of factors beyond a state's borders in political science research represented a blending of two distinct theories of policy adoption. Formerly, internal determinants models focused only on individual state characteristics that influenced policy adoption while diffusion models emphasized the influence of surrounding states (Berry and Berry 1990). This omission of either internal or external influences results in an incomplete version of events. Berry and Berry (1990) suggest a unified approach combining internal and external factors in the same model. This would rectify the problem of studies that include one set of variables and omit the other.⁵⁰

Others have adopted this methodology. Studies of antismoking policies (Shipan and Volden 2006), hate-crime legislation (Grattet, Jenness, and Curry 1998; Soule and Earl 2001), same-sex marriage (Haider-Markel 2001), and education reform (Mintrom 1997) have all heeded the call and employed unified models to explain their specific policy of interest.

Explaining the Adoption of State Supreme Court Selection Methods

Currently there are no unified models explaining the spread of judicial selection systems. However, scholars have examined the states' choices regarding judicial selection. Glick (1981)

⁴⁹ Horizontal diffusion is the spread of ideas from one state to another. The other major type of diffusion is vertical diffusion and captures the influence the national government has on the states.

⁵⁰ Though influential, Berry and Berry (1990) note that much work needs to be done on how to properly operationalize these variables.

provided an early attempt at measuring the diffusion of state judicial policies. His main focus was to determine the conditions that prompt states to update and modernize their courts. The main innovation Glick investigated was centralization of state court systems.⁵¹ Glick utilized social, political, and economic indicators to measure court centralization. He hypothesized that states using the merit plan would be more likely to have professionalized court systems. Ultimately, Glick found little support for the proposition that adoption of the merit system quickens the pace of reform.

Scheb and Matheny (1988) found similar results in their investigation of relationships between several judicial policy innovations.⁵² They find that merit selection is driven by the same factors that prompt states to adopt judicial disciplinary procedures. On the other hand, different forces are responsible for states eliminating lay judges, creating administrative positions, and consolidating the court system. Ultimately, Scheb and Matheny find that court innovations are correlated with larger urban populations and more manufacturing jobs.

These early attempts to analyze diffusion at the state court level are quite limited. The purpose of Glick's (1981) analysis was not to assess the decision to alter judicial selection methods. Furthermore, both Glick and Scheb and Matheny (1988) rely on cross-sectional data. This prevents the use of time-varying covariates in their models. Only longitudinal data permits conclusions to be made concerning factors that change over time.

Following Glick (1981), other scholars studied the diffusion of merit selection. Puro, Bergerson, and Puro (1985) sought to explain why merit selection spread rapidly. They tested a

⁵¹ Glick operationalizes centralization as the presence of a court administrator's office, salary of court administrators, funding allocated to court management, court rulemaking power, and the number of judicial training programs in operation.

⁵² Judicial reform is operationalized as an index of a combination of factors, including merit selection, court consolidation, elimination of lay judges, judicial disciplinary commissions, and court administrator positions.

model of merit selection diffusion using regional, political, social, and economic covariates to explain adoption. The results indicate that both internal and external factors influence the decision of a state to adopt the merit plan. Professional legislatures were less apt to adopt merit selection, while states with greater urban areas were more likely to adopt the Missouri Plan.⁵³ States in some regions experienced accelerated adoption rates of merit selection while those states in other regions were significantly less likely to do so.

Puro, Bergerson, and Puro (1985) and Dubois (1989) focus on the factors influencing the adoption of merit selection. Dubois (1989) emphasizes the factors that promote acceptance by the public.⁵⁴ This analysis examines instances of merit selection sent to voters for approval or denial from 1941 through 1980.⁵⁵ The primary question investigated is what factors make the public more likely to affirm the merit plan. The results indicate that merit adoption is more likely when it is not packaged with other reforms, if a legislative supermajority is required to pass judicial reform through state legislatures before being sent to voters, and in states that have merit selection in the lower courts already. In addition, states with larger urban populations had higher rates of voter approval for merit selection, though the reasons for this are debated. Caution ought to be exercised when interpreting these descriptive results. When subjected to a

⁵³ The merit plan for selecting judges is often referred to as the Missouri Plan because Missouri was the first state to implement this system in 1940.

⁵⁴ The general public has an opportunity to vote on policy passed out of the state legislature in some states. In others, voters have the opportunity to vote on amendments. Lastly, judicial reform can take the form of a referendum which provides the public another avenue for influence.

⁵⁵ The data for this study include only initial adoptions of an innovation. While converting to merit can be conceived of as a repeating event, Dubois (1990) limits his analysis to the initial adoption effort.

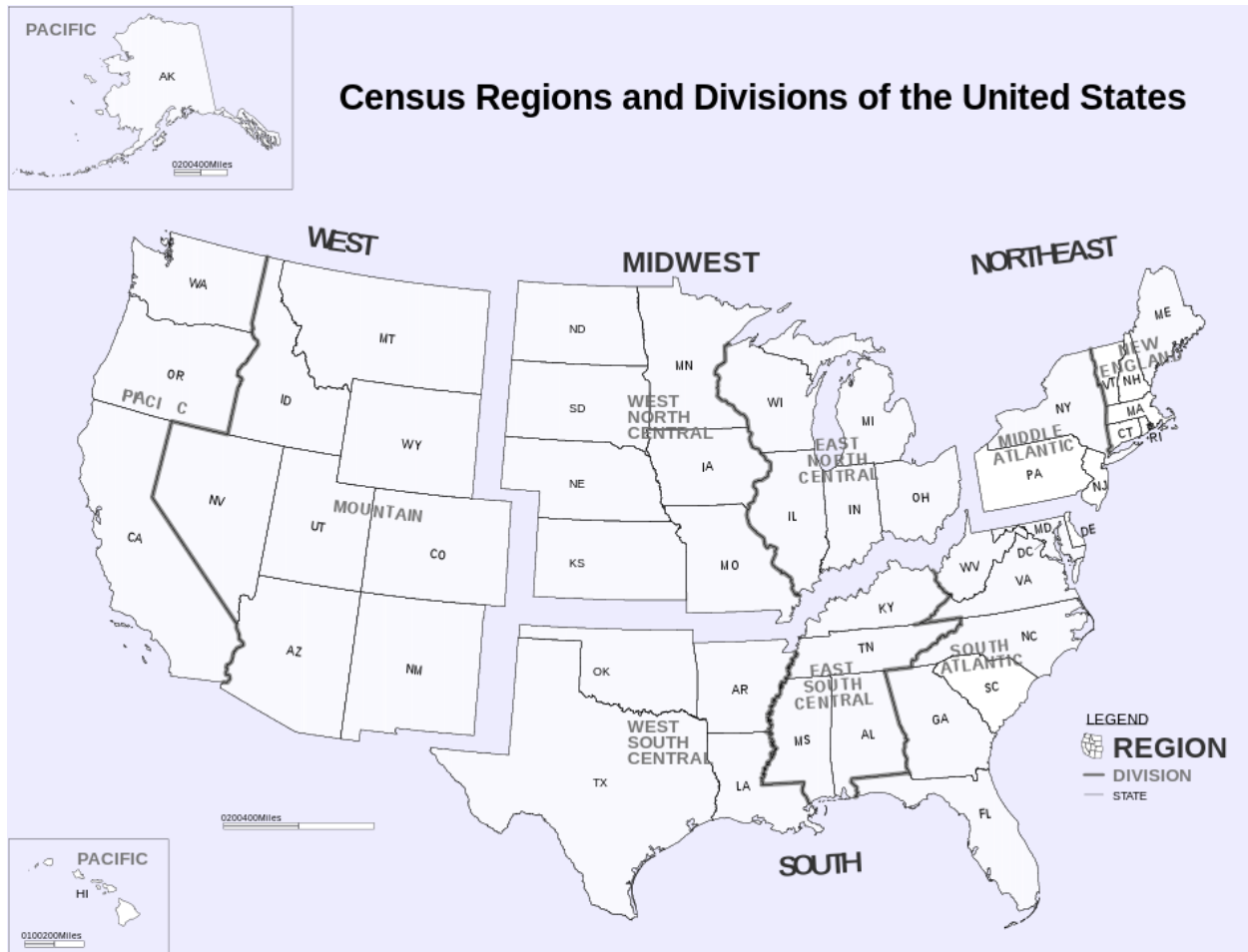


Figure 2.1. United States Census Region Codes
Source: United States Census Bureau

multivariate model, only prior experience with merit selection and supermajority requirements were significant.⁵⁶

While important, the research by Puro, Bergerson, and Puro (1985) suffers from several flaws. First, probit analysis was used because of the dichotomous dependent variable. This creates the same problem in Glick's (1981) study that also analyzed cross-sectional data. Both Glick (1981) and Puro, Bergerson, and Puro (1985) have a single observation for each state in

⁵⁶ Urbanization was not included in the multivariate model.

their respective datasets. Because each state constitutes a single line in the dataset, the independent variables for each state are fixed, preventing an analysis of how non time-varying covariates enhance or decrease the probability of an event. Reliance on census region codes is also problematic because contiguous states are often assigned to different regions. Looking at Figure 2.1, it is evident that relying on region codes is a flawed approach. For example, even though Illinois shares a border with Iowa and Missouri, Illinois has a different region code than both of them.

During the course of these early analyses, Puro, Bergerson, and Puro (1985) and Dubois (1990) debated why merit systems are adopted. Puro, Bergerson, and Puro found a significant effect for urbanization on the adoption of the merit plan. In their concluding remarks, they emphasize this result and postulate that rural districts feared a loss of political power in the wake of *Baker v. Carr*, 369 U.S. 186 (1962). They argue that the decision to adopt merit selection was intended to take the selection power away from the public and vest it with the governor. By relocating judicial selection power in the hands of the governor, rural legislators hoped to insulate themselves from increased urban power.

Dubois (1990) was skeptical about the link between urbanization and merit adoption. He reexamined these claims. His analysis provides descriptive evidence that the “reapportionment thesis” was not the reason for the diffusion of the merit system. Dubois (1990) also found that most adoptions of the merit plan coincide with a total constitutional overhaul in a state.⁵⁷ In

⁵⁷ Descriptive statistics presented show that merit reform was sponsored by legislators from both urban and rural communities. In addition, the vote share was high in both urban and rural communities in cases where the public was afforded the ability to vote on reform.

addition, Dubois uncovered patterns suggesting that proponents of judicial reform are more likely to achieve success if only the merit plan is up for a vote rather than a package of reforms.

Explaining Policy Diffusion

This dissertation utilizes diffusion theory as the basis for understanding how judicial selection policy has spread across the United States across time. In order to provide context, this section reviews prominent diffusion literature and its relevance for the dissemination of judicial selection systems.

Judicial selection techniques new to a state constitute innovations despite the possibility that a specific method is not new. For example, the merit system adopted by Missouri in 1940 satisfied the criteria of being an innovation though the idea emerged in the early 1900s. Likewise, West Virginia recently adopted nonpartisan judicial elections in 2015, 108 years following the first use of this method. Nevertheless, nonpartisan judicial elections are new to West Virginia and thus it qualifies as an innovation. The change from one judicial selection system to another satisfies the definition of policy innovation provided by pioneers of diffusion research (Rogers 1962; Walker 1969). Dubois states that “as with innovation research conducted in other policy areas, the study of innovation in court systems asks the same fundamental questions: Why do some states act as pioneers more readily than others? Do particular political, economic, social or other characteristics distinguish the states which have adopted these reforms from those states which have not” (1990, 24)? Importantly, the policy adopted may not be identical to previous versions. This analysis models only the adoption of a general method and

not how policies change and evolve over time.⁵⁸ Analyses of policy adaptation, not adoption, study a different phenomenon distinct from the choice to adopt in the first place (Glick 1992).

Despite the different approaches used to explain the spread of ideas, there are similarities among diffusion studies. The goal of diffusion research is to determine the causes of policy adoption over time and space. Diffusion analyses using event history analysis assess the probability that a policy will be adopted, given that it has not yet been adopted yet. In order to assess the likelihood of adoption, the dependent variable is based on the innovation being studied.

There are two main approaches used to model the diffusion of an innovation. In non time-varying models, the dependent variable is dichotomous and measures whether or not an entity has experienced an event. In these models, the data on each case being studied is contained in a single row of the data set. Longitudinal models of diffusion, on the other hand, allow for the inclusion of time-varying covariates. In contrast to non time-varying models, the unit of analysis is time until adoption of a policy. Each row represents a line of data for any entity that has not experienced an event yet. For example, studies that examine the spread of state hate crime legislation use the passage of such laws as the dependent variable. This is a straightforward approach using a dichotomous dependent variable. Until a state adopts a policy they are coded zero. The year a state adopts the policy of interest, they are labeled one and removed from the dataset. As will be described in more detail in the next chapter, I follow this method and use the number of years until the adoption of a specific judicial selection mechanism

⁵⁸ It is certainly possible that innovations adopted by actors later down the line adapt and change the policy in subtle or substantial ways. This phenomenon has been studied, but in these cases the authors focus not on innovation adoption, but on reinvention and refinement. Thus the research questions that guide these studies are different from those who research the diffusion of innovations.

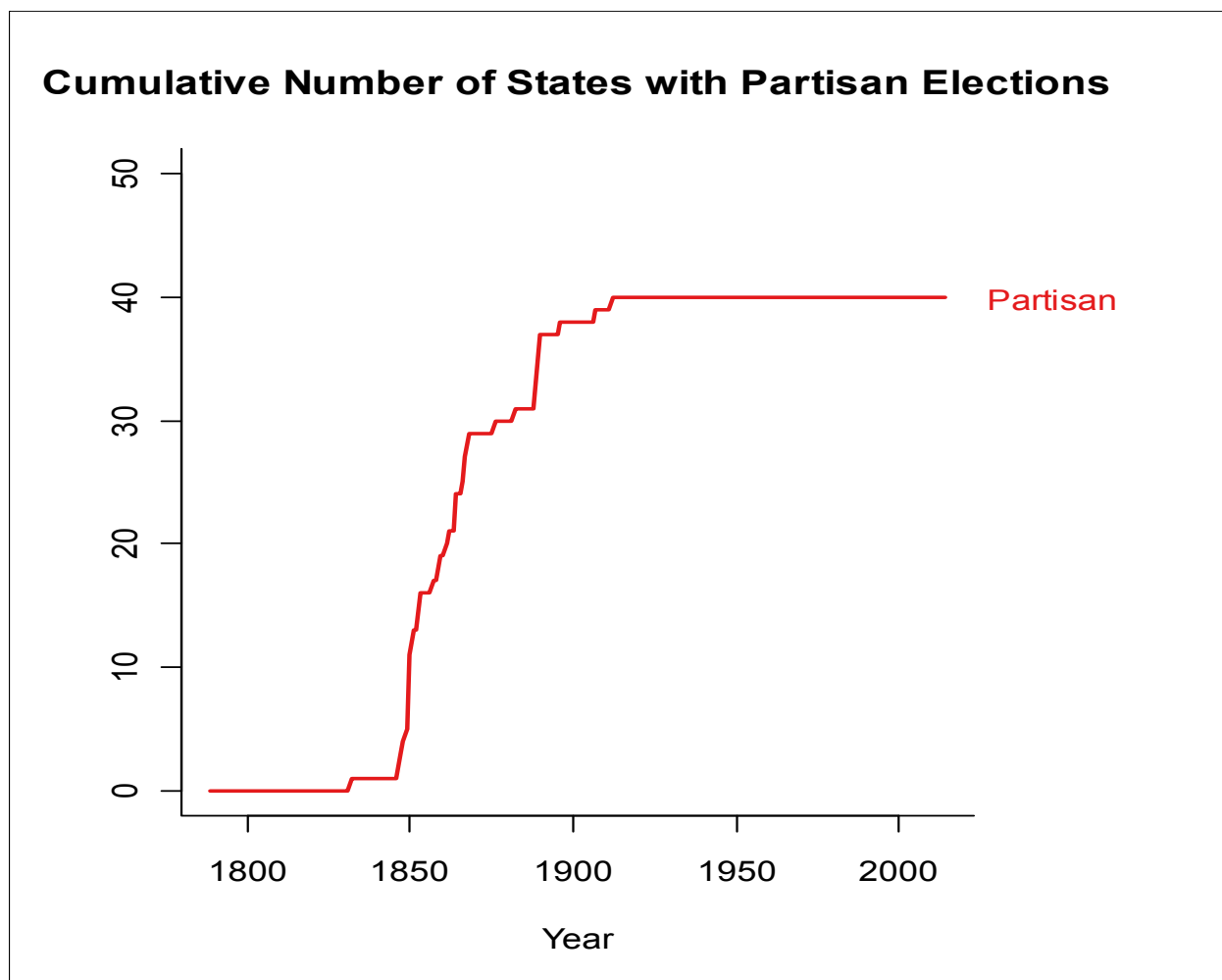


Figure 2.2. Cumulative Number of States with Partisan Elections

as the dependent variable of interest.⁵⁹ This technique is rarely applied in judicial selection research.

In the study of state policy adoption, regardless of the policy being studied, the state is the unit of analysis.⁶⁰ For this reason, the topic of supreme court selection procedures is fertile ground for diffusion research (Shipan and Volden 2008). Though state supreme courts vary

⁵⁹ Adoption has been operationalized in two main ways. One method measures state adoption as the time-period in which the law took affect. I follow the more prominent strategy which is to label a policy adopted the year it was passed.

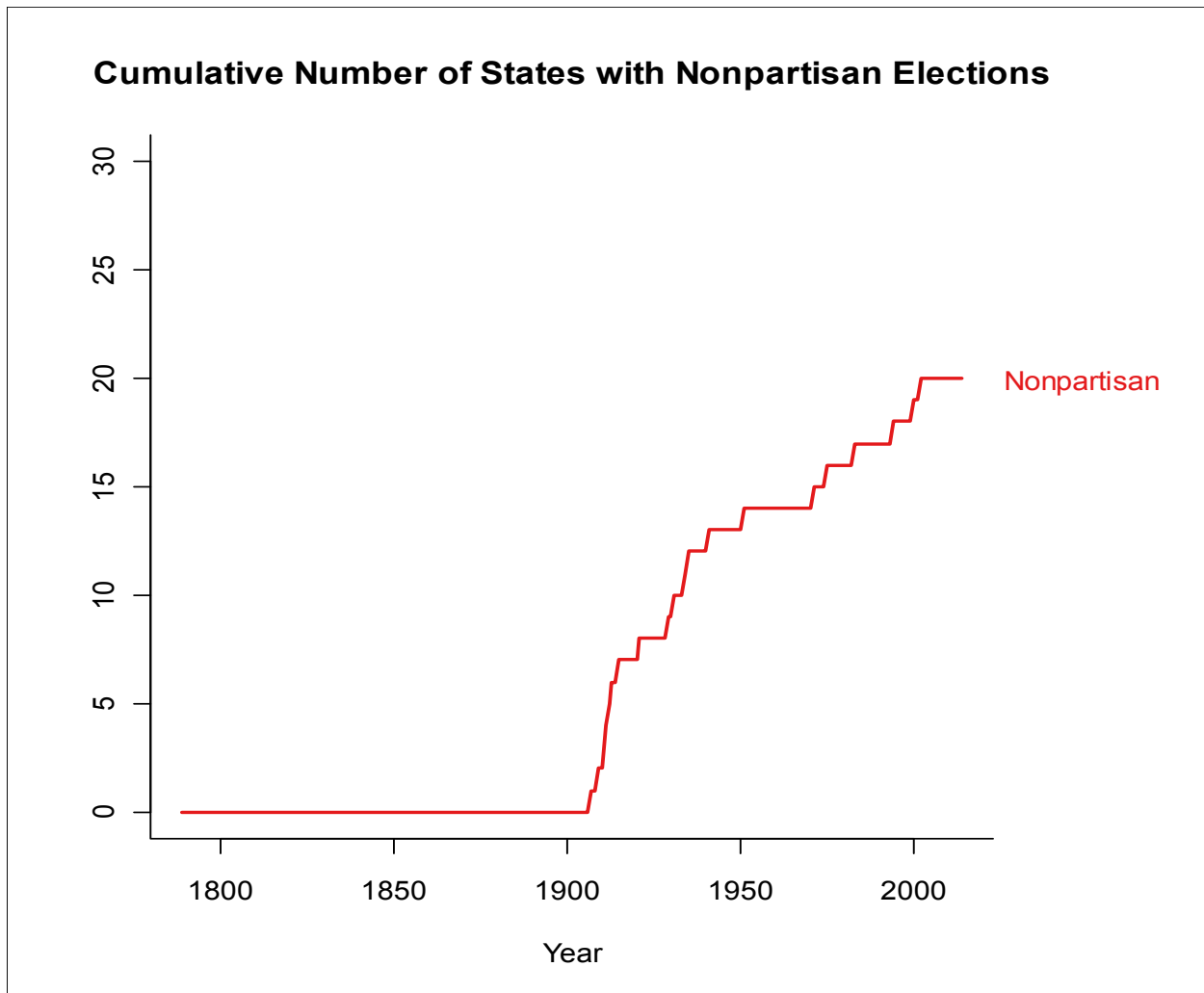


Figure 2.3. Cumulative Number of States with Nonpartisan elections

along several dimensions, all 50 states have a court of last resort. Similar to the national court structure, state court systems typically have a lower, middle, and upper tier. Though not identical, such consistency permits meaningful analysis among the states. The behavior of state governments resembles organizational change, making diffusion theories of organizational behavior a natural fit to represent state behavior.

⁶⁰ The unit of analysis will vary based on the policy being analyzed. For example, an analysis of the spread of a policy from one city to another would result in a city, not a state, as the unit of analysis.

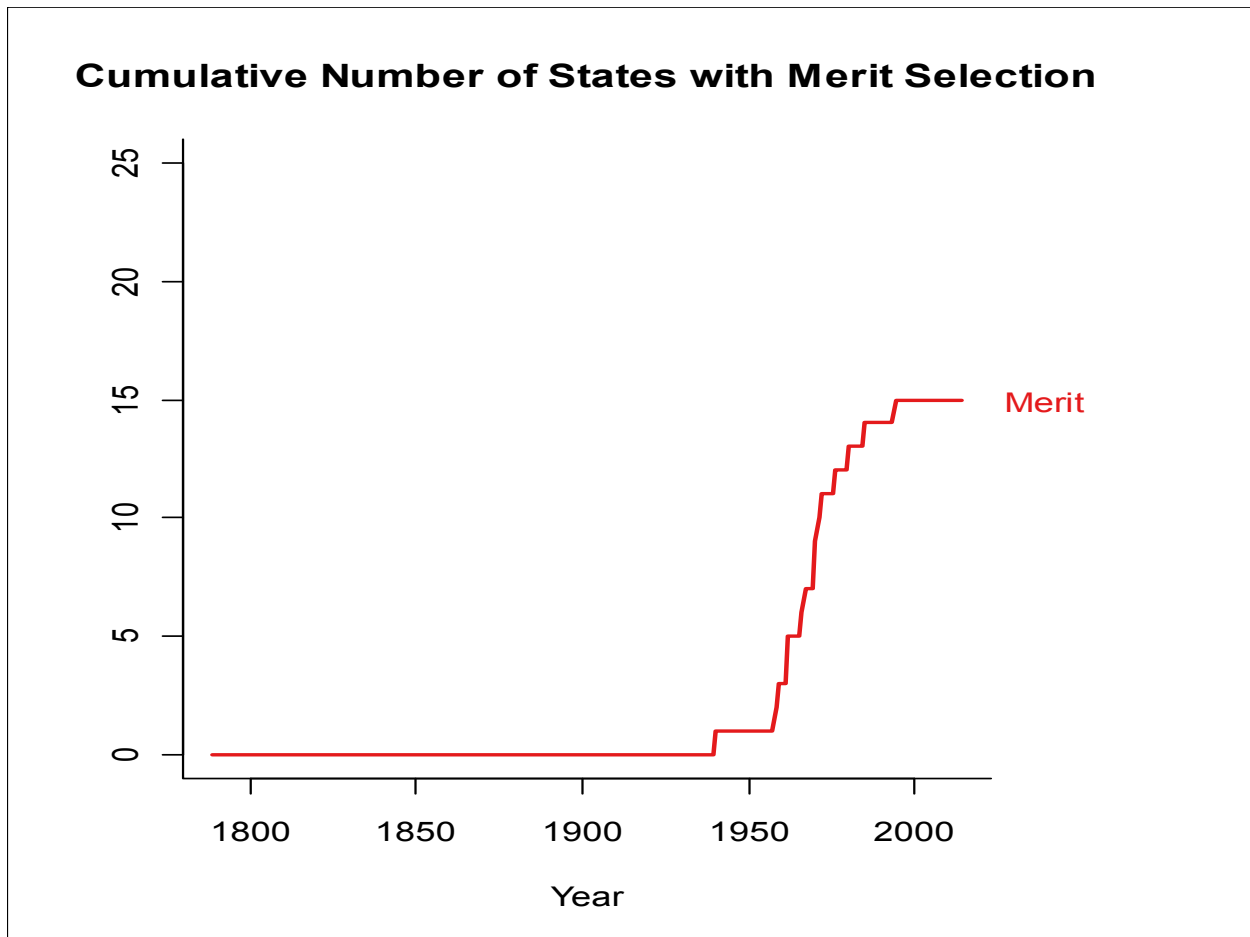


Figure 2.4. Cumulative Number of States with Merit Selection

Typically, policy adoption diffusion patterns form an S-shaped curve with a few actors initially adopting followed by a lag. This initial lag is followed by rapid adoption that levels out over time. These diffusion patterns emerge in the data regardless of the policy being studied. Rogers observes that “the adoption of an innovation usually follows a normal, bell-shaped curve when plotted over time on a frequency basis. If the cumulative numbers of adopters is plotted, the result is an S-shaped curve” (1995, 257). This reflects hesitancy following the first few adoptions of other actors to follow suit. This initial lag is followed by large-scale adoption that trails off as fewer actors are available to adopt. These patterns also give weight to the contention that actors learn from and emulate one another. According to Rogers (1995, 259):

We expect a normal adopter distribution for an innovation because of the cumulatively increasing influences upon an individual to adopt or reject an innovation, resulting from the activation of peer networks about the innovation in a system. This results from the increasing rate of knowledge and adoption (or rejection) of the innovation in the system.

This adoption pattern is present in studies of policy adoption in political science, sociology, and public administration research. The cumulative adoption of different judicial selection methods creates this same pattern (see Figures 2.2, 2.3, and 2.4).

Judicial Selection Patterns

The patterns of partisan and merit adoption follow the typical patterns observed in innovation diffusion research. As can be seen in Figures 2.2 and 2.4, there is an initial blip signaling the first state to adopt a system. After this first adoption there is a gap of time when no other states joins the first state. It took 15 years for another state to adopt partisan elections following Mississippi and a full 18 years until another state followed Missouri in adopting the merit plan. In contrast, nonpartisan election patterns do not exhibit the S-shaped curve so often witnessed in diffusion literature. The lag following the initial adoption is not present in adoptions of nonpartisan elections. It takes only two years for a state to follow in Washington's footsteps in switching to nonpartisan elections. Within ten years, a full seven states had adopted nonpartisan elections. This pattern is unique to the diffusion of merit selection and is not found in either of the other selection mechanisms analyzed.

Though policy diffusion is used as a means to address a range of policy issues, only one attempt has been made to assess the diffusion of state supreme court selection systems (Budziak and Kypriotis 2011). The authors analyzed the adoption of the merit system since 1960 in order to determine what factors drive some states to retain current systems and others to experiment with other options. They find evidence that neighboring states influence the decisions of other

states. While this is a step in the right direction, no attempt is made to apply this technique to other modes of judicial selection. Additionally, the data begin in 1960, which excludes the initial states to make the switch.

Conclusions

The study of why states adopt or reject judicial selection schemes is important to those who sit on the bench, other governmental actors, and the public affected by judicial decisions. At this point however, studies have not systematically addressed the factors that stymie or promote selection policies. As this review of the literature makes clear, studies that relate to judicial selection adoption are both sparse and limited in the conclusions that can be drawn from them due to data and model restrictions.

While literature on the determinants of judicial selection is scarce, diffusion analyses remain prominent. This field has made improvements over time. Diffusion studies once exclusively focused on either internal or external factors. Since the beginning of the 1980s, unified applications of this theory have been increasing. This study takes advantage of the benefits of diffusion theory and applies them to the study of judicial elections.

CHAPTER 3

HYPOTHESES AND RESEARCH DESIGN

Policy ideas enter the political process in a variety of ways. Citizens, advocates, and intellectuals may advance solutions when public problems arise. Politicians, bureaucrats, and entrepreneurs may link problems with solutions in order to formulate new policies. National policymakers may observe what other countries are doing and emulate their actions. Within federal systems, there are additional sources of policy ideas, as local and regional experiences may inform national and subnational policymakers. Indeed, varied policy adoptions and experiments are among the reasons cited for devolution of policy control to subnational governments.

Charles Shipan and Craig Volden⁶¹

Though research into the causes of changing judicial selection methods is scant, a large body of scholarship explores reasons for policy adoption. There are several forces at work that potentially influence the choice to retain judicial selection methods or abandon in favor of something new. Reasons for policy reform range from state specific characteristics to external influences from other states. This chapter highlights the theory applied in this dissertation and specifies the hypotheses tested.

Theory and Hypotheses

The following hypotheses are divided into two categories. The first category of hypotheses focuses on factors internal to a state that either promote or hinder change. These internal hypotheses are constructed to capture the forces unique to the state that influence policy adoption. The second category is based on the idea that states adopt policies as a result of events

⁶¹ Shipan, Charles, and Craig Volden. 2006. "Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States" *American Journal of Political Science*. 50(4): 825-843.

and circumstances that exist beyond their borders. Because states are not self-contained, they respond to forces beyond their borders. Especially when a policy under consideration can upset the balance of political power within a state, policy makers will be reticent to pass and implement an untested policy. Thus, policy makers will observe the consequences of policy alteration in other states. The information exchanged between policy makers in different states through direct communication and any other information that they receive will inform them as they consider the same policy. The influence of surrounding states and national movements on policy adoption forms the foundation for these hypotheses.

Internal Influences

Altering judicial selection systems is often achieved by modifying a state constitution or via legislation. In these situations, elected legislators or delegates control the decision to retain the judicial selection system in use or adopt an innovative selection scheme. Delegates to constitutional conventions and legislators promote their positions for or against adoption of a new system and ultimately vote in favor or against judicial selection. Even when judicial selection reform is adopted via popular vote, these decisions are not immune from political campaigns. As decisions to change judicial selection procedures are frequently political in nature, partisan control of state governments is important to measure.

The composition of state legislatures may alter the propensity of states to alter selection methods though the exact relationship between level of party control and policy adoption is unclear. One account of party control requires unified party government in order to have the necessary majority to pass major pieces of legislation. If support for judicial selection reform is not bipartisan, the opposing party can prevent passage in at least one of the houses of the legislature. As a result, if judicial reform requires a majority vote in both houses of the state

legislature before being sent to the governor, successful passage from both houses may be difficult if one party is not in control of both. Berry and Berry posit that “this is because a unified government can better avoid the ‘roadblocks’ resulting from the need for compromise between two parties” (1990, 403). Dubois (1989) reinforces this notion and suggests that the influence of unified party control increases, the more important a policy is.

Similarly, if judicial reform requires a state constitutional amendment, divided party control within a state may frustrate efforts to place that issue on the ballot. A single party with unified control of state government on the other hand may have the votes necessary to place judicial reform on the agenda. At the same time, given that the current governmental structure is favorable to the party in power, they may be reticent to disrupt the status quo lest they risk losing power under different institutional arrangements. Parties that control both houses of the legislature and the executive branch do not want to upset the current composition of the government. In this scenario, unified control of government within a state would reduce the chance of altering the judicial branch. Hanssen, in describing those states that resisted judicial elections in the 1800s, notes that “states with larger legislative majorities were less likely to do so, consistent with the hypothesis that a stronger hold on power reduces the attractiveness of an independent court” (2004, 432). As a result, state governments under the control of one party have less incentive to change the existing arrangements.⁶² It is anticipated that unified government will have a greater influence in the analysis of the adoption of nonpartisan judicial elections and the merit system as the majority of these decisions began in state legislatures.⁶³

⁶² Information regarding state legislative make-up is found in Dubin (2007). This volume contains information on the partisan affiliation of all state legislatures from 1796 – 2006.

⁶³ The majority of the adoptions of partisan judicial elections were the result of the initial constitution that established the state and not legislator action.

H1: Institutional Control Hypothesis: States with unified governments are less likely to change judicial selection procedures than states with divided government.

A second factor expected to influence adoption rates is the presence of a formal state bar organization. Bar associations have long used their resources to promote judicial reform. Since the emergence of the first state bar organizations, these institutions have taken an active role in legal affairs including judicial selection. In fact, state bar associations have advanced one reform or another throughout the history of judicial selection controversies. In some cases, it has been demonstrated that increased legal professionalism increases support for reform across time (Slotnick 1988).

The American Bar Association (ABA) has a long and continuing history of championing reform. The ABA and its state counterparts often espouse the same positions on judicial reform (Scheb 1988). The ability of these organizations to channel information to interested parties and generate support is influential (Hanssen 2002; Heinicke 1967; McClellan 1991; Scheb 1988). As will be demonstrated, many historical accounts of policy adoption focus on the power of national social movements to facilitate policy adoption. Critics of this approach caution that overemphasizing the importance of the Jacksonian and Progressive movements inflates their power at the expense of the importance of bar associations. For example, Canes-Wrone and Clark (2009) suggest that state bar organizations are more influential when it comes to judicial selection reform than broad national movements.

The literature on judicial selection is replete with examples of influential bar organizations engaged in the process of reform (Heinicke 1967; McClellan 1991, Pearson and Castle 1990). Some even claim that state bar organizations are the main reason reform was passed. State bar associations are able to mobilize resources and fight for judicial selection

reform. This organized pressure places judicial reform on the agenda and increases the likelihood that reform is eventually adopted.

State bar associations attempt to channel the debate on judicial selection. Several analyses document the influence of state bar organizations (Berkson and Carbon 1978; Canes-Wrone and Clark 2009; Hanssen 2004; Heinicke 1967; McClellan 1991; Pearson and Castle 1990; Scheb and Matheny 1988; Slotnick 1988). It is not unusual for state bar associations to have committees dedicated to judicial reform proposals (Milligan and Pohlman 1968). For example, the Mississippi State Bar Association was outspoken about the benefits of the merit plan and advocated for its adoption. The Mississippi State Bar issued a statement reading, “we strongly favor a system whereby judges are to be appointed by an official and responsible authority, whose power of appointment, however is to be guided by a body of intelligent opinion and subjected to final control by popular will effectively voiced through the ballot” (McDonald 1941, 194). The pervasiveness of bar activity in qualitative accounts of judicial reform indicates that this needs to be captured.

On a related note, interest group activity is frequently measured as a determinant of policy adoption. Interest groups are hypothesized to facilitate change through advocacy activities including public education campaigns, lobbying, and advertising. The use of resources to raise public awareness has caused diffusion researchers to have a renewed discussion of how to adequately capture the influence of individual opinion leaders and interest groups. These organizations often “seek to initiate dynamic policy change. They do this to win support for ideas for policy innovation” (Mintrom 1997, 739). The ways in which interest groups win support are varied. Pressure groups identify problems, inform decision-makers about solutions, communicate with media outlets, and act as coalition builders (Mintrom 1997). For these

reasons, the presence of a state bar association is assumed to increase the rate at which states adopt different selection systems.⁶⁴

H2: State Bar Association Hypothesis: States with state bar associations will be more likely to adopt judicial selection reform.

A factor that may inhibit reform is the amount of time the current judicial selection system has been in use. The greater the *age* of the judicial selection method, the lower the probability that it will be abandoned. Thus, the duration of time that a state has operated under a specific system will affect the probability of change. The longer a system has been in place, the more entrenched it is. Over time, citizens and public officials become familiar with the routine. Any alteration to such a scheme would result in increased uncertainty. The uncertainty associated with policy adoption is present in decisions altering judicial selection procedures. Depending on the judicial selection system jettisoned, the public or public officials would need to be accustomed to new rules and procedures. Additionally, new selection schemes have the potential to alter who occupies a judicial position. Possible results include higher rates of turnover. Thus, “states become committed to their past legislative enactments and are less receptive to ascendant strategies that actually may have greater legitimacy within the system. In other words, states that pass novel laws early in a time period are not expected to adopt dominant forms or forms institutionalized later” (Grattet, Jenness, and Curry 1998, 290).

In addition, the pattern of changes over the lifespan of the state is indicative of a state’s propensity to change. States with a history of alterations in judicial selection measures are

⁶⁴ State bar organizations began to develop in the late 1800s and continued into the mid 1900s. This variable is included in all models except the merit model with a start time of 1960, but variation decreases as all states adopt state bar organizations. This variable is omitted from the 1960 merit model because all states had a bar organization and thus it is constant.

assumed to be more receptive to new ideas and systems. States that have experienced few, if any, changes in judicial selection over time are hypothesized to be less likely to alter their current system.

H3: Age of Current System Hypothesis: The longer a selection system has been in place the lower the likelihood judicial selection will be altered.

H4: Number of Prior Changes Hypothesis: The greater number of times a state has altered judicial selection procedures in the past the more likely they are to adopt judicial selection reform.

An additional internal characteristic hypothesized to increase the likelihood that a state opts for a new judicial selection system is the percentage of a state population concentrated in urban areas. The percentage of the public living in urban areas increases the demand for policy reform. Glick states the influence of urbanization on the judicial branch and how critical it is to include as a measure, averring:

The urban industrial states, for example, have a larger number and variety of competing political demands, all seeking favorable government policy. Also, reflecting the environment, these states possess more resources to meet modern problems. They are more likely to raise and spend more money and to adopt many innovations in order to cope with various demands. Just as legislatures and administrative agencies are likely to adopt novel approaches to new problems in the urban states, court systems in these same states also are likely to face a larger amount of complex and varied litigation, much of it generated from corporations, government, and other organizations in a heterogonous society (1981, 51).

Rural states react to problems differently than urban states and this informs the speed at which states adopt new policies. Urban states are more receptive to innovations (McVoy 1940). States with greater levels of urbanization have a more diverse population, greater resources, and a wider array of problems (Puro, Bergerson, and Puro 1985). These states also tend to have more professionalized legislatures. These problems and access to resources combine to enhance

innovation adoption. Simply stated, states with greater urban populations ought to increase the likelihood of innovation adoption. Rodgers (1995) explicates that urbanization is consistently related to a state's innovativeness.

Walker (1969) finds empirical support for the claim that urbanization has a powerful effect on innovation. In addition, Dubois' (1990) results support the assertion that more urbanized states are more likely to push for merit plan adoption. Dubois finds that proposals for merit selection were likely to be supported by legislators residing in urban districts. Similarly, the bulk of support for such systems was located in urban communities compared to rural communities.

Though urbanization is hypothesized to increase the likelihood of innovation across all time periods, its treatment in the merit chapter can provide further evidence or lack thereof for the "reapportionment hypothesis." Puro, Bergerson, and Puro (1985) suggest that prospects of reapportionment influence the decisions of state legislatures to alter selection systems. Representatives from rural districts would seek to avoid losing influence to urban areas by insulating the judiciary from reapportionment. This analysis will measure the percent of the state that is rural compared to urban based on US census data.

H5: Percent Urban Hypothesis: States with a greater percentage of urban population are more likely to adopt merit selection.

Another factor likely to increase the adoption of a new judicial selection method is the occurrence of a constitutional convention within a state. State constitutions outline the manner in which state supreme court judges are selected. As a result, altering these selection schemes is difficult because in order to change judicial selection schemes, the constitution must be amended. Dubois states that "unlike normal legislation, constitutional amendments often require

extraordinary legislative majorities and then the approval of a majority of voters participating in a constitutional referendum. Alternative mechanisms for state constitutional change, such as constitutional conventions and popular initiative, are also available” (1990, 28). During constitutional conventions, judicial selection is already on the agenda. If the constitution is ratified, the selection mechanism in the draft constitution becomes law. As a result, the chances of a new selection system are heightened when a new constitution is formed. Dubois (1990) suggests that it is easier for a state to adopt the prevailing system of the time during the formation of a new constitution.

H6: Constitutional Convention Hypothesis: The adoption of a new constitution increases the probability that a state alters judicial selection methods.

The level of professionalism of state legislatures is also associated with policy adoption. Professional legislatures have a greater proclivity to embrace reform and innovate. Compared to nonprofessional legislatures, professional legislatures meet frequently throughout the year, earn a higher salary, and have more staff and resources at their disposal. As a result, professional legislatures are both more aware of policy developments in other states and able to take the steps necessary to implement new policies. On a related note, judicial reform is often propelled by arguments that new systems will increase the professionalism of the judicial branch. This may increase the attractiveness to judicial selection reform to legislatures that are already professional. It is assumed that more professionalized legislatures will pursue greater professionalization in the courts and will have greater resources to promote passage of judicial reform. Thus, states with professional legislatures are more likely to adopt new policies.

H7: Legislative Professionalism Hypothesis: States with professional legislatures are more likely to adopt judicial selection reform.

The legislature is not alone in influencing policy adoption. Being part of the policy process, it is likely that the governor's strength will impact the adoption of merit selection.⁶⁵ A strong executive will want to retain as much control over the judiciary as possible. In the early years of the United States, governors had a role in selecting judges in a majority of the states.⁶⁶ As a result, a switch to partisan or nonpartisan elections effectively removes some gubernatorial influence. Conversely, states employing the merit system return some power to the governor. Even though governors in merit systems must select from a narrow list of candidates, the nomination still rests in their hands. Compared to partisan and nonpartisan elections, this represents an increase in power. Thus, governors are likely to be more supportive of merit selections.

H8: Governor Powers Hypothesis: Stronger governors increase the likelihood a state switches to the merit plan.

External Influences

Internal characteristics of a state are an important but not exclusive aspect of the judicial selection story. In addition to the hypothesized relationships between characteristics internal to a state and the decision to adopt judicial selection reform, a unified model of judicial selection reform requires variables measuring external factors. The primary questions I address by including external variables in this analysis are straightforward: Does a state respond to conditions beyond their borders? Will adoption by other states make it more likely a state will adopt the same policy? In other words, when a state is making the decision to adopt a specific policy reform, does it take into consideration other states that have already adopted that reform?

⁶⁵ Because the measure of governor powers begins in 1960, it is not possible to include this measure in the partisan and nonpartisan models.

⁶⁶ Governors in seven of the original states had confirmation power. In the remaining original states, the legislature had sole authority to fill the bench.

I hypothesize that adoption of a policy by a neighboring state has a measurable influence on the decision to either adopt or reject a given policy. A positive relationship between adoption by contiguous states and likelihood of adoption would support the diffusion hypothesis. Failure to reject the null hypothesis would indicate that decisions to alter state policy are an internal affair. Consistent with diffusion theory, this analysis posits that states are responsive to their neighbors when determining whether or not to alter policy (Rogers 1995).

Prior research demonstrates that a single state can exert pressure on another state. Furthermore, this influence is additive in that the more surrounding states that implement a policy the greater the pressure on a state to pass the same policy. In theory, more information is provided to an actor that is surrounded by neighboring actors that have adopted a policy (Shipan and Volden 2008). Each additional state adopting a particular program or policy provides an example of consequences. These consequences can be positive, negative, planned, or unintended. Regardless, each adoption becomes a source of information for other states.

According to Rogers (1995), diffusion is primarily a process of information exchange between actors in a social system. Applied to the spread of judicial selection, all 50 states comprise the social system. Shipan and Volden (2008) note that while the general theory of diffusion has proliferated, a more nuanced approach is required. In addition to documenting how policies diffuse among the states, it is important to understand the specific mechanisms at work. Shipan and Volden stress the need for a more detailed approach stating that “although these works have uncovered a great deal of evidence that policies do diffuse, much less is understood about the specific mechanisms that cause a policy to spread from one government to another” (2008, 841). In their study of within-state adoption of anti-smoking policies, Shipan and Volden (2008) test four theories of policy dissemination. They suggest that local and state governments

are likely to adopt existing policies through four primary processes (Learning, Coercion, Imitation, and Competition). While the research of Shipan and Volden (2008) centers on city-to-city diffusion, this analysis will concentrate on state-to-state diffusion in an effort to determine which mechanisms galvanize states to change selection systems.

While coercion and competition do not appear to apply in assessing state adoption of judicial selection methods, learning and imitation are viable reasons for change. Learning entails one governmental entity observing the implementation by another actor and judging the results of the policy. Shipan and Volden (2008) suggest that the greater number of actors adopting a particular method will increase the potential of an entity to adopt a similar method. Learning also reduces the costs of problem solving by permitting state agents the ability to take cues from other states (Berry and Baybeck, 2005). As a result, rather than sifting through a large array of potential solutions, state actors are able to use information short-cuts by relying on past experiences of states that have already confronted similar situations. Imitation implies that states will attempt to copy the actions of other states. While imitation is similar to learning, it implies that actors are concerned with copying the actor, while learning entails witnessing an event, analyzing the consequences, and then making the determination as to whether or not it would be propitious to do the same. As a result, if learning is taking place, policy adoption occurs after a period of time has elapsed following the initial adoption by another actor. Imitation, on the other hand, involves an actor attempting to take the same actions of another regardless of the consequences and should occur sooner than in states that are learning. Thus, imitation ought to occur closer to the initial policy change of a state, while learning requires a certain amount of time to assess consequences. Though similar, there is a distinction between learning and

imitation. Learning entails analyzing the effects of a given policy and then deciding on whether or not to adopt, while imitation focuses on the actor without regard for consequences.

Also, state policy-makers are likely to engage in greater communication with their counterparts in neighboring states (Berry and Berry 2007). This linkage has the potential to serve as a conduit for information on the results of policy experimentation. For example, Douglas, Raudla, and Hartley (2015) find that judges implementing drug courts were often persuaded by their discussions with their counterparts in other states. Some judges opting to incorporate drug courts stated that they were encouraged by positive assessments from other judges with whom they communicated. Adoption by neighboring states thus has the potential to legitimize new ideas, which makes it easier for legislators to sell innovations to their constituents. The same dynamics should exist in the realm of judicial selection policy. The more states that adopt a particular version of judicial selection, the more information available to surrounding states.

In addition to more communication between neighboring states, states that share borders are likely to have similar “political, cultural, or structural” characteristics (Grattet, Jenness, and Curry 1998). Neighboring states “will adopt similar policies at common points in time. In this interpretation, region is simply a proxy for similar social and political conditions” (Grattet, Jenness, and Curry 1998, 290). Recall that policy adoption research has been primarily interstate or intrastate. Combining these variables in a single model allows for an integrated approach to the study of judicial selection diffusion.

In order to assess the diffusion hypothesis, it is necessary to measure the influence that neighboring states exert in relation to different judicial selection procedures. Different operationalizations have been used to capture external influences over time. One attempt at

measuring the influence of other states is to have a single variable based on different geographical regions within the United States (Soule and Zylan 1997).⁶⁷ This variable can provide initial evidence of regional influence, but the results are difficult to interpret. Measuring diffusion in this fashion is an improvement over not incorporating regional influences at all, however the measure does not indicate which regions are more likely to adopt a certain policy. Using census region codes to measure diffusion is also problematic due to how the regions are coded. As has been explained previously, region codes do not take into consideration the proximity of one state to another. This results in several instances of contiguous states being coded as part of different regions. It is the equivalent of neighbors on opposite sides of a street belonging to two different legislative districts. Berry and Berry note the inherent difficulties of relying on region codes to assess interstate diffusion:

First, the states could be divided into predesignated regions with the hypothesis that a state's probability of adopting a lottery increases as the number of states in its region that have previously adopted it gets larger. But this approach has significant weaknesses. The variety of different regional demarcations in the literature, with different numbers of regional clusters and different groupings of states within these clusters illustrates the difficulty of justifying any particular demarcation. While one might introduce a theoretical argument in support of one demarcation or another, the choice of how to define regional clusters remains largely arbitrary. Furthermore, whenever predesignated regions with fixed boundaries are defined, some states that border each other necessarily wind up in different regions. So in testing a regional influence hypothesis, the impact of some neighboring states would inevitably be ignored (1990, 403).

A more refined measure, one not based on static classifications, is required to accurately test the impact that states have on one another. Recent diffusion studies have recognized the inherent weaknesses of previous approaches and have developed another measure of neighboring state influence (Berry and Berry 1990; Shipan and Volden 2006). This new variable equals the proportion of surrounding states that have adopted the policy of interest in a given year. The

⁶⁷ Region codes are based on regions assigned by the United States Census Bureau.

benefit of this measure is that it has a unique value per state that taps into how the surrounding states are operating for every year a state is in the data. This measure eschews arbitrarily assigning region codes based on predetermined regions and assumes that all surrounding states that have adopted policy will have an influence. This is a vastly improved measure that gives a unique score to each state every year they are in the data.

A single region variable is included in this analysis to compare and contrast different measurements of diffusion. However the main diffusion variable employed is the proportion of bordering states that have adopted a given approach to judicial selection. This variable will indicate the extent to which the proportion of neighboring states changing judicial selection methods exerts influence. The surrounding state variable is a dynamic indicator of neighboring state activity. Thus, if external factors facilitate change, the greater proportion of states changing selection measures will place more pressure on the state to change judicial selection methods. A positive relationship will support the contention that states learn and imitate other states (Shipan and Volden 2006).

H9a: Proportion of Surrounding States Hypothesis: The greater proportion of border states that change methods, the greater chance a state will adopt that system.

H9b: Regional Diffusion Hypothesis: States belonging to the same region will be more likely to adopt the judicial reform.

A final set of independent variables included act as controls for two prominent national movements. It is often suggested that states are susceptible to national forces. Grattet, Jenness, and Curry emphasize this in stating “timing, regionalization, and structural/cultural similarity may also shape the content of laws. That is, states that pass laws during roughly the same time period and that are similar in terms of regional location and structural/cultural dimensions are

Table 3.1. Expected Effects by Judicial Selection Procedure

	Partisan Elections	Nonpartisan Elections	Merit Plan
Diffusion Variables			
Surrounding States	+	+	+
Internal Variables			
Urbanization	+	+	+
Divided Government	+/-	+/-	+/-
Number of Prior Changes	+	+	+
Age of Current System	-	-	-
State Bar Organization	+	+	+
Constitution	+	+	+
Legislative Professionalism	N/A	N/A	+
Governor Powers	N/A	N/A	-
Jacksonian Era	+	N/A	N/A
Progressive Era	N/A	+	N/A

expected to develop laws with similar content” (1998, 290). As will be evident in the following two chapters, much of the literature attributes reforms in the 1800s and 1900s to the Jacksonian and Progressive Eras. Though largely anecdotal, scholars emphasize that the democratizing influence of the Jacksonian period during the early to mid 1800s caused states to implement wide-ranging reforms, including reforms of judicial selection. In the same respect, many

historical accounts ascribe the reforms that occur throughout government in the early 1900s to the progressive movement. Table 3.1 contains a complete list of the hypotheses as well as the expected relationships.

I empirically measure the influence of these national movements. Included in this dissertation are dichotomous variables that take the value of 1 during the years when these ideas were at the peak of popularity. This is done in an effort to detect the influence of these two cultural waves that swept across the country. As a result, these categorical variables are specific to different reforms. At the time of the Jacksonian movement, the only alternative in existence was partisan judicial elections. Because no other system had been developed yet, it is not realistic that this variable would influence the decision to adopt anything other than partisan elections. Similarly, the Progressive Era aligns with the spread of nonpartisan judicial elections. During the Progressive Era states were abandoning partisan judicial elections in favor of nonpartisan judicial elections. As a result, the variable accounting for the Progressive Era is only included in models of the spread of nonpartisan judicial elections.

H10: Jacksonian Era Hypothesis: From 1828 through 1850, states are more likely to adopt partisan elections.

H11: Progressive Era Hypothesis: From 1890 through 1920, states are more likely to adopt nonpartisan elections.

Explaining Decisions to Adopt Judicial Reform

This section outlines the data and methods employed to test these hypotheses. Both qualitative and quantitative evidence are employed to describe why some states adopt judicial selection reform. In an effort to provide a rich description of the process of abandoning one method of judicial selection in favor of another, two states are selected per chapter. These states

were selected based on when the state adopted the judicial selection method that is focused on in the chapter. Each chapter contains a profile of an early adopter and a later adopter. Once the states were selected for inclusion in this analysis, primary and secondary data were gathered to provide a detailed profile of the state. For example, Ohio adopted partisan elections in 1851 as a result of a state constitutional convention. In describing Ohio's conversion to partisan judicial elections the complete records of the floor debates and proceedings were analyzed. In addition, secondary sources describing Ohio during this period were also included in this analysis.

While enlightening, these case studies do not provide a systematic analysis of state judicial selection conversion. Duration models are utilized to explain state judicial selection adoption decisions. In contrast to most scholarly work on judicial selection, the focus of this research is on measuring the likelihood of change given the independent variables over time. Thus, the emphasis is on the spread of judicial selection methods. The choice to adopt or reject judicial selection schemes is of primary interest and not the ramifications of these decisions. As a result, this is quintessentially a diffusion analysis, not an evaluation of judicial policies.⁶⁸

The particular innovation is different in each of the three different models, though the same basic concept is measured. The main event studied is the first time a state adopts a specific judicial selection system. Innovations are conceptualized as a policy new to the state, not necessarily a new idea. I adopt the definition of innovation used by Walker (1969) and subsequent studies. For Walker, an innovation is, "defined simply as a program or policy which is new to the state adopting it, no matter how old the program may be or how many other states may have adopted it" (1969, 881).

⁶⁸ The variables utilized are chosen specifically to measure the impact on the decision to adopt, not what follows.

Diffusion research recognizes that actors adopt innovations at different points in time. Early adopters are the units that are among the first to adopt an idea. For judicial selection, Mississippi is considered an early adopter of partisan elections, as it was the first state to use this as a means of judicial selection. States that adopt near the end of the adoption cycle are referred to as laggards. Tennessee is classified as a laggard because the state did not adopt partisan elections until 1974. Despite adopting partisan elections 142 years after the first state to adopt them, Tennessee is still considered to be innovating. Thus, innovations occur when the policy is adopted within a state, regardless of the age of the idea.

The goal of using event history analysis is to explain events using longitudinal data. In order to estimate the hazard rate associated with a state adopting a new selection system, I utilize event history analysis and estimate a Cox proportional hazards model to assess diffusion over time across states.⁶⁹ Utilizing a failure model rather than the more commonly employed logit or probit models has several advantages.⁷⁰ For example, those approaches do not consider adoption and nonadoption at the same time, time-varying covariates, and censored data. Event history analysis is an improvement over traditional methods and is capable of handling the aforementioned methodological issues. The use of such techniques has greatly been expanded upon in the social sciences and is now one of the most frequently used techniques in the diffusion literature.

Given the nature of the data utilized in this analysis and the improvements over other methods, the Cox proportional hazards model is utilized to assess the likelihood of states altering

⁶⁹ Due to the high rate of right-censored data (states that never adopt the merit system), survival analysis is the most appropriate technique. Omitting those states which never convert would result in a biased sample (Box-Steffensmeier and Jones 2004).

⁷⁰ Event history analyses are also frequently referred to as survival-time analysis, duration models, and hazard models. Different fields have developed different names for this analysis though they are all referencing the same technique.

judicial selection methods over time. There are several benefits of this model. The Cox proportional hazards model assesses the choice to either adopt or not adopt on a yearly basis. Thus it simultaneously measures the decision to adopt and not adopt. The Cox model also is equipped to handle right-censored data. As applied to judicial selection systems, the model takes into consideration the states that have yet to adopt new selection procedures by the last year of data collected. Failure to do this can result in biased estimates. Finally, this model assesses independent variables that change on a yearly basis per state. The models included in this dissertation contain independent variables that change over time for each unit of analysis. Cox hazard models account for these time-varying covariates and produce results that can be interpreted in terms of how changing independent variables affect the probability of judicial selection adoption.

This model is also an improvement over fully parametric duration models because “the particular distributional form of the duration times is left unspecified, although estimates of the baseline hazard and baseline survivor functions can be retrieved” (Box-Steffensmeier and Jones 2004, 47). Box-Steffensmeier and Jones strongly recommend the use of this measure because requiring the researcher to a priori specify a distribution can bias the results if the distribution of the hazard rate is incorrect. Even when such a distribution is selected based on theory, it is still possible that the data will not behave in accordance with such assumptions. In such cases, the model will yield biased estimates. Not specifying the duration expectancy provides for a much more flexible model.⁷¹ In the absence of a predetermined shape parameter, the results of the data will provide a more accurate picture of what is actually occurring.

⁷¹ An advantage of the Cox model compared to parametric event history models is that no hazard rate is specified resulting in a model which is more flexible. Rather than assuming a

Cox proportional-hazards models determine the risk that a unit of analysis will experience an event in a given year taking into consideration that it has not experienced the event yet.⁷² For this analysis, states are the primary unit of analysis and the event is adoption of a new judicial selection method. Thus, the risk that a state faces each year is measured.⁷³

Event history analysis produces unstandardized coefficients representing the impact of a one-unit change of the explanatory variable on the hazard rate (Grattet, Jenness, and Curry 1998). These coefficients can be interpreted in terms of signs and significance, but further interpretation is complicated. On the other hand, these coefficients can be converted to hazard ratios.⁷⁴ Hazard ratios are easier to interpret. Regarding hazard ratios, Hartzell and Hoodie state that “its deviation from the value of one indicates the percent increase or decrease in the likelihood of the incident increasing. Variables with hazard rates below the baseline value of one tend to decrease the potential of the event happening; variables with hazard rates higher than one increase the risk of the event occurring” (2003, 327). When applied to state judicial selection policy, event history analysis calculates a hazard rate which represents the likelihood that a state will adopt a specific selection system in a specific year. As a result, model results can be used to interpret the impact that the time-varying covariates have on the probability that a state adopts a judicial system during a particular year as long it has not yet adopted the system.

Alterations in state supreme court selection measures are prime examples of data that are ripe for the application of these methods. They occur over time and in many cases the event

monotonically increasing/decreasing or flat baseline hazard, the Cox model makes no such constraints thereby decreasing the possibility of model misspecification.

⁷² Another benefit according to Nicholson-Crotty is that “the model estimates and controls for the underlying hazard rate to ensure that the supposed impact of relevant independent variables is not simply reflecting some trend in the timing of adoptions” (2004, 49).

⁷³ This is known as the conditional probability of an event.

⁷⁴ The hazard ratio is the exponentiated coefficient.

never occurs at all. These models are capable of handling these issues.⁷⁵ In addition, the diffusion of innovations follows a similar pattern across studies. For example, event history analysis allows for time varying covariates to influence the probability of an event occurring. Another common issue in event history data arises when the dependent variable never experiences the event. For example, when examining why states decide to abandon elections in favor of merit selection, those states that do not change their systems are censored. If such scenarios are not accounted for, biased estimates are possible.

This analysis assesses states switching among three different selection approaches. As has been discussed, the start times for diffusion analyses typically based on the data available and not theory. Thus, data availability and not theory dictates the start time and leading to arbitrary time-spans in many event history analyses. The preferred method is to have the dataset begin with the first actor that experiences an event and continue for as long as units are at risk of experiencing the event (Rogers 1995). That is the approach used in this dissertation. The time period analyzed in each chapter begins with the first state to adopt the selection method of interest. It then runs to the present day as the option to adopt any method continues to exist. This time-span is advantageous because it permits conclusions to be drawn from all states that have the opportunity to convert to a new system after the first state adopts it, regardless of which system they previously operated under. Furthermore, though adoption by different states across time has been uneven and not always following a particular pattern, this analysis includes all

⁷⁵ This is referred to as right censored data. Biased results typically occur when there is an underlying pattern of subjects dropping out of a study before they can be recorded such as patients that drop out right before death. This problem related to right censored data is not present in this analysis. The more pernicious censoring happens when a state adopts a new innovation before the start of the data set. This is referred to as left-censoring. This forces the difficult choice of either including the left censored data potentially resulting in biased estimates or omitting altogether. Fortunately, the data in this analysis are not left-centered because the timespan includes all adoptions.

Table 3.2. Operationalization of Variables

Independent Variables	Description
Percent of Surrounding States	Continuous; This percentage is calculated by first determining the absolute number of surrounding states. Next, each year the state is in the data, the number of states with a certain selection system is divided by the total number of surrounding states. This is a rolling measure that is calculated for each state year.
Urbanization	Continuous: Number assigned is the percent of people living in urban areas defined by population density according to the United States Census. Data obtained from The Statistical Abstract of the United States.
Divided Government	Dichotomous; 0 if all three branches of government are controlled by the same party; 1 otherwise. Data coded from information contained in Dubin, Michael (2007) <i>Party Affiliations in State Legislatures: A Year by Year Summary, 1796-2006</i> .
Number of Prior Changes	Continuous; number of times a state has altered state supreme court selection methods.
Age of Current System	Continuous; number of years since the last change in state supreme court adoption mechanism.
State Bar Organization	Continuous; 0 if no state bar organization is in operation, 1 if the state has a voluntary bar association, and 2 if the state has a bar organization that has compulsory requirements.
Constitution	Dichotomous; 0 in years when there are no constitutional conventions, 1 in the years that states held constitutional conventions.
Legislative Professionalism	Continuous; Score based on Squire Legislative Professionalization Index. Score ranges from 0 to 1 with 0 representing no legislative professionalism and 1 being completely professionalism.
Governor Institutional Powers	Continuous; Scale ranges from 1 to 5 with 1 being the least amount of power and 5 the greatest.
Jacksonian Era	Dichotomous; 1 if years 1828 through 1850, 0 otherwise
Progressive Era	Dichotomous; 1 if years 1890 through 1920, 0 otherwise

switches to a specific system encompassing the rather slow initial adoption period through the time-span when a rash of states adopted such methods.

Included in this analysis are all 50 states from the first year a given system is adopted. Thus, the data range for transition to partisan elections is 1832 to 2014. The chapter analyzing the switch to nonpartisan elections contains data beginning in 1907 and runs through 2014. Finally, the merit system was initially adopted by Missouri in 1940. Thus the chapter on merit selection is based on data from 1940 through 2014. The risk set for all three time periods consists of any state that has yet to adopt a new selection procedure. An inevitable result is that the size of the risk set will decrease over time as states experience events (i.e. states adopt a given selection procedure).

The data are longitudinal and accounts for every year a state is in existence until they adopt the selection method of interest. The response variable for all models is binary with 0 indicating that the state has not adopted a new selection method, and 1 representing those states that have abandoned prior methods in favor of the scheme particular to the chapter. Thus, the dependent variable captures the change from the various selection schemes in use to a new selection method. Until the state adopts a new selection system, they are at risk of doing so. Each state is labeled as 0 until the *initial* adoption of selection method at which point they will take the value of 1 and subsequently be dropped from the analysis.⁷⁶ This results in one line of data per state per year.⁷⁷ Accordingly, the units observed are states while the unit of analysis is

⁷⁶ A state drops out at the first instance of merit adoption. Though it is possible that a state adopts merit only to have this system replaced or ruled unconstitutional, there is only one state (Tennessee) that adopts merit and subsequently has the system ruled unconstitutional. Even in that case, Tennessee later re-adopts the merit system.

⁷⁷ Time is measured on a yearly basis. Though a policy may be adopted at different points during a year, no matter when throughout the year selection is altered, it is measured by year.

state year. All states are included in each section with the start time based on the first state to adopt a specific judicial selection plan. The end time for the data in each chapter is 2014 because states are still free to adopt any judicial selection system they prefer. Table 3.2 contains information on how variables are operationalized.

Conclusion

This chapter covered the main hypotheses to be tested in the following chapters. Though the judicial selection method focused on will vary in the following chapters, the same forces are assumed to be at work. The results of following chapters will shed light on the factors that influence the choice to adopt partisan and nonpartisan judicial elections as well as merit selection. The unified model will provide a more complete picture of what influences states to alter selections methods than currently exists.

CHAPTER 4

TRANSITION PERIOD ONE: THE SWITCH TO PARTISAN ELECTIONS

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friend of public and private faith, and of public and personal liberty; that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minority party; but by the superior force of interested and over-bearing majority.

James Madison⁷⁸

In *Federalist 10*, James Madison opines the dangers of factions and political parties. The “evil of factions” is inherent in the political division of power. Despite Madison’s warnings, partisan impulses manifested as political parties almost immediately in the newly formed United States of America. Beginning in the first Congressional session, factions began to coalesce. Over time, the judicial branch proved to be vulnerable to factions. In fact, the first transition away from the appointment of judges was to popular elections in which they were identified according to their political party affiliation. Though this mode of selection has largely been replaced by nonpartisan and merit selection, it was once the dominant form of judicial selection. At the zenith of its popularity, 35 of the 46 states used partisan elections to staff state high courts.

Following the typical pattern observed in diffusion studies, the dissemination of partisan elections resembles an S-shaped curve with a single early adopter not immediately followed by other states. But, as will be shown, partisan adoption exploded following an initial trial period. Next, I profile two states in order to give a description of how partisan elections for state judges

⁷⁸ *Federalist 10*.

took hold during the time when partisan elections were the trend - Mississippi, (the first state to adopt) and Ohio (the thirteenth state to adopt). The chapter concludes with an empirical analysis that tests the triggers that either enhance or inhibit states from adopting partisan selection. The heart of the empirical analysis is the testing of internal and external motivators of change over time. The empirical analysis demonstrates that both internal and external factors influence states to alter their selection methods during this first major period of judicial transition.

Judicial Selection Under the New Constitution

After abandoning the Articles of Confederation, the delegates that assembled in Philadelphia began crafting a new constitution. The product of their efforts was a new form of government although the ideas and philosophy it was based upon were not. These men certainly had ideas they liked, such as the separation of powers scheme and notions of popular sovereignty. Also brought along were the trepidations and negative elements that were all too real at the time due to their recent experience under British control. Thus, they pursued and wrote into law ideas they preferred, while also building into the Constitution mechanisms to prevent the abuses they sought diligently to avoid.

Article III of the Constitution outlines the procedures for selecting, retaining, and removing federal judges. Under British rule, the king appointed colonial judges. As such, appointment of judges was the system that the framers were accustomed. The former colonists were also well aware that judges appointed by the king were agents of the crown rather than unbiased figures that decided disputes based on an objective interpretation of the law. In order to prevent similar abuses, the framers crafted a system of executive appointment and legislative confirmation. Senators, by majority vote, can give their blessing to nominations or strike them

down. Once confirmed by the Senate, federal judges retain their positions for life barring impeachment.

Early states modeled their judicial selection procedures after the federal government. Though appointment schemes varied, all of the original states institutionalized the appointment of judges. The 11 additional states that joined the United States through 1832 institutionalized the appointment of judges.⁷⁹ In sum, 24 states relied on some form of judicial appointment until Mississippi became the first state to experiment with a new system.

Given that no other system had ever been utilized to select state judges, it is not surprising that the initial states used the federal model. It is important to note that the legislature had an influential role in selecting judges. In six original states, the legislature had sole responsibility for the selection of judges (Hanssen 2004). In the remaining seven states, the legislature nominated judicial candidates. Following legislative selection, the governor was required to confirm the nominee. Thus, unlike the federal model, the selection, retention, and removal of judges was not under the complete purview of the executive. Legislative dominance was deliberate since the nation worried about judges becoming agents of state governors, just as judges during the colonial period had been “faithful agents of the British crown” (Sobel and Hall 2007, 31). As legislatures were in a position to either name the judicial candidate of their choice or at least veto those that they did not prefer, the legislature was influential in the selection of judges.

While the legislature may have been satisfied with appointing state judges, there is evidence that the public was initially skeptical of this method. Some citizens questioned the ability of judges to act independent of the legislatures and governors selecting them. As early as

⁷⁹ The two primary forms of appointment were legislative appointment with governor consent or vice versa.

Table 4.1. States and Partisan Judicial Elections

State	Years in Use	Means of Adoption
Alabama	1867-2015	New Constitution
Alaska	NA	NA
Arizona	1912-1973	Legislation
Arkansas	1864-1999	New Constitution
California	1850-1910	Original Constitution
Colorado	1876-1965	Original Constitution
Connecticut	NA	NA
Delaware	NA	NA
Florida	1853-1861 and 1885-1970	1853: Constitutional Amendment 1885: New Constitution
Georgia	1868-1877 and 1896-1982	1868: Constitutional Convention 1896: Constitutional Amendment
Hawaii	NA	NA
Idaho	1890-1933	Original Constitution
Illinois	1848-2015	New Constitution
Indiana	1851-1969	New Constitution
Iowa	1857-1961	New Constitution
Kansas	1861-1957	Original Constitution
Kentucky	1850-1974	New Constitution
Louisiana	1852-1863 and 1904-2015	1852: New Constitution 1904: Constitutional Amendment
Maine	NA	NA
Maryland	1851-1940	New Constitution
Massachusetts	NA	NA

Table 4.1 (Continued)

State	Years in Use	Means of Adoption
Michigan	1850-1938	New Constitution
Minnesota	1859-1911	Original Constitution
Mississippi	1832-1867 and 1914-1993	1832: New Constitution 1914: Legislation
Missouri	1849-1939	Constitutional Amendment
Montana	1889-1935	Original Constitution
Nebraska	1867-1961	Original Constitution
Nevada	1864-1914	Original Constitution
New Hampshire	NA	NA
New Jersey	NA	NA
New Mexico	1912-1988	Original Constitution
New York	1847-1975	New Constitution
North Carolina	1868-2001	New Constitution
North Dakota	1889-1908	Original Constitution
Ohio	1850-1910	New Constitution
Oklahoma	1907-1966	Original Constitution
Oregon	1859-1930	Original Constitution
Pennsylvania	1850-1912 and 1921-2015	1850: Constitutional Amendment 1921: Legislation
Rhode Island	NA	NA
South Carolina	NA	NA
South Dakota	1889-1920	Original Constitution
Tennessee	1853-1970 and 1974-1993	1853: Constitutional Amendment 1974: Legislation

Table 4.1 (Continued)

State	Years in Use	Means of Adoption
Texas	1866-1868 and 1876-2015	1866: New Constitution 1876: New Constitution
Utah	1896-1944	Original Constitution
Vermont	NA	NA
Virginia	1850-1863	Legislation
Washington	1889-1907	Original Constitution
West Virginia	1862-2014	Original Constitution
Wisconsin	1853-1913	Original Constitution
Wyoming	1890-1971	Original Constitution

Shay's Rebellion, the public expressed (sometimes violently) their displeasure with state governments including judges. Following unpopular decisions in favor of the state and against debtors, the public began to link judges with the legislative laws that helped create their debt (Haynes 1944). Public anger was not solely directed at the legislative and executive branches of government, as it became common for judges to be accused of being captured by the legislature and only doing the bidding of state officials. Judges were frequently burned in effigy as a form of protest (Haynes 1944).

This discontent continued throughout the early nineteenth century. Blaming legislative control of judges for unpopular decisions was the initial impulse because of the colonial experience (Hanssen 2004). Over time, the public grew to believe that the judges were not acting in their interest. As a result, calls for change increased. A solution designed to free judges from the control of executives and legislators was to shift judicial selection to the public.

The voting public would be responsible for selecting state court judges, specifically via partisan elections. Though this method was not immediately praised or adopted by the states, it diffused rapidly.

Despite the former popularity of partisan judicial elections, states have largely abandoned this method. As of 2015, only seven states still use partisan judicial elections. Table 4.1 contains a list of all states and the date that they converted to partisan judicial elections. This raises several questions: Why did some states adopt partisan elections and others reject this selection scheme? What are the factors that drove the diffusion of partisan elections? Are the causes of adoption of partisan elections internal to the state, based on the observation of other states, or a combination of both?

Qualitative Analysis of Partisan Judicial Elections

This section contains case studies on two states that switched from appointment schemes to partisan judicial elections. Mississippi and Ohio represent two ends of the partisan diffusion spectrum. Mississippi is detailed because it was the first state to select state judges in partisan elections. An emphasis is placed on identifying the characteristics that generated the first instance of state judges being elected by the public. On the other end of the spectrum is Ohio, a state that waited to adopt partisan judicial elections. Comparing and contrasting these two states sheds light on whether similar or different characteristics motivated the move away from judicial appointment.

Mississippi: Early Innovator/Adopter

Under Mississippi's constitution of 1817, state judges were selected by majority vote in both houses of the state legislature. Within 15 years, public discontent with several aspects of

the government resulted in a constitutional convention to revise the state's governing structure.⁸⁰

It was during the constitutional convention that Mississippi became a pioneer in the field of judicial selection moving away from judicial appointment. No other state had adopted such a system. While different variations of appointment had been utilized across the states, partisan elections were completely untested. Thus, the Mississippi innovation is an informative case.

Concerns over the lack of popular control in Mississippi prompted the legislature to call for a new constitutional convention. As other case studies illustrate, there are often specific events that initiate calls from the public to reform the judicial branch. These events tend to involve the behavior of public officials, unpopular judicial decisions, or in some cases, unlawfulness that capture the attention of the media, public officials, and candidates running for office (Bonneau and Hall 2009).

In the case of Mississippi, focusing events and scandals raised awareness and calls for change among the general public. Historical accounts of the Mississippi constitutional convention attribute the calling of a constitutional convention to Jacksonian impulses (Case 1992).⁸¹ Coyle describes these events:

Unpopular judicial decisions, personal misbehavior, and official misconduct in the judicial ranks sparked unsuccessful efforts to remove justices of the peace and probate judges from office, but perhaps the most important fomenters of dissatisfaction with the Mississippi judiciary, notwithstanding the impact of Jacksonian democracy, were the unsuccessful efforts of three consecutive legislatures to impeach supreme court justice Joshua Child on grounds of dueling drunkenness, and official misconduct and the controversial supreme court decision in *Cochrane v. Kitchens* declaring unconstitutional an act of the Mississippi General Assembly (1972, 101).

⁸⁰ In Mississippi at the time, a constitutional convention was the only way to alter the state constitution. This required a two-thirds vote in the legislature.

⁸¹ The Jacksonian Era lasted from approximately 1828 to 1850.

The *Cochrane v. Kitchens* decision nullifying a state law that attempted to override a federal law, coupled with the high profile behavior of Justice Child, resonated with the public.⁸² Coyle (1972) notes that the inability to unseat Justice Child reinforced the idea that it was impossible to remove justices regardless of their conduct, thus increasing the demand for greater judicial accountability.

Despite these internal events, most scholarly accounts attribute the reform movement to dissatisfaction with governmental structures across the board. According to this account, Mississippi was responding to national democratizing influences and not to significant internal problems. Though judicial selection was among the reforms of the Jacksonian Era, the movement included several other areas of policy reform. For example, reforms included putting an end to the Electoral College, abandoning state legislature appointment of United States Senators, and eliminating civil service rotation (Solimine et al. 2003). Stone indicates that governmental change in Mississippi:

...Was due not to any necessity of remedying abuses but to the spread of the extreme democratic movement which accepted as a part of its fundamental philosophy the principle that the power of selection of all governmental officers should be exercised by the people through the ballot, a doctrine which ultimately led to the selection of practically all state and municipal officers by popular election (1919, 180).

In this version of events, early structural changes were not so much due to salacious events, but rather to a wave of democratic impulses across the country. Thus, the dissatisfaction with appointed judges was one among many reforms that aimed to enhance the overall democratic nature of the country.

This wave of democratic reform is collectively referred to as the Jacksonian movement. Recognition that unelected judges were not compatible with democracy was one of the driving

⁸² *Cochrane v. Kitchens* is an unreported case because the court reporter was not present during the oral delivery of the decision (Coyle 1972).

reasons that Mississippi called for a new constitution, though this was not the only objective of the convention (Drake 1957).⁸³ Still, there is some disagreement over the influence that the Jacksonian movement had within Mississippi. Winkle III (1993) suggests that the timing of the convention was more coincidental than anything else. Though several states also revised their constitutions during this time and became more representative, Mississippi's original constitution is regarded as more democratic than most at the time. Drake (1957) suggests that the constitutional convention took on a democratic flavor only after the convention was called. As a result, democratizing the state became a priority when revising the constitution. According to Drake, "although the forces of Jacksonian democracy may have been at work in Mississippi throughout the 1820s, there is little or no direct evidence that before 1830 Mississippians were actually clamoring for changes in the conservative features of their constitution" (1957, 354).

Others are more forceful in their assertions that the Jacksonian movement was critical to Mississippi's constitutional convention. During the 1820s and 1830s, as populist sentiments began to spread, these ideas became synonymous with Andrew Jackson. Case (1992) claims that the principles of Jacksonian populism were not tangential to the 1832 convention. According to Case, Mississippians worshiped Jackson "with an almost blind political worship. Jackson's Mississippi followers attacked the 1817 constitution as undemocratic, and considered its provisions providing for the legislative or executive appointment of most public officials as inconsistent with the concept of public accountability" (1992, 4).

⁸³ Other motivations for a new constitution included changing annual legislative sessions to biennial sessions, selecting a permanent location for the capitol, and managing the newly acquired territories. As a result of land expansion through acquisitions, such as the Choctaw Purchase from Native Americans, required new legislative representation schemes and judicial districts had to be adjusted.

Accounts from the convention support these claims (Brazy 2006, 84).⁸⁴ Converting appointed positions to elected positions was emphasized in the Mississippi convention. Many delegates questioned the wisdom of electing judges. Delegates to the convention were incredulous of the ability of citizens to determine the quality and competence of judicial candidates. Prominent delegate Stephen Duncan retorted that “we will give you a constitution much more than the one we are considering and much more democratic than any other in the United States. Not republican – but down right and absolute democracy” (Cited in Brazy 2006, 84). Scholars tend to agree that democratic impulses played a prominent role in the convention itself, though the role that the Jacksonian movement played in motivating the convention is debatable.

It appears that a conglomeration of national and state forces combined to generate pressure for constitutional change. The growing democratic movement, dissatisfaction with debtor policies, calls for political reform, and the need to expand courts and adjust legislative districts to accommodate the expanding territory all facilitated the constitutional convention (Sansing 1986). Ultimately, the constitution that emerged from the convention was intended to be a temporary document, responsive to the popular sentiments, and a product of the era (Winkle III 1993).

Once the convention was convened, several issues were considered. Issues on the agenda were expanding suffrage, length of legislative sessions, and judicial term limits. Most of these issues were not controversial. For example, on the issues of judicial term limits, expanding suffrage to women, and eliminating property qualifications, there was bipartisan support.

⁸⁴ Regardless of these national impulses, the convention was solely a state affair. National politics remained outside of the process. National politicians did not make any speeches or appearances in an attempt to sway the convention one way or another.

Judicial selection reform emerged as a contentious issue (Drake 1956, 359). In fact, the judicial reform debate took center stage.⁸⁵ According to Winkle III, “only judicial selection, the salient topic of the convention, sparked a genuine clash of interests” (1993, 6). The debate divided the delegates of the convention.

Stephen Duncan described people falling into one of three groups (Winkle III 1993). The conservative “aristocrats” pushed to retain the status quo of legislative selection, though they would have accepted gubernatorial appointment as an alternative (Case 1992). This group argued that judicial positions were too important to be left to the general public to decide. Such a radical change would result in a judicial branch not staffed by those skilled in the law. Rather, partisan elections would result in a political judiciary overrun by partisan influences, ending in corruption.

On the opposite end of the spectrum were the “whole hogs,” those that wished to elect judges at every level within the state.⁸⁶ The result of this proposal would place every single judicial seat, regardless of level in the hands of those eligible to vote at the time. Whole hogs bemoaned the disproportionate weight placed on independence over accountability. Those that fell into this camp viewed the judiciary as acting “irresponsibly” and as a result, the people should have the ability to remove them (Drake 1957). The whole hogs did not focus exclusively on the Mississippi Supreme Court. In addition to electing judges, this group was in favor of electing all judicial officials. Finally, there was a group that proposed a more modest alteration. The “half hogs” were a group that supported electing lower level judges such as county and

⁸⁵ While judicial selection became the main debate, it was part of a larger judicial reform movement emphasizing accountability. These reforms included making the supreme court completely distinct from the lower branch (no sharing of posts) and creating term limits for judges.

⁸⁶ The whole hogs held a majority of the delegate seats during the convention (Case 1992).

circuit judges and retaining appointment at the supreme court level as a compromise (Case 1992).

This debate arguably garnered the most time and attention from the delegates. Ultimately, the convention approved of partisan elections for all judicial offices, the position espoused by the whole hogs. As a compromise, judges would not be elected for life as the whole hogs wished, but instead would have term limits. Winkle III (1993) attributes the main reason for this choice to the prominent democratic impulses of the time. This alteration in judicial selection was the biggest deviation from Mississippi's previous constitution. The final constitution was approved by the convention and became the governing law of the state.⁸⁷

In ratifying the new constitution, Mississippi became the first state in the country to rely on something other than appointment for judicial selection. While it would be 15 years before another state followed suit, the judicial selection choice sent reverberations around the country. The experiment of Mississippi was referenced during the constitutional conventions of other states. For example, the same year that Mississippi implemented popular elections, Iowa was facing the same choice. An Iowa delegate declared that Mississippi could not even enforce their own laws due to the popularly elected judiciary (Ellis 2011). However, at the 1845 Louisiana constitutional convention, some delegates cited Mississippi favorably. Specifically, some Louisiana delegates suggested that Mississippi had found the cure for taking politics out of the judiciary because of judicial elections (Ellis 2011). As evidenced, Louisiana delegates looked beyond the state for information on partisan judicial elections. Importantly, Louisiana delegates looked to Mississippi, a state they share a border with and an innovator. Ultimately, Mississippi

⁸⁷ Ratification was not submitted for a popular vote. Ironically, delegates who pressed for more popular elections were the leading opponents of sending the document out for a popular vote (Drake 1957).

crafted a new method of selecting judges that stemmed from public, political, and national forces.

Ohio: Later Adopter/Innovator

After Mississippi broke new ground in judicial selection, it took 15 years for the next state to adopt partisan judicial elections. New York became the next state to employ partisan elections to fill state supreme court positions in 1847. After this, the floodgates opened. Illinois adopted partisan elections in 1848 followed by Missouri in 1849. Then, seven states made this choice in 1850 and two more followed in 1851. Ohio adopted partisan judicial elections in 1851, becoming the thirteenth state to do so.

Similar to Mississippi, the evidence indicates that Ohio delegates responded to national and state-level pressure to reform. Under Ohio's original constitution, the legislature determined the composition of the bench. Over time, national and local forces generated a call for reform. At the national level, there was resistance to federal judicial review in the wake of *Marbury v. Madison*, 5 U.S. 137 (803). Issues of federalism and the balance between the branches of the new government were highly contentious with no clear answers.

While *Marbury v. Madison* established judicial review in the context of the United States Supreme Court nullifying an act of Congress, the question soon focused on the authority of the Supreme Court to nullify state legislative decisions. The answer was provided in *Fletcher v. Peck*, 10 U.S. 87 (1810) and *Martin v. Hunters Lessee*, 14 U.S. 304 (1816). It was popular at the time for these decisions to be derided. Several states passed laws nullifying federal decisions. The Ohio Supreme Court, on the other hand, consistently ruled that state laws negating federal decisions were unconstitutional. According to Haynes, there was a backlash to these rulings and "attempts were made in Ohio in 1808, in Kentucky in 1822, and in New York in the same year to

remove judges for holding statutes unconstitutional. Although all were unsuccessful, impeachment proceedings in Ohio failed in the state Senate by only one vote: nine were for acquittal against fifteen for conviction” (1944, 95).

Decisions favoring national over state power did not sit well with the citizens of Ohio and resentment began to build (Haynes 1944; Solimine et al. 2003). The public also became disillusioned with partisan politics at the state level, including political actions directed at judges. The impeachment of two Ohio Supreme Court judges who voted against a law enacted by the state legislature gave further credence to the perception that political parties had taken hold of the judicial branch. Ellis indicates that “by the 1820s, Ohioans of both parties were dismayed that political parties had taken control of government appointments to secure private advantages” (2011, 1543). These accusations were made during the debates at Ohio’s constitutional convention. Delegate Humphreville noted popular displeasure with the judiciary, stating that “I believe the defects in our judicial system were one of the many causes that led to the calling of this convention. The organization of the judicial system is a matter in which the people generally take a deep interest.”⁸⁸

Scholars often attribute changes in Ohio during this time to the Jacksonian movement. Historical accounts maintain that national pressures were influential. For example, Solimine et al. note that abandoning appointment schemes in Ohio was “the natural offspring of the Jacksonian Era” (2003, 5). Of course the Jacksonian movement was broader than judicial reform. In other words, judicial elections were part of the Jacksonian platform, but existed as part of a broader democratic agenda. Nevertheless, the reasons for abandoning judicial appointment in favor of partisan elections “both in Ohio and elsewhere, are somewhat obscure.

⁸⁸ 1851 Reports, Floor Speech, June 14, 1850, p. 431.

But to varying degrees, the switch appears to have been driven largely by Jacksonian notions of popular sovereignty, to have the public more involved in the selection of judges, and in turn make judges more accountable to the electorate” (Solimine 2002, 560).

Hall (1984) cautions, however, that the Jacksonian movement ought not to be overemphasized. After all, the bulk of the delegates responsible for adopting partisan election were lawyers. Hall maintains that these delegates were primarily concerned with the growing power and prestige of the courts. They believed that judicial elections would increase public support and respect for the institution. This would enhance the power of the state courts (Solimine et al. 2003). At the same time, delegates anticipated that judges who had previously resisted populist reforms would be more accommodating if they had to justify their decisions to the public.

As was the case with Mississippi, there were several other issues that prompted a convention besides judicial reform. Additional concerns over race relations and the growing power of corporations facilitated the formation of a constitutional convention (Gold 1984).

With competing explanations for judicial selection reform in the literature, it is necessary to examine the debates that occurred during the convention itself to uncover what exactly happened. The full record of floor debates has been recorded in *The Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-1851*, hereto referred to as *1851 Reports*. These reports reveal a large amount of time dedicated to judicial selection, even a full month from June 8, 1850 through July 10, 1850. Within this record there is support for most of the conventional accounts of the motivators of change.

A major issue for the delegates revolved around the proper role of a judge, as a clash between judicial accountability and independence. Those that favored appointment argued that it

was inherently unethical for judges to be punished if they vote according to their best judgment, only to face expulsion by the public if their decision ran counter to the prevailing public wind. On several occasions, delegates referenced the United States Constitution as establishing the proper judicial selection system. In a speech delivered during the convention, Delegate Nash proclaimed that:

Under our system of written constitutions, it (the judiciary) is appointed to settle and determine what the law is. Sir, the people organize the judiciary to settle this very question, and for that reason the judiciary power is made independent of all human power except in order that it may not be left under any sinister influence to depart from the rule of rectitude. In Heaven's name if there is any one rule for the people to be governed by, let it be this. For if they cannot reverence the judge who follows the convictions of his conscience, against their own temporary impulses; I say if any people should withhold their respect for such a judge, they are unfit to govern themselves.⁸⁹

Nash argued that in the absence of electoral accountability, the public still had remedies available when they disagreed with a decision – constitutional amendment or rewritten laws. In addition, delegate Kennon noted that democracy does not mandate judicial elections, stating that “if the gentleman means that public opinion should control the decisions of a sworn officer of the court, in opposition to law, I say that is not democratic; for if that be democracy, I yield the palm to the gentleman.”⁹⁰ Regarding the proper role of a judge, Delegate Stanbery opines:

We must protect it (judicial power); rather than guard against it. It is our safeguard, when properly constituted, against political power, wherever that power may be lodged. We must make it independent, to secure impartiality and honesty. From the earliest times – from the times when man first conceived a right idea of the judicial character, independence and impartiality have been deemed its essential attributes. In the early ages, when the virtues were deified, justice was well personified, a bandage was drawn over her eyes, and even balances put into her hands, to indicate perfect impartiality – complete independence of all extraneous influences. I never want to see a judge upon the bench, who must look to the people before he can decide a case – who must constantly consult and be governed by popular impulses – who shall always blunder a fear of accountability to those who make and unmake him. How can such a judge take the solemn oath to discharge high office without fear, favor or affection; he who is constantly in dread – who

⁸⁹ 1851 Reports, July 5, 1850, p. 676.

⁹⁰ 1851 Reports, July 3, 1850, p. 676.

is trembling at every step, lest his decisions may not be acceptable to a popular majority.⁹¹

Supporters of appointment were also concerned about judges not having enough time to perform required duties with election demands. This would be especially problematic for newer judges who needed time to learn the job before they start running for reelection.

Another concern was the possibility of quid pro quo behavior. Several delegates thought it unrealistic to expect a judge to rule against an influential constituent that could help secure reelection. In such a scenario, it would be tempting to vote against the litigant's interests even if the judge believed it was the right decision. Exchanges of decisions for political support would lead to the most corrupt courts possible, according to opponents of judicial elections. Nash argued "we want impartial judges, governed by law, and not to the excited masses moved by demagogues and disappointed litigants. Justice cannot be obtained by any such system, and they know it."⁹²

On the other hand, there were those that did not see partisan elections as incompatible with justice. According to the delegates that argued for this, holding judges accountable was essential and a proper role for citizens. Several delegates expressed faith in the ability of the public to select capable judges. In addition, elections would produce judges who were more competent and responsive. For example, Delegate McCormic's comments spoke to this:

Whether the term be four years or seven years, the time when they shall surrender their office will as certainly arrive in the one case as in the other; and whether that time be nearer or more remote, it will not, cannot influence the mind of any one who is an upright judge. This influence, I apprehend, will not be such as to make the judge subservient to any party or individual, so far as to effect a judicial decision. It will have this effect – and this is the principle upon which we base the argument in favor of the frequency of judicial elections – it will have the effect to ensure the strict performance of their duties as judges; it might have the effect of making them more expert; and attend more

⁹¹ 1851 Reports, July 3, 1850, p. 691.

⁹² 1851 Reports, July 5, 1850, p. 704.

promptly to their business; labor harder, and with more diligence and efficiency, if they have to surrender their office within a few years, than they would if they had the right to hold on for many years. This is the accountability to which we would subject these judges – and the only accountability. If the judges are good men, they will be re-elected, and if they are bad men, or bad judges, they will have served too long if their term be but four years.⁹³

Noting that the public may sometimes elect a bad judge, the delegates supporting elections stressed that this decision can be rectified by removing the judge from office following their term. The idea of accountability is framed not as a poison but as an added incentive to perform better. Eventually, election systems provide judges that are more capable and responsive to the public. Advocates for judicial elections took issue with the contention that judges will be honest no matter what. While this is fine in theory, examples of dishonest judges are provided as a justification for the argument that true honesty is only possible in electoral systems.

Other delegates supported judicial elections, reasoning that democracy required it. Allowing executives or legislatures to make decisions independent of the public would produce the system that existed during colonial times. As delegate Mitchell expressed, “The reason why the judge should be answerable to the rest of mankind, at fixed periods of time, rather than to the crown, is to be found in this fact: That the mass of mankind are always in favor of the right and proper discharge of the duties of office; whereas, the crown requires subservience” (July 3, 1850). Similarly, Delegate Stanton argued that:

There is no doubt but the people are the safest, as well as the only just and proper depositories of sovereignty, because they can have no motive to do wrong. Their errors are errors of judgment only. And they rarely err in judgment, except through the influence of passion or prejudice. I agree that the judge should look forward to the approbation of an enlightened and upright public opinion, to be pronounced upon

⁹³ 1851 Reports, July 3, 1850.

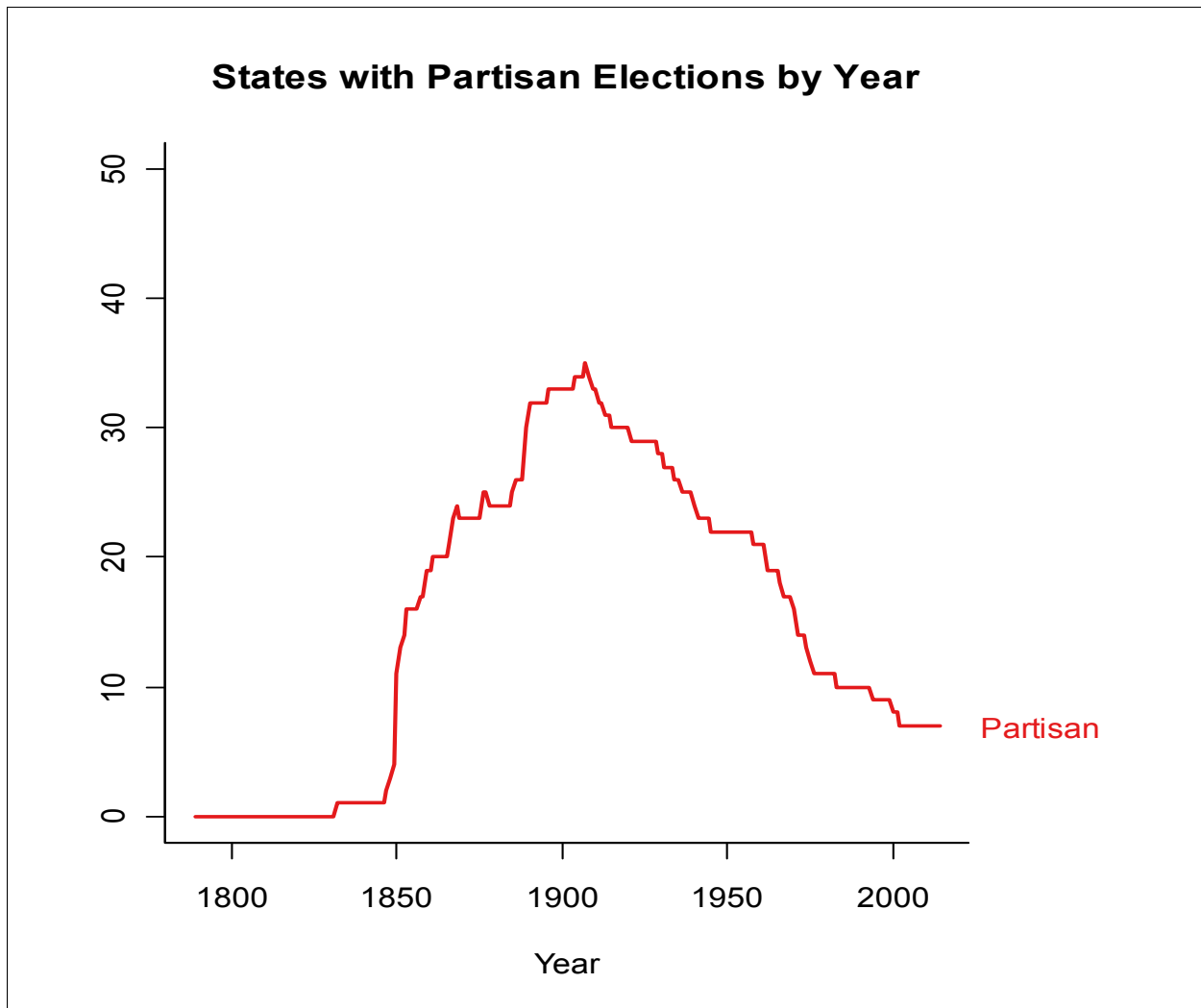


Figure 4.1. Total Number of States with Partisan Elections per Year

thorough, calm and unbiased reflection, when he has passed beyond the reach of the noise and clamor, and malice of interested or prejudiced partisans.⁹⁴

Interestingly, in an effort to assuage fears and predictions of doom, several of the delegates advocated for term limits and age restrictions. References were made to the success of other states using these restraints. Delegates also explicitly referenced the communication they had with judges and other officials across state lines. Delegate Kennon stressed “we have taken

⁹⁴ 1851 Reports, July 3, 1850.

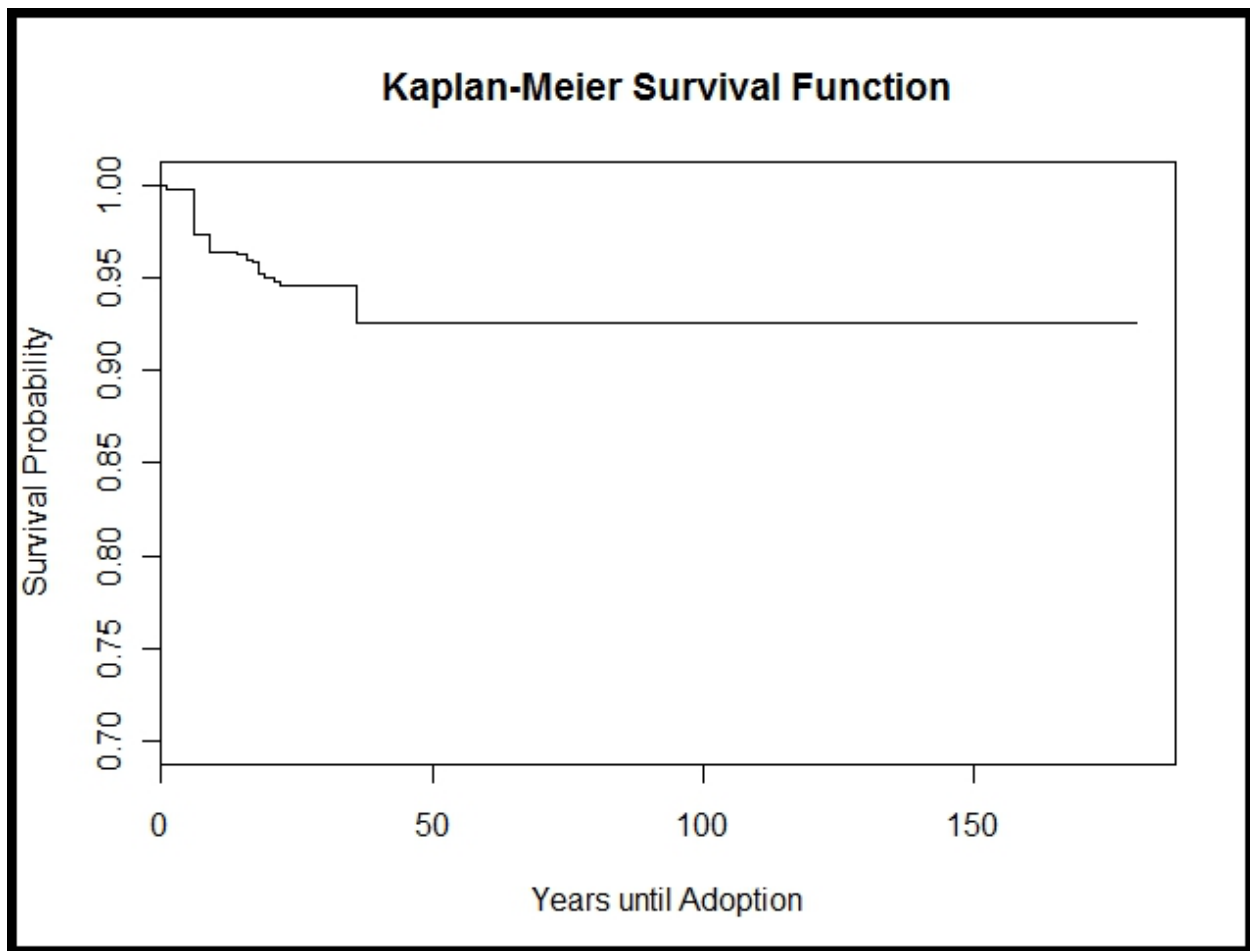


Figure 4.2. Kaplan-Meier Survival Function for Partisan Election Adoption

some pains to see what has been done by the people of other states – what other men have done in this department, who have gone before us, and who may be regarded as democratic.”⁹⁵ This communication revealed some ramifications of system change, as they were able to look at states that had already implemented these reforms. While not a frequent occurrence, Mississippi and New York are both cited as reasons to support judicial elections given their experiences as leading states.

⁹⁵ 1851 Reports, July 3, 1850.

As noted earlier in this chapter, Mississippi was the first state to adopt partisan elections in 1832. As shown in Figure 4.1, rapid adoption did not follow. Rather, there was a period of 15 years in which no other state adopted partisan elections. The next state to implement such a system was New York in 1847, at which point rapid expansion began to occur. This trend continued until the turn of the twentieth century, when states began moving away from partisan elections. As is evidenced in Figure 4.1, the dramatic rise in adoption of partisan judicial elections is matched by the dramatic abandonment of this system of selection.

Quantitative Analysis of Partisan Judicial Elections

In order to test the reasons why states adopted partisan elections, data were collected on every state beginning in 1832, the year that Mississippi became the first state to adopt partisan judicial elections.⁹⁶ The data run through 2014 as states are still at risk of adopting partisan systems. The model includes a mix of internal and external variables. The primary external variables measure the influence of other states and the Jacksonian movement. The main diffusion variable in this analysis is the proportion of surrounding states utilizing partisan judicial elections. This variable measures the percentage of border states that have partisan judicial elections. The internal variables of interest measure state-level divided government, state urbanization, the existence of state bar associations, the number of times a state has switched selection system in the past, and whether or not a state held a constitutional convention.

Figure 4.2 provides a visual representation of the survival probability of states at risk of adopting partisan elections. The likelihood of a state adopting partisan elections increases for the first 35 years following the first adoption in Mississippi. The probability of adopting partisan judicial elections diminishes as time goes on which represents states gradually moving away

⁹⁶ In order to model the risk of adoption, it is common for survival analyses to begin at the time of the first actor to adopt a new policy.

Table 4.2. Cox Proportional Hazards Results: 1832-2014

DV: Partisan Adoption	Coef. (Std. Error)
Surrounding State Percentage	2.26** (.91)
Divided Government	-.64 (.50)
Percent Urban	-.03 (.01)
State Bar Organization	.33 (.50)
Number of Prior Changes	1.76*** (.35)
Jackson	-.52 (.73)
Constitution	4.24*** (.94)
Number of Observations	2,278
Number of Events	37
AIC	135.2922

*0.1, **0.05, ***0.01

from partisan elections. Interpretation of survival rates provides a glimpse into the overall hazard rate. Other than offering a look into how dichotomous variables influence hazard rates, not much can be said about the impact of individual covariates as Kaplan-Meier survival plots are not based on the influence of the independent variables. The Cox proportional hazards model results are presented in Table 4.2, which demonstrate several interesting conclusions. The results indicate that internal and external factors influence the probability that a state will switch to partisan elections.

The proportion of surrounding states variable is statistically significant and signed in the hypothesized direction. Consistent with diffusion theory, adoption of partisan judicial elections by border states has a positive and significant impact on states transitioning to a merit based system. The greater the proportion of states with partisan elections surrounding a state, the

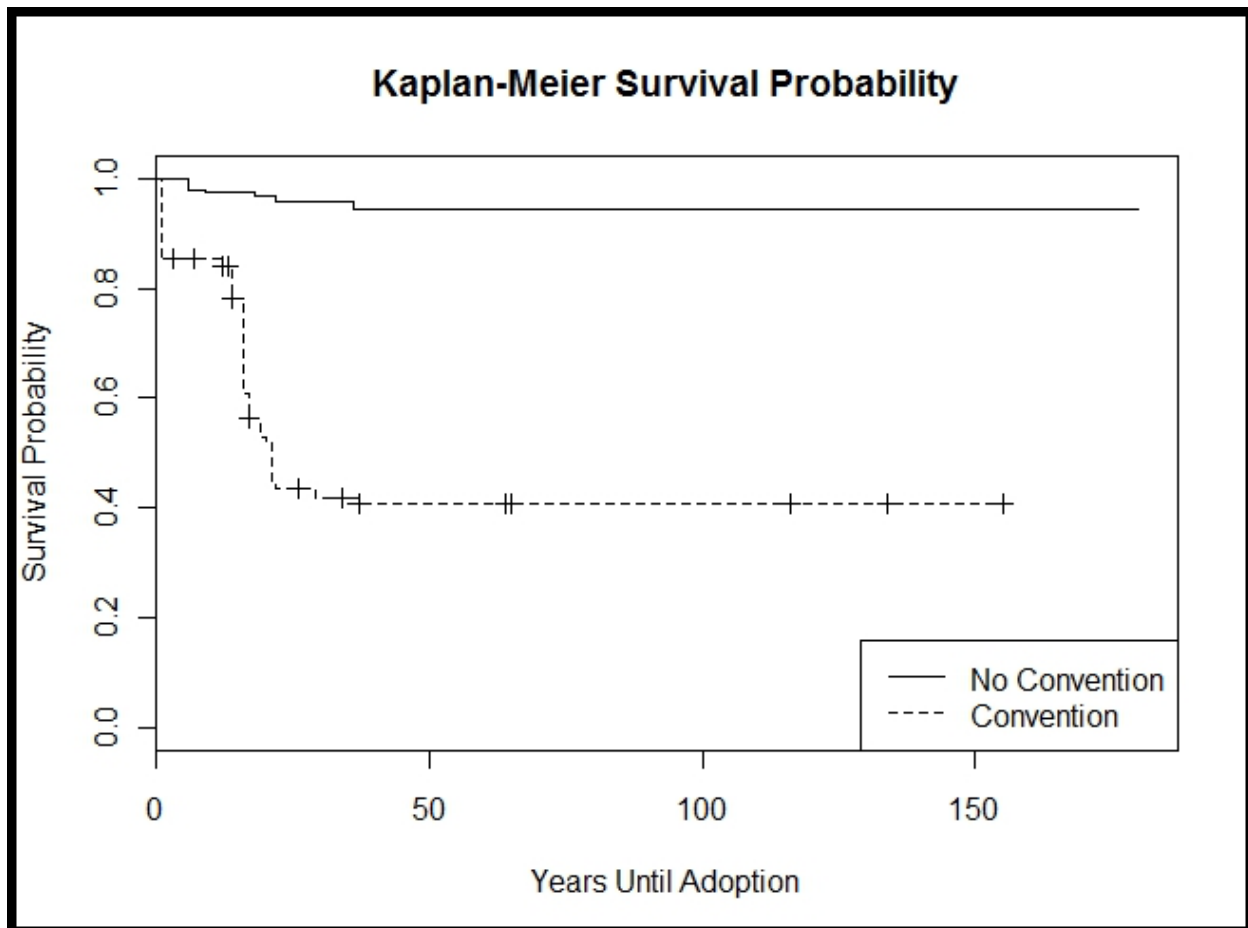


Figure 4.3. Kaplan-Meier Survival Function by Constitutional Convention

greater probability they experience the event, in this case the adoption of partisan elections. All else being equal, states that are completely surrounded by states with the partisan elections are eight times more likely to adopt the merit system. Thus, as states are increasingly surrounded by states with partisan elections, they are more likely to adopt such a system. This supports the theory that external characteristics influence the likelihood of a state adopting partisan elections. Also evident is that the diffusion variables do not perform consistently across different models.

Using a single regional diffusion variable instead of the surrounding states measure does not result in a significant relationship.⁹⁷ While not easy to interpret, a positive result would indicate that regional patterns exist. While the percentage of surrounding states with partisan elections affects the likelihood of adoption, the single regional diffusion variable fails to attain significance. Thus, the general region variable appears to be too blunt to capture regional influence. Taken together, these results support the contention that regional diffusion should be included in models of state policy diffusion and that the way these influences are measured is important. These results indicate that diffusion is partially attributable to forces external to a state.

Internal factors are also part of the explanation for the diffusion of partisan judicial elections. In addition to the influence of surrounding states, two internal variables also have positive and significant effects on the hazard rate. First, the number of prior changes to judicial selection has a significant and positive impact on the hazard rate. States that have experimented with different selection systems are more prone to adopt partisan judicial elections. It is important to keep in mind the time period being investigated. As states progress through time, the trend is to move first from appointment to partisan elections. States then typically switch to nonpartisan elections and eventually merit selection. Many of the states that adopted partisan selection did not have numerous changes prior to adoption, but many had one alteration. Several of the states in this time period altered appointment schemes at least once. This proclivity to change appointment schemes also affected the likelihood of experimenting with partisan elections.

⁹⁷ See Appendix for results.

The final variable to achieve significance is the formation of a new constitution. This variable is also significant and in the predicted, positive direction. States that create new constitutions are over 69 times more likely to adopt partisan elections. Figure 4.3 presents the survival function based on whether or not a state held a constitutional convention. This graph compares states that held constitutional conventions to those that did not. Corroborating the descriptive accounts of partisan adoption, this graph shows states holding a constitutional convention had a much greater probability of adopting partisan elections compared to states that did not. Such a large impact verifies the suggestion that how states alter policy matters. Amending the constitution to provide for partisan elections is a difficult task. As a result, constitutional changes are more likely in years where a system-wide overhaul is occurring. States adopting new constitutions were much more likely to abandon appointment in favor of partisan elections. Likewise, new states were likely to adopt partisan elections as their first system of judicial selection.

Curiously, urbanization, divided government, the presence of state bar associations, and the time period associated with the Jacksonian movement do not achieve conventional levels of significance. The lack of an effect for urbanization and bar association influence may be attributable to the time period when most states adopted partisan elections. The peak of partisan election popularity was in the late 1800s just as the industrial revolution was beginning. Thus, when most states opted for partisan elections, they were predominantly rural. Though bar associations are commonly associated with reform, it is not surprising that the measure for bar professionalism is not significant. While the earliest bar associations were formed in the 1870s, most of them were established in the late 1800s and early 1900s. In addition, it took time for bar organizations to become institutionalized and play a prominent role in lobbying for reform. It is

likely that this is the reason no effects are found in any of the models in terms of bar professionalization.

On the other hand, the lack of significance for the Jacksonian period is interesting. Anecdotal accounts are filled with references to the influence of this national movement on the states. In my own analysis of Ohio's convention debates, rhetoric focused on democratic values and popular sovereignty frequently. When measured empirically, the time period associated with the Jacksonian movement fails to influence the hazard rate of partisan adoption. Of course, one possibility is that a binary variable measuring the impact of a specific time is too crude to capture the true impact of the Jacksonian movement. Another possibility is that, when combined with these other influences, Jacksonian impulses were not a powerful motivator. Regardless, grandiose claims about the ability of the Jacksonian movement to shape policy find no support in this analysis.

Conclusion

The case studies from Mississippi and Ohio reveal that internal and external factors influenced these states' decisions to adopt partisan elections. The empirical results verify this contention, showing that internal and external characteristics influence the rate of adoption of partisan judicial elections. Models explaining policy change that focus on one or the other miss potentially powerful forces of policy diffusion.

The influence of surrounding states is significant, indicating that states respond to external influences. It appears that states learn from those closest to them. In the case of partisan judicial elections, the qualitative information and quantitative results show that states respond to other states. The results of the Cox model do not provide a substantive rationale for this, but the anecdotal evidence suggests some explanation. Members of both the Ohio and

Mississippi constitutional conventions referenced the experiences of other states as evidence for or against adopting partisan elections. Delegates were able to use the experiences of other states as evidence to support their position. The ease with which policy can be altered also influences states to jettison the status quo and experiment with partisan adoption. States adopting a new constitution, as well as states that are modifying their existing constitution via constitutional convention, are much more likely to adopt partisan elections. In addition, some states are more prone to changing policy in the area of judicial selection. Some states appear to be hesitant to alter selection systems, while others change multiple times. These results should also give pause to claims that the Jacksonian revolution was the primary motivating factor in states that moved towards partisan elections for judges.

While this analysis is telling, it is not without its flaws. For example, I do not account for specific high-profile leaders or proponents of change within a state. It is possible that prominent figures lend credibility to partisan elections influencing a state to move toward adoption. In addition, this analysis does not analyze communication across state lines. While anecdotal evidence is provided in the form of speeches delivered during the Ohio constitutional convention, communication is not systematically measured. This is a difficult concept to measure. Recent attempts to capture this influence rely on surveys of policy makers assessing the extent of communication with other states and policy leaders. This is not an option when attempting to decipher the influence of communication channels from this time period. Finally, anecdotal evidence suggests that popular dissatisfaction with certain judges, high profile events, and scandals may have prompted states to convene constitutional conventions in the first place. Such salient events are not explicitly measured in the models. Though model results are illuminating, other factors may be involved.

CHAPTER 5:

TRANSITION PERIOD TWO: THE SWITCH TO NONPARTISAN ELECTIONS

The expectation was that nonpartisan elections, by insulating judges from ordinary political pressures, would encourage them to behave more like statesmen and less like politicians. Correspondingly, the Progressives and other reformers hoped that facts such as professional qualifications and other merit-based criteria would become central to judicial contests.

Brandice Canes-Wrone and Tom Clark⁹⁸

This chapter explores the second transition phase of judicial selection. Partisan elections were a revolutionary idea and diffused rapidly following an initial lag. However, the popularity of partisan elections was temporary. As rapidly as states embraced partisan elections, they dropped them in favor of nonpartisan contests for judicial office. This chapter begins by providing a general overview of nonpartisan elections and shows how nonpartisan replacement diffused across the states. Next I provide a case study of Ohio and West Virginia. This provides context for the empirical analysis that follows.

As adoption of partisan elections spread, hopes were high that judges would be independent of legislative control. Implementing partisan elections was as much about independence from unpopular legislatures as it was about making judges accountable to the public. Of course, the results did not align with predictions.

Excising judicial selection from legislatures did not remove politics from the selection process as intended. Partisan elections heightened the influence of politics, as political parties

⁹⁸ Canes-Wrone, Brandice and Tom Clark. 2009. "Judicial Independence and Nonpartisan Elections" *Wisconsin Law Review*. 21 (64): 21-65.

seized the opportunity to gain a hold in the judicial branch. They were largely successful (Winters 1965). During the 1860s, for example, the Tammany Hall political machine in New York City “seized control of the elected judiciary” and installed judges who lacked experience and competence (Winters 1965). Accounts of the time are filled with examples of judges who did not know the business of law, or the law itself, yet were successful because they did the bidding of the party machines to whom they owed their success. If the goal was to protect judges from political pressure, partisan elections were not the answer.

Beyond the influence of party organizations, partisan elections were also accused of doing little to boost public knowledge of judicial candidates and the judicial branch itself. Voting was based on partisan loyalties, not on the quality, record, or character of the candidate. Even informed voters lacked much influence over the process of selecting a judge. In many cases, general election candidates were those selected by political parties in primaries. Controlling the primary process and determining who the general election candidates would be permitted the parties to control the composition of the bench. In addition, closed primaries requiring voters to declare their partisan affiliation before casting a vote reduced the ability of the opposing party to disrupt the preferred slate of candidates favored by party machines. Average voters had no influence over who the party candidates would be in the first place. Fallout from partisan elections was so vitriolic and negative that some states opted to revert back to appointment selection schemes.⁹⁹

If the Jacksonian movement was the dominating theme that resonated during the mid to late 1800s, the Progressive Era, lasting from approximately 1890 to 1920, is credited with many reforms of the late 1800s into the 1930s. Numerous scholarly accounts attribute nonpartisan

⁹⁹ Mississippi and Virginia, both states that had abandoned appointment in favor of partisan elections, returned to appointment.

reforms to progressive efforts. A goal of the progressive movement was to increase efficiency and effectiveness of government. A precursor to achieving this goal was to staff government positions with capable and qualified individuals. As far as judges were concerned, this would mean removing partisan incentives while trying to retain accountability. Thus, the reform proposed was not to move away from judicial elections but to transform them. A straightforward approach gained popularity in the early 1900s. Converting partisan contests to nonpartisan elections required the removal of party identification from the ballot. The intended goal in omitting the Republican/Democrat label was to remove partisan motivations for judicial selection.

Nonpartisan elections became the clarion call for several organizations including the American Judicature Society, the American Bar Association, and many state bar associations. These organizations saw this conversion as a promising way to remove the pejorative influence of partisanship from the judicial arena. While the debate about the success of this approach continues, many organizations still see nonpartisan elections as a vast improvement over partisan elections. According to Park, organizations such as the American Bar Association, Common Cause, and the League of Women Voters maintain the belief that partisan elections unavoidably lead the public to view judicial candidates and judges as regular politicians and not “disinterested guardians of the law” (2011, 164). Park argues that, at a minimum, nonpartisan elections should be used though these organizations now embrace the merit plan as the best alternative to partisan elections. On the other hand, realizing that moving partisan elections to the merit system may be too drastic a change, these organizations still promote nonpartisan elections as a better course of action than partisan contests.

Table 5.1. States and Nonpartisan Judicial Elections

State	Years in Use	Means of Adoption
Alabama	NA	NA
Alaska	NA	NA
Arizona	NA	NA
Arkansas	2000-2015	Constitutional Amendment approved by voters
California	1911-1934	Legislature established
Colorado	NA	NA
Connecticut	NA	NA
Delaware	NA	NA
Florida	1971-1975	Legislature established
Georgia	1983-2015	New Constitution
Hawaii	NA	NA
Idaho	1934-2015	Amendment approved by voters
Illinois	NA	NA
Indiana	NA	NA
Iowa	NA	NA
Kansas	NA	NA
Kentucky	1975-2015	Amendment approved by voters
Louisiana	NA	NA
Maine	NA	NA
Maryland	1941-1969	Legislature established

Table 5.1 (Continued)

State	Years in Use	Means of Adoption
Massachusetts	NA	NA
Michigan	1939-2015	Constitutional Amendment
Minnesota	1912-2015	Legislature established
Mississippi	1994-2015	Legislature established
Missouri	NA	NA
Montana	1935-2015	Legislature established
Nebraska	NA	NA
Nevada	1915-2015	Legislature established
New Hampshire	NA	NA
New Jersey	NA	NA
New Mexico	NA	NA
New York	NA	NA
North Carolina	2002-2015	Legislature established
North Dakota	1909-2015	Legislature established
Ohio	1911-2015	New Constitution
Oklahoma	NA	NA
Oregon	1931-2015	Legislature established
Pennsylvania	1913-1920	Legislature established
Rhode Island	NA	NA
South Carolina	NA	NA
South Dakota	1921-1979	Legislature established
Tennessee	NA	NA

Table 5.1 (Continued)

State	Years in Use	Means of Adoption
Texas	NA	NA
Utah	1951-1984	Legislature established
Vermont	NA	NA
Virginia	NA	NA
Washington	1907-2015	Legislature established
West Virginia	NA	NA
Wisconsin	1913-2015	Legislature established
Wyoming	NA	NA

Compared to the spread of partisan and merit selection, the adoption of nonpartisan judicial elections follows a different pattern. In partisan and merit plan adoption, an initial state experimented with a new system and more than ten years passed until the next state followed their lead. The nonpartisan election selection system diffused much quicker and, compared to partisan elections, has not experienced a steep drop in the modern era. They remain a viable alternative.

Since 2000, Arkansas, North Carolina, and West Virginia have switched to nonpartisan elections. This indicates that switching to nonpartisan elections is not just a theoretical option for states. The primary question investigated in this chapter is why states, in rapid succession, begin to jettison judicial selection methods in use in favor of nonpartisan elections. Table 5.1 includes all states and indicates the years that states employed nonpartisan judicial elections, if they ever had them, and how nonpartisan elections were adopted.

Qualitative Analysis of Nonpartisan Judicial Elections

This analysis of the adoption of nonpartisan judicial elections proceeds in the same fashion as Chapter 1. Descriptive accounts of two states are presented in order to uncover the circumstances that led an early adopter (Ohio) as well as a later adopter (West Virginia) to adopt nonpartisan judicial elections.

Ohio: Early Adopter/Innovator

From 1851 through 1911, Ohio Supreme Court judges were chosen in partisan elections. In the same way that partisan elections were often adopted, Ohio made the switch to nonpartisan elections via a constitutional convention. Though not the first state to embrace nonpartisan elections, Ohio was among the earlier states to employ this method. It was the fifth to do so, only five years following the first state.¹⁰⁰ At the time of adoption, Ohio had been using partisan elections for 51 years. This raises questions as to why Ohio opted to forego partisan elections in favor of nonpartisan judicial contests.

Whereas judicial reform was a critical element of the constitutional convention of 1851, reforming the Ohio judicial system was not the focus of the 1912 convention. Issues that took center stage were tax reform, women's suffrage, and working conditions in the state (Terzian 2004). Nevertheless, judicial selection re-emerged albeit with a lower profile this time around. Most scholarly accounts describe the alteration of judicial selection as a result of intense pressure by progressives in the state legislature (Hall 1984). In marked contrast to the high-profile

¹⁰⁰ Washington was the first state to adopt nonpartisan elections in 1907.

discontent experienced before the 1851 convention, there is little evidence that the public was incensed over judicial conduct under partisan elections.

In addition to the lack of high profile scandals, there appears to be little concern over voter participation in judicial races. In fact, the main question regarding judicial administration at the convention was not judicial selection, but instead the operation of circuit courts.¹⁰¹ Another controversial issue was the number of supreme court judges required to overturn lower court decisions and decisions striking down state laws (Terzian 2004).

One of the central criticisms levied at partisan judicial races is that such races convey the impression that judges are simply politicians in robes (Murphy et al. 2006). As a result, this disillusioned the public and depressed voter turnout. But there is no evidence that voters were abstaining from voting in judicial races in Ohio preceding the switch to nonpartisan races. This is not to suggest that political parties were not active. Parties were involved in judicial selection from the time partisan judicial elections were adopted in 1851 until they were abandoned in 1911. During this time, political parties selected judicial candidates who were then included on party tickets (Solamine 2006). Despite this, voting rates remained consistently high during the period of partisan elections. Interestingly, it was only after the adoption of nonpartisan elections that turnout in elections suffered. Following the adoption of nonpartisan races, ballot roll-off increased, the opposite result of what was hoped by reformers (Solimine et al. 2003).

The lack of scandal, consistent voter turnout, and no public outcry, prompts the question as to why Ohio would disturb the status quo without a triggering event. As mentioned above, the conventional wisdom is that Progressives pushed judicial reform through as part of a broader

¹⁰¹ Similar to the federal courts at the time, the Ohio Constitution required state circuit judges to ride circuit. A related concern was that new trials were held at the circuit level. This resulted in two trials, one at the lower level and one at the circuit level. Reformists wanted to change this to have trials in the lower courts and review at the circuit level.

agenda to improve government (Hall 2009). Attempts were made in 1874 and 1891 to hold another constitutional convention, but failed. By 1909, demand for reform was so great that the Ohio legislature initiated the process of convening a constitutional convention earlier than originally planned (Terzian 2004). A manifestation of this drive to reform was the conversion of partisan judicial selection to nonpartisan by eliminating the use of party labels on the ballot.¹⁰² From the early calls to have a new convention, to the convention itself, progressive ideas had a strong support base. After success in initiating the convention, the Ohio Progressive League elected delegates sympathetic to progressive ideas. Once the convention was convened, Herbert Bigelow, a prominent Progressive, was elected president (Terzian 2004).¹⁰³

In the lead up to the constitutional convention, partisan power had shifted. In the 15 years prior to the convention of 1912, partisan control had reversed resulting in Democrat control in the House and the Senate. This seems to support the influence of liberal pressure to change government. At the same time, Progressive legislators served in the legislature, but only for a brief period of time. From 1912 through 1915 there were a total of four Progressives in the Ohio legislatures between both the house and the senate. In the 1912 session, Progressives comprised six percent of the legislature, which then dropped to one percent in the 1914 session. Despite the low number of Progressive legislators, the Democrats supported the liberal ideas associated with the progressive movement.

Progressive ideas also found support in Ohio from the mayor of Cleveland, Tom Johnson, who was a prominent and well-known progressive supporter. Consistently, Mayor Johnson

¹⁰² In addition to the adoption of nonpartisan elections, Ohio also required that judicial names be rotated on the ballot.

¹⁰³ Bigelow was elected on the 11th ballot. He received the bulk of his support from democratic delegates indicating that democrats were “more sympathetic to reform than the latter” (Terzian 2004, 384).

advocated the adoption of policies that would “open the political system” (Terzian 2004).

Another prominent supporter was the Direct Legislation League, a progressive group striving to generate public support for a new constitutional convention. The Direct Legislation League “viewed a constitutional convention as a means to incorporate their reforms into Ohio’s fundamental law, beyond the power of political party bosses to repeal or subvert” (Terzian 2004, 382).

Another pro-reform group active in Ohio during the time was the Ohio Progressive Constitutional League. This organization spearheaded campaigns to place pressure on representatives to convene a new constitutional convention. A critical part of their strategy was to sponsor and support candidates espousing progressive ideas. According to Terzian, “with such an array of progressive forces enlisted in the campaign to elect delegates, the resulting convention had a distinctly progressive character. More than half of the delegates were progressive” (2004, 384). In the end, much of the judicial reform agenda was adopted. Adopted reforms included ending circuit riding, the two trial and one review process, easing the ability of the Ohio Supreme Court to overturn circuit decisions striking down legislation, and making it more difficult for the Ohio Supreme Court to nullify state progressive laws.

According to these scholarly accounts, there were several reasons for judicial reform during the course of the 1912 convention. In order to determine the accuracy of these claims, I analyze *The Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* hereto referred as 1912 Reports.

Inspection of the debate records confirm that judicial selection was not the most urgent judicial problem addressed. In fact, judicial selection does not appear until the very end of the debates over judicial structure. The main debates were concentrated on the number of Ohio

Supreme Court judges required to declare laws unconstitutional, the inefficiency of the court system due to the structure of the circuit courts, and the jurisdiction of the circuit courts.

Analysis of the convention debates on judicial selection yields surprising results.

Initially, before moving onto a vote to strip partisan labels from the ballot, there was a debate to return to appointment. Central to this debate was a return to a discussion regarding the proper balance between accountability and independence. Speaking on the floor, Delegate Evans asserted the following:

A judge should be absolutely independent. This cannot be attained by any means whatever unless the judge is appointed or elected to serve during efficiency. No judge can be made absolutely independent unless he is appointed permanently, subject only to good behavior and efficiency. The wit of man has never devised and can not devise any plan to make a judge independent except to make his tenure permanent. In the election of judges, the people of this state and other states who have elective judges have defied the experience of the whole world. Not a country of Europe would for a moment consider the question of adopting our plan of elected judges for short terms. Why should the people not elect judges? Because it is impossible for them to know or pass upon the fitness or qualities of the candidate for judge for the office and for that reason they should not determine the judgeship by their votes. When we place on the voters the determination of questions they can not properly determine, either from want of knowledge or inability to obtain it, then the voters are compelled to perform a function which they can not intelligently discharge. In such a case they must vote for some reason and they do so by political label or by newspapers reports of a candidate.¹⁰⁴

This argument was raised on the first day of debate over judicial selection, though a vote was never taken that would have reinstated appointment of Ohio Supreme Court judges. Rather, the debate quickly turned towards the influence of political parties in the selection process. Noting that there were only two political parties that dominated in Ohio, delegates stressed that judicial power had been concentrated in the hands of the Democrats and Republican legislators. As was referenced in scholarly accounts of Ohio's transition to nonpartisan elections, partisan control of the primaries dramatically limited the ability of the public to select judges. This

¹⁰⁴ 1912 Reports, Thursday, April 4, 1912, p. 1051.

sentiment is echoed in the debates on this issue. For example, Delegate Evans, in the course of advocating a return to appointment, states that:

The power of nomination in the selection of judges is the real power, and the people have never had that power, and it is the intention of the political managers that they never shall have it and to keep that power, they insist on the election of the judges, which means that they have the kernel of nut and give the shell to the people.¹⁰⁵

Evans was expressing discontent with the experiences of the past 61 years. He goes so far as to say that “the political parties by their conventions have nominated the judges and judgeships have been and are sold, bartered and exchanged like any political plunder.”

Also troubling to critics of partisan selection of judges was the quality and competency of those who won partisan elections. One of the reasons for the call for nonpartisan elections was to increase the professionalization of the bench. Professionalization would require these positions be staffed with qualified individuals capable of adequately performing their duties. Again, Delegate Evans finds no possibility of professionalism in a system of judicial elections, stating:

The bosses, like savage political chiefs, who without any responsibility name the judges, really select them and the pretended election by the people is a farce. I would rather that the governor, whom I know, or can know should name the judges, than that they should be named by irresponsible politicians who have no interest to serve but their own. The selection of these officers at an election is no better than gambling. We are liable to have too many political accidents. Look at the last election of supreme judges in Ohio. Two competent and able judges were summarily dismissed by a political revolution, and two new and untried men given their places, when neither of the four were considered by the people in casting their votes for these offices. Such happenings are a disgrace to the administration of justice and ought to be put to an end.¹⁰⁶

The influence of party bosses emerges as a prominent concern of the delegates to the convention. This is not their only concern. Fears about quid pro quo arrangements between judges and powerful litigants were raised. The temptation of judges to decide cases in favor of

¹⁰⁵ 1912 Reports, Thursday, April 4, 1912. p. 1052.

¹⁰⁶ 1912 Reports, April 4, 1912, p. 1052.

parties willing to compensate them for favorable rulings was a concern raised by delegates to the 1851 Ohio convention as well. The argument was premised on the nature of having a judge be dependent on the population for retention of his seat. While some questioned the ability to staff the bench with qualified judges due to party control, others did not doubt the competency of judges. The concern was that these abled-bodied jurists were placed in a position that rendered them incapable of doing due diligence on the bench. Speaking on the convention floor, Senator Theodore Burton claims that:

The function of judges is not to pass laws; it is to interpret them, to maintain justice and right between man and man. One important part of their duty is to stand firmly against the oppression of majorities and the power of selfish interests. It is of the utmost importance that judges should as far as possible be removed from the turmoil and strife of political contests and from the demands which are based upon excitement or clamor. A defeated litigant is seldom philosophical. Oftentimes decisions must be rendered which offend numerous citizens, and that judge, who by reason or the fear of an abrupt removal must constantly stand in awe of discontent or excitement, cannot properly perform his duty.¹⁰⁷

Despite these fears, calls to end the process of judicial elections emanated from the minority. Even Senator Burton did not call for the abolishment of judicial elections. Rather, he stated that, “it is of the utmost importance that judges should be as far as possible be removed from the turmoil and strife of political contests and from the demands which are based upon excitement or clamor” (753). Thus, it seems that nonpartisan elections work as a compromise position between those who wanted to abolish elections and those who wished to retain this system. This middle ground garnered support based on the argument that, while remaining accountable, the removal of partisan labels would properly cure the problems associated with party influence. In addition, the bench would become more able to perform their duties in accord with popular expectations. Delegate Halfhill provides a good example of the moderate character

¹⁰⁷ 1912 Reports, March 19, 1912, p. 753.

of this position in stating, “so when you come to select this judge and come vote on a nonpartisan ballot you will eventually get more satisfactory judges in those counties where the county is not now of itself a subdivision; and this is something that immediately interests and touches all of the people of the state of Ohio.”¹⁰⁸

Finally, while the bulk of the debate centered on the corrupting influence of political parties on the courts, there are a few references to other states adopting progressive reforms. Though these citations of other states did not focus on the judiciary, there are indications that Ohio delegates were looking outward when deciding internal policies. For example, debates concerning the inclusion of initiative and referendums into the lawmaking process cite states that had enacted these reforms and the positive benefits that flowed from them. While it is not surprising that Ohio did not reference other states using nonpartisan elections because of how new they were at the time, it does indicate that policy lessons from other states were important.

One final point of contrast between the 1912 convention and the convention of 1851 was the influence of national figures. While the 1851 convention was devoid of national leaders attempting to influence the delegates, the convention in 1912 featured a high profile speech delivered by Theodore Roosevelt on February 21, 1912. While his comments were not focused on judicial selection, his speech was filled with progressive rhetoric. His main concern was the debate over the recall of judges. He noted that judges are powerful figures that can and do exert power over the public. As a result, Roosevelt pushed for the passage of the recall amendment. Negating the argument that the people would abuse this privilege, Roosevelt expressed confidence in the public that they would exercise this power prudently.

West Virginia: Late Adopter/Innovator

¹⁰⁸ 1912 Reports, April 24, 1912, p. 1401.

If Ohio is an example of a state leading the way for nonpartisan elections, West Virginia serves as a contrast. West Virginia only recently adopted nonpartisan elections in 2015.¹⁰⁹ This conversion took some by surprise. West Virginia opted to retain elections and did not embrace the merit plan. Furthermore, West Virginia had been using partisan elections consistently since 1862. Why did West Virginia decide to alter selection methods in the first place? Why did the legislature opt to retain elections?

Though West Virginia's conversion to nonpartisan elections is recent, it has been a long process that spans decades. The Brennan Center for Justice notes that proposals to abandon partisan elections have been supported by the West Virginia State Bar Association and the state Chamber of Commerce for over 20 years. Despite the endorsement of prominent organizations, persuading the legislature to take up this measure was a difficult task.

Events within the last decade increased pressure on the legislature to curtail high amounts of campaign spending during judicial elections. West Virginia was home to the judicial election that would result in the United States Supreme Court deciding *Caperton v. Massey Coal*, 556 U.S. 868 (2009). While this was notable at the national level for creating a standard for recusal at the state level, it was also a high-profile event in the state. During the 2004 election, incumbent Warren McGraw was running against challenger Brent Benjamin. This contest was bitterly fought and waged in the public eye. Interest groups opposed to McGraw spent approximately \$3.6 million in their successful effort to unseat McGraw (Streb 2004). McGraw and Benjamin raised an additional \$376,000 and \$540,000 respectively. Combined with the \$1 million raised by trial lawyers and labor unions, this became one of the most expensive judicial races in history.

¹⁰⁹ Governor Tomblin signed the bill on March 25, 2015, and nonpartisan elections went into effect on June 10.

The amount of money spent was not the only source of criticism. The negative tone that the challengers took also generated backlash. One of the primary groups backed by Massey Energy CEO Don Blankmanship was the organization And for the Sake of the Kids, which ran ads declaring McGraw a friend to child molesters. Reaction from the media, politicians, and judges was swift, with the majority condemning the rhetoric and tactics used during this campaign.¹¹⁰ Outspoken opponents of judicial elections frequently reference these types of campaigns as fuel for their arguments to abandon judicial elections.

Races such as these have kept alive the cause of discontinuing partisan elections. In 2009, The Public Policy Foundation of West Virginia published a report urging the legislature to adopt change immediately. Included in this report are letters from federal and state judges. Within this report, former United States Supreme Court Justice Sandra Day O'Connor notes the influence that money has on the public's perception of the court and urges a move away from partisan elections. O'Connor's advocates that West Virginia adopt the merit system, but she is also supportive of nonpartisan elections as a better option compared to partisan elections. According to O'Connor, "if contested judicial elections are to continue, they should be made nonpartisan. Judges should be fair and impartial, with allegiance to the law rather than to a particular political party" (cited in Sobel and Hall 2009, 3). In addition, North Carolina State Supreme Court Justice Wanda Bryant, references her experiences campaigning in partisan judicial elections which include raising money and contending with the large sums of outside money. Dissatisfied with her experiences, Justice Bryant urges West Virginia to alter their system of judicial elections.

¹¹⁰ Adam Liptak, "Judicial Races in Several States become Partisan Battlegrounds," *The New York Times*, October 24, 2004.

While the bill to institute nonpartisan elections passed with bipartisan support in the West Virginia legislature, the reform was primarily endorsed by Republicans. For years, Republicans had been advocating for reform. Republicans were in the minority for most of this time, however. The initial bill switching to nonpartisan elections was introduced in 2010 and sponsored by Republican delegate Kayla Kessinger. Lacking political support, this measure never made it to the governor's desk. This changed in 2014 when Republicans won a majority in the House and a Democratic state senator switched partisan affiliations in the Senate breaking a 17-17 deadlock.¹¹¹ With Republicans now in control for the first time in years, they were able to pass a series of reforms including changing judicial elections to nonpartisan contests.¹¹² Though initially vetoed by Democratic Governor Tomblin, citing concerns that such a change would not eliminate the underlying problem of big money in judicial elections, he eventually signed the bill on March 25, 2015.

Prior to passage of the bill, supporters were outspoken about both the benefits and costs of such legislation. Republican supporters wrote editorials, made television appearances, and delivered public speeches. Advocates boasted about benefits such as removing the taint associated with judicial elections, attracting quality candidates, increasing the number of lawyers running for office, and removing politics from the process. Sponsor Kayla Kessinger consistently promoted the idea that this measure would require voters to focus on the qualifications and job performance of judges and not political ideology. Kessinger derides the influence of politics stating that “judges should be elected based on factors other than their political party. Politics should not be at the forefront of their minds when determining court

¹¹¹ Reid Wilson, “Party Switch gives Republicans Control of West Virginia Senate,” *The Washington Post*, November 12, 2014.

¹¹² The bill passed 90-9 in the House of Delegates and 33-1 in the Senate.

cases.”¹¹³ The West Virginia Chamber of Commerce, a supporter of nonpartisan contests, conveyed similar sentiments. Chamber President Steve Roberts stated that “our only regret is that it took this long for the bill to pass. We have been strong advocates for a very long time of getting the partisanship out of our judiciary. We think getting the politics out of the courts is a very important step on the way to ensuring a better legal climate in West Virginia and fairer trials everywhere.”¹¹⁴

The bill received broad praise but positive assessments were not universal. Opposition came from the West Virginia Association for Justice due to the loss of information to voters. In addition, the association argued that spending in other states with nonpartisan elections is often more than in states with partisan elections. Anthony Majestro, President of the West Virginia Association for Justice states that “if anything, those expenses will increase. Other states that switched to nonpartisan elections saw increases in both the number of candidates filed and the amount of money spent. It will also increase the likelihood of independent expenditures, with special interests hiding behind misleading names and refusing to disclose who has funded the effort.”¹¹⁵ State legislators echoed these claims. Democratic Senators Mike Romano and Barbra Fleischauer were skeptical of the promises of reform and emphasized that nonpartisan elections do not target the true problem in elections - money. According to Fleischauer, “by not knowing what party a person is in, you’re deprived of information that’s valuable to voters.”¹¹⁶ While the results of switching to nonpartisan elections remain to be seen, the mix of internal and external

¹¹³ Wendy Holdren, “Governor Signs Nonpartisan Election of Judges Measure,” *The Beckley Register-Herald*, April 8, 2015.

¹¹⁴ Whitney Burdette, “Groups React to Judicial Elections Bill,” *Charleston Daily Mail*, April 7, 2015.

¹¹⁵ Whitney Burdette, “Groups React to Judicial Elections Bill,” *Charleston Daily Mail*, April 7, 2015.

¹¹⁶ “West Virginia House Passes Bill to Make Judge Elections Nonpartisan,” *The Charleston Gazette*, February 4, 2015.

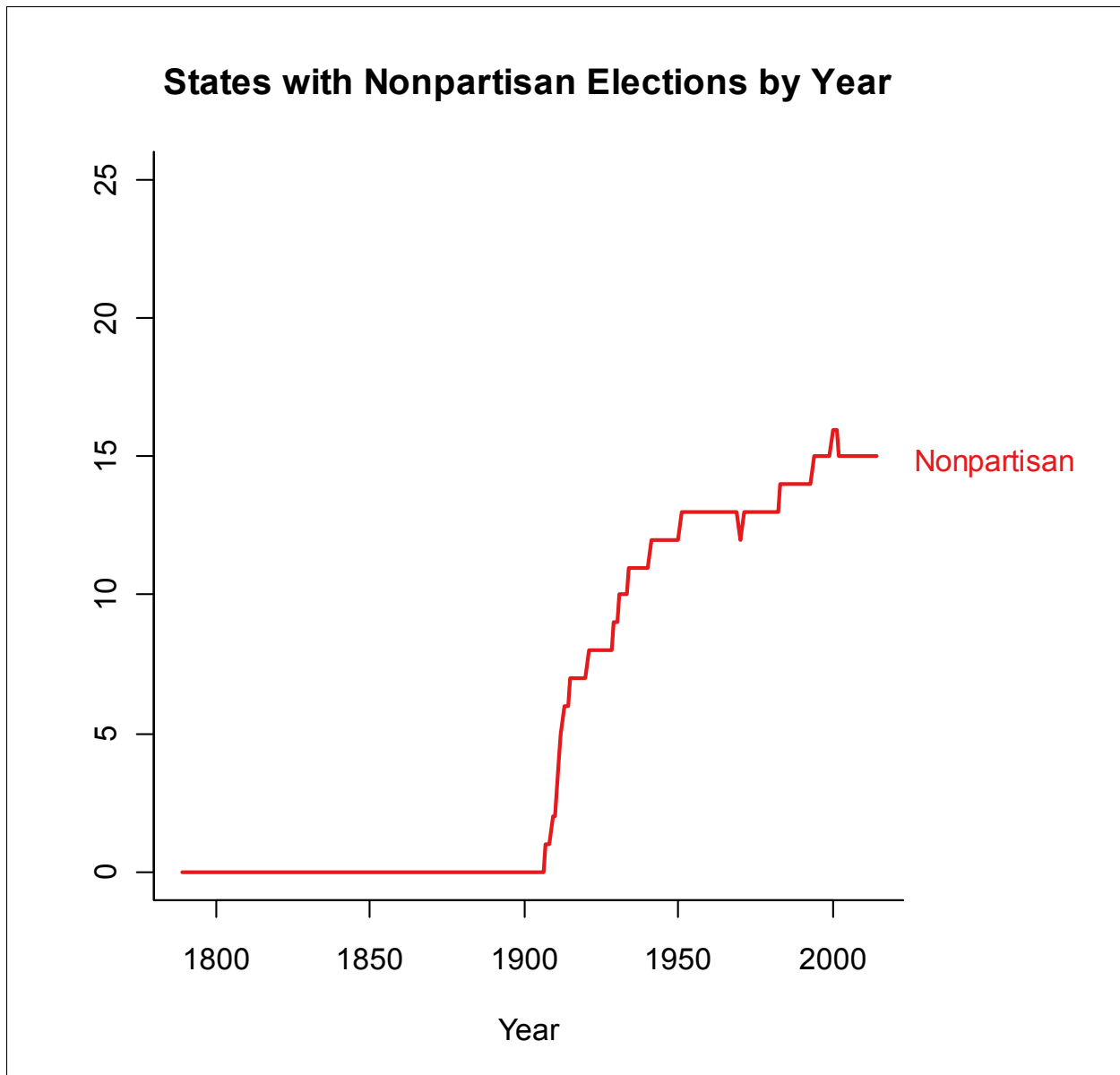


Figure 5.1. Number of States with Nonpartisan Elections per Year

reasons supporters and opponents relied on to make their case for nonpartisan elections is apparent. Supporters rely on the same arguments that were used in the 1912 Ohio constitutional convention that focus on quality of the bench, excising politics from judicial selection, and the legitimacy of the judicial branch. At the same time, opponents are aware of the failure of

nonpartisan elections in other states to reduce the amount of money flowing into judicial campaigns.

Quantitative Analysis of Nonpartisan Judicial Elections

Nonpartisan elections began in earnest in 1907 when Washington became the first state to employ this method. Compared to partisan elections that diffused at a slower pace, nonpartisan judicial selection picked up speed almost immediately. In the 10 years following Washington's adoption, seven more states found nonpartisan contests appropriate for judicial selection, while none of the early adopters dropped nonpartisan elections. The total number of states utilizing nonpartisan judicial elections over time is displayed in Figure 5.1. The total number of states employing nonpartisan elections jumps quickly followed by a period of slower growth. Another interesting feature of nonpartisan elections is that there has not been a decline in states utilizing nonpartisan judicial elections. Compared to the steep decline experienced by partisan elections, this is striking. States adopted and then rejected partisan elections. States that have implemented nonpartisan elections have retained this system for the most part even though an alternative option, the merit plan, has been in operation for 75 years. In fact, despite the popularity of the merit system, the last state to adopt it was in 1994. Since 2000, three states have converted to nonpartisan elections.¹¹⁷ While these patterns are insightful, they are not systematic. In order to test the influence of specific covariates, the Cox proportional hazards model is used incorporating both internal and external variables.

In order to test these models, information on all states beginning 1907, the first year nonpartisan elections were in operation, and running through 2014 was collected. Because of the inclusion of time-varying independent variables, the data are long form with each row

¹¹⁷ Arkansas adopted nonpartisan elections in 2000 and North Carolina switched in 2002.

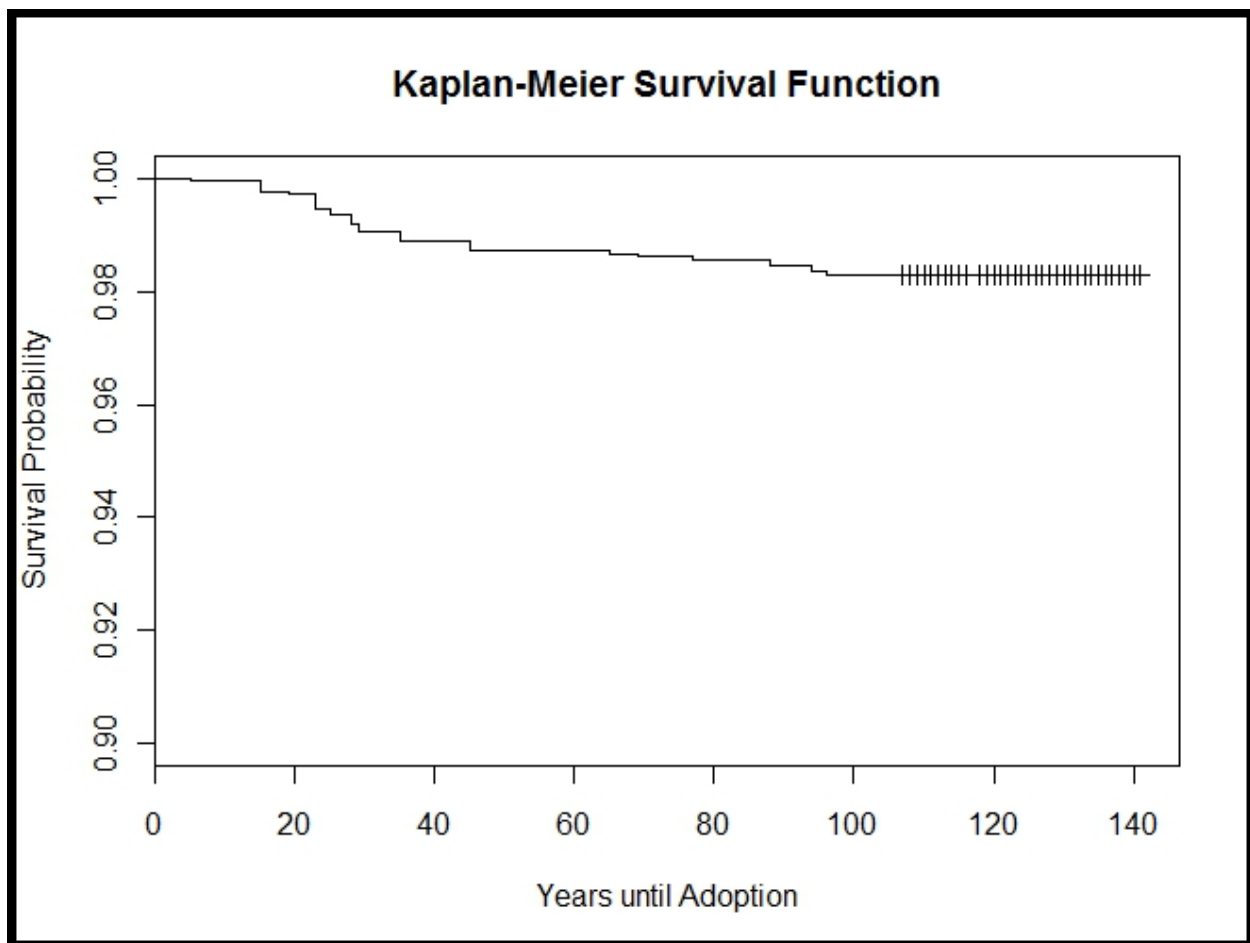


Figure 5.2. Kaplan-Meier Survival Function for Nonpartisan Election Adoption

representing a state year. The variable measuring nonpartisan adoption is coded 0 every year the state does not have nonpartisan elections. The year that a state adopts nonpartisan elections, the dependent variable is coded 1. At this point the state is dropped from the data as it no longer faces a risk of experiencing an event. The data in this analysis consist of 3,664 state years with a total of 21 events or instances of states switching to nonpartisan elections. Figure 5.2 displays the survival rate of the model. Graphing the survival rate indicates that the probability of survival does decrease over time. The probability of adoption is slight, but the survival probability continues to decrease over time as states have continued to adopt nonpartisan

Table 5.2. Cox Proportional Hazards Results: 1907-2014

DV: Nonpartisan Adoption	Coef. (Std. Error)
Surrounding State Percentage	2.74** (1.11)
Divided Government	-.11 (.60)
Percent Urban	.01 (.01)
State Bar Organization	.22 (.43)
Number of Prior Changes	.38** (.18)
Age of Method	-.06*** (.01)
Progressive Era	1.96* (1.13)
Number of Observations	3,664
Number of Events	21
AIC	100.8473

*0.1, **0.05, ***0.01

elections. This is not surprising given that less than a majority of the states adopt nonpartisan elections and that these changes occur over a period of 108 years. While this graph shows the overall survival rate, it does not include the impact that individual covariates have on the likelihood of adopting nonpartisan elections.

In order to determine how internal and external factors influence adoption of nonpartisan judicial elections, a Cox proportional hazards model is estimated. Table 5.2 contains the results. The variable measuring the influence of surrounding states is significant and in the hypothesized direction. It was predicted that the more states encompassing an individual state with nonpartisan elections, the greater likelihood the state would also adopt nonpartisan elections. This is exactly what the results show. Compared to states having no border states

with nonpartisan elections, those that are completely surrounded are almost 20 times more likely to adopt nonpartisan elections. The results demonstrate that neighboring states exert a strong influence on a given state regarding nonpartisan judicial elections.

Using a general diffusion variable in lieu of the proportion of surrounding states does not render significant results.¹¹⁸ Given the strong impact of the proportion of surrounding states variable, this is further evidence that such a measure is inappropriate for measuring diffusion.

With respect to the intrastate variables of interest, those factors internal to a state, some of the hypothesized relationships exist while others do not. The results indicate that the more times a state has altered judicial selection in the past, the more likely it is to adopt nonpartisan elections. On the other hand, states that have not experimented with different judicial methods in the past are less likely to adopt nonpartisan elections, compared to states that have. For every prior change in judicial selection method, the rate of nonpartisan adoption increases 46 percent. This result lends credence to the argument that some states are more innovation prone while others are more risk averse.

The age of the current method of selection affects adoption of nonpartisan elections in the predicted direction. It was hypothesized that the longer a state had used their current system, the lower the probability that they would embrace judicial reform in the form of nonpartisan judicial elections. The results indicate that a relationship between these variables exists. The coefficient of the variable measuring the length of time under the current selection regime is significant and negative. The longer a state has been under a specific system, the less likely a state is to adopt nonpartisan elections. For each additional year the current selection system is in place, the rate of adoption of nonpartisan elections is 6 percent less.

¹¹⁸ See Appendix for results.

The final significant variable measures the influence of the Progressive Era. The coefficient is significant and positive, meaning that states were more likely to adopt nonpartisan elections from 1890 to 1920. States were seven times more likely to adopt nonpartisan elections during this time. Thus, it does appear that the progressive movement did have a measureable effect on the decision to implement nonpartisan elections.

Covariates failing to achieve conventional levels of significance are urbanization, divided government, and the presence of a state bar association. These results are surprising given that states were adopting nonpartisan elections at the same time bar associations were becoming more professionalized and while urbanization was dramatically rising.

Conclusion

This chapter analyzed the continuing evolution of judicial selection policies. While partisan elections were designed to enhance the democratic nature of the bench, it was quickly determined that this policy had several unintended consequences. The descriptive analyses of Ohio and West Virginia corroborate this. Similar statements from prominent political figures echo each other despite these states adopting nonpartisan elections 103 years apart. Also uncovered is a tendency for states to reference experiences in neighboring states. Though statements regarding other states were not the focus in either Ohio or West Virginia, examples of references were found during both transitions.

The results of the empirical analysis find that external and internal factors influence states to change to nonpartisan elections. Just as in Chapter 4 regarding partisan elections, the proportion of surrounding states variable was significant. This variable has performed consistently indicating that neighboring states exert a powerful force on states when they are considering altering judicial selection systems. Once again, however, the regional diffusion

variable failed to explain policy adoption. These results indicate that a more refined measure of diffusion does a better job of identifying interstate influences.

Also found, was the time period variable measuring the impact of the Progressive Era. While admittedly a crude instrument used to measure national political forces, it does seem that progressive impulses were partly responsible for increasing the rate of nonpartisan elections. Though Jacksonian influences were not found to be significant in the model results for partisan elections, progressive forces do appear to matter.

Despite the information that these results add to the scholarship on judicial elections, there are still improvements to be made. The Progressive Era variable does not pick up the strength of Progressive legislative members within individual states. Similarly, even though the variable measuring diffusion is an improvement, it still does not provide an accurate picture as to the specific reasons states choose to follow their neighbors. Nor does it pick up the extent of communication that states have. Improvements to these dilemmas will be discussed in the concluding chapter. Ultimately, this chapter provides further evidence that internal and external factors must be taken into consideration in order to form a more accurate picture of policy development.

CHAPTER 6

TRANSITION PERIOD THREE: THE SWITCH TO MERIT SELECTION

The framers of our United States Constitution wisely chose to have an appointment process for all federal judges. That system has worked well for over two centuries. A majority of our 50 states have opted to have contested elections for state court judges. Problems have emerged with the election process. They frequently produce judicial candidates who raise money for their campaigns from the very lawyers who will appear before them and from special interest groups that have or will have legal issues to be resolved in the courts. Such fundraising leads to the perception, and sometimes the reality, that justice is not blind but bias... An appointment process for judges followed by periodic retention elections offers clear advantages over partisan judicial elections... Judges who don't need to raise money for partisan campaigns can focus on applying the law fairly and impartially to each litigant.

Sandra Day O'Connor¹¹⁹

While partisan selection experienced a 74-year period of growth, nonpartisan elections did not fare as well. Only 33 years elapsed between the first adoption by Washington and the emergence of the merit system in Missouri. Something partisan and nonpartisan judicial elections had in common was that both were met with almost immediate disappointment. Calls for yet another system were swift and emanated from very powerful figures (Canes-Wrone and Clark 2009).

During the early 1900s, frustration grew with the methods being used to staff state courts. Those favoring accountability were not satisfied with appointment schemes that removed power from the electorate. Under these systems, judges who were not cognizant and responsive of the public will could not be punished effectively. On the other hand, judicial independence

¹¹⁹ Letter to Clif Moore, Chairman of the Joint Judiciary Subcommittee of the West Virginia House of Delegates, September 7, 2008.

proponents were alarmed by the powerful role that politics played in the selection of judges in both partisan and nonpartisan elections. Dependence on political parties and party machines, in conjunction with the prospect of losing their seats because of unpopular, though possibly *correct*, decisions did not sit well.

Roscoe Pound, in an often-cited speech to the American Bar Association in 1906, provided several reasons why the public expressed discontent with the courts.¹²⁰ According to Pound, citizens were forced to navigate a complicated maze of state courts. In addition the public believed that legal actors were only concerned with winning cases and not justice. Pound also addressed the election of judges. He noted that it was difficult for the public to make informed choices regarding judicial candidates. The everyday work of a judge is boring, Pound stated, and the public has little interest in the actual work of a judge. In order to become truly informed about the court, voters would have to acquire an immense amount of information in order to know and understand the law, the actions of a judge, and the rulings released. For Pound, the solution was to remove the public from the selection process completely. To be clear, Pound was not suggesting completely eliminating the role of the public in the judicial process. That role however ought to be limited to actions that the public is capable of managing, such as serving on juries.

The displeasure with the operation of the courts and judicial selection was expressed by many in the early 1900s. Not all shared Pound's sentiment that the public ought to be completely excised from the selection process. Reformers had the task of trying to balance the desire to retain independent judges capable of ruling according to the law, without fear of public reprisal. Those calling for independence believed that judges could not objectively apply the law

¹²⁰ See "The Causes of Popular Dissatisfaction with the Administration of Justice."

while fearing punishment. The purported benefits of having independent judges during the early 1900s consisted of enhanced civil liberty protections and increased economic growth (Canes-Wrone and Clark 2009). At the same time, reformers acknowledged the potentially contrary sentiment that judges ought to be responsive to the people they serve. The public wanted both and reformists struggled to find the proper balance. At this point, states experimented with different judicial systems to deal with the independence/accountability dilemma.

Several reforms were proposed, but one that gained momentum over the years was proposed by Albert Kales.¹²¹ Widely cited as the father of merit selection, Kales proposed a system that would blend the two prominent judicial selection methods in use at the time. What would come to be known as the merit plan involved initial appointment by the governor followed by a retention election. Though familiar, these two aspects were modified under this proposal. The governor would not be able to select anyone he or she desired. Instead, a list of candidates would be forwarded to the governor by a nonpartisan judicial selection commission. The governor would be able to select the person of his or her choice as long as that person was on the list supplied by the judicial selection commission. The next step in the process involved popular election after the judge served a probationary period. But this was neither a partisan election nor a nonpartisan contest.

Under the merit plan, judges would run in a retention election. A retention election would only involve judges whose terms had expired. In order to retain his or her seat, the judge would have to garner a majority of the vote. Failure to do so would result in defeat. As a result, the merit plan combined appointment with elections.

¹²¹ See “Unpopular Government in the United States” (1914).

Table 6.1. States and the Merit Plan

State	Years in Use	Means of Adoption
Alabama	NA	NA
Alaska	1959-2015	Original Constitution
Arizona	1974-2015	Popular Initiative
Arkansas	NA	NA
California	NA	NA
Colorado	1966-2015	Constitutional Amendment
Connecticut	NA	NA
Delaware	NA	NA
Florida	1976-2015	Constitutional Amendment
Georgia	NA	NA
Idaho	NA	NA
Hawaii	NA	NA
Illinois	NA	NA
Indiana	1970-2015	Constitutional Amendment
Iowa	1962-2015	Constitutional Amendment
Kansas	1958-2015	Constitutional Amendment
Kentucky	NA	NA
Louisiana	NA	NA
Maine	NA	NA
Maryland	1970-2015	Executive Order
Massachusetts	NA	NA
Michigan	NA	NA

Table 6.1 (Continued)

State	Years in Use	Means of Adoption
Minnesota	NA	NA
Mississippi	NA	NA
Missouri	1940-2015	Popular Initiative
Montana	NA	NA
Nebraska	1962-2015	Constitutional Amendment
Nevada	NA	NA
New Hampshire	NA	NA
New Jersey	NA	NA
New Mexico	NA	NA
New York	NA	NA
North Carolina	NA	NA
North Dakota	NA	NA
Ohio	NA	NA
Oklahoma	1967-2015	Constitutional Amendment
Oregon	NA	NA
Pennsylvania	NA	NA
Rhode Island	NA	NA
South Carolina	NA	NA
South Dakota	1980-2015	Constitutional Amendment
Tennessee	1971-1973 and 1994-2015	1971: Legislature passed 1994: Legislature passed
Texas	NA	NA

Table 6.1 (Continued)

State	Years in Use	Means of Adoption
Utah	1985-2015	Legislature approved judicial article followed by approval by popular vote
Vermont	NA	NA
Virginia	NA	NA
Washington	NA	NA
West Virginia	NA	NA
Wisconsin	NA	NA
Wyoming	1972-2015	Constitutional Amendment

Support for this plan grew over the next quarter century with prominent reform advocates and organizations pushing for the implementation of the merit plan. The American Judicature Society, which was formed with a primary goal of reforming judicial selection, supported merit selection. It began holding conferences on judicial selection in which this solution was heavily promoted. At the same time, the number of articles advocating the merit plan published by *Judicature*, the academic journal of the American Judicature Society, began to increase. In addition, the American Bar Association supported the merit plan as well. In 1937, the American Bar Association's House of Delegates officially adopted a position in favor of merit selection.

In 1940, Missouri became the first state to implement merit selection. Unlike the diffusion of nonpartisan elections, following Missouri's embrace of this system, adoption was slow at first and sometimes outright rejected. In 1951, voters in New Mexico voted down the merit plan, with only 37.1 percent voting in favor despite bipartisan support (Dubois 1989). It took another 18 years before another state adopted merit selection. After this, rapid expansion

occurred. Currently, 34 states and the District of Columbia use merit selection for judges at some level, and 15 employ merit selection to fill supreme court vacancies. Table 6.1 provides a list of states using the merit plan and the means by which the merit plan was adopted.

In spite of the rapid expansion of the merit system, there has not been universal acceptance of this system. For example, the last state to adopt the merit plan did so in 1994. Since that time, four states have converted to nonpartisan elections. There have also been several failed attempts at implementing the merit system. For example, a Florida ballot measure failed in 2000 with only 32 percent of the voters favoring the merit plan. Failed attempts also occurred in 2001 in Pennsylvania and Michigan despite the allocation of millions of dollars endorsing the plan. Multiple attempts have been made in Louisiana, with the plan being voted down in 1997, 1999, and 2003.

Qualitative Analysis of Merit Selection

In this chapter, I profile Missouri, the first state to adopt merit selection, and Utah, which is late in formally adopting merit selection in 1985. The events that took place preceding adoption of merit selection are analyzed in order to provide context for the empirical analysis that follows.

Missouri: Early Adopter/Innovator

Missouri has a history of altering judicial selection systems, but until the adoption of the merit plan in 1940, the state had been responding to national waves of change and not leading the charge.¹²² In 1821, the original Missouri constitution followed the example set by other states and settled on a system of gubernatorial appointment combined with senatorial approval, with life tenure. As with other states with appointment systems, a current of negative public

¹²² The merit plan was passed by popular initiative petition.

sentiment gradually grew in opposition. Stith and Root note that “political influence and cronyism soon led Missouri to amend its constitution to provide for popular election of judges” (2009, 712). Also, similar to the experience of other states, the feeling that partisan elections did not achieve their intended results grew.

Scholars are uncertain as to why Missouri was the first state to convert to merit selection. Most likely, an amalgamation of internal and external factors facilitated the abandonment of partisan elections in favor of the merit plan in 1940. State politics and corruption are among the main reasons for the discontent experienced in Missouri during the early twentieth century (Stith and Root 2009). Beginning in the early 1900s and continuing into the 1930s, partisan forces had a strong grip on the judicial branch. Judges in the early 1900s were frequently accused of arriving at decisions based on partisan loyalties and not the law. Stith and Root reinforce this claim noting that “too often political party machines decided who would be mayor, senator, and even judges” (2009, 722). According to the Missouri Bar Association:

Prior to the adoption of the Missouri nonpartisan court plan, judicial selection in Missouri was controlled by political machines and party bosses who sought to unseat judges issuing unfavorable rulings. Judicial positions were so tenuous under machine politics that from 1918 to 1941 only two supreme court justices were successful in their bids for reelection.

Political parties grappling for judicial control resulted in contentious races. The most infamous machine during the 1930s was controlled by the Democrats through the leadership of Kansas City Boss Tom Pendergast “who literally decided things in a smoke-filled room” (Stith and Root 2007, 722). Pendergast was a powerful figure and those who opposed him faced his wrath. For example, judges voting against his preferred positions were often met with defeat in their next election (Stith and Root 2007).

Partisan control over the judiciary resulted in the belief that the court was staffed by loyal partisans, not able jurists. A frequently cited example of an elected judge with little experience and low bar ratings is Judge Eugene Padberg. Padberg had a law degree, but he worked primarily as a pharmacist. Before winning election to the Missouri Circuit Court, he had worked on a total of eight divorce cases and one annulment case. He was not ranked highly by the bar. Upon taking his seat on the court, he was criticized for not being capable of handling even simple jobs expected of that position.¹²³ According to the Missouri Bar Association, his work was criticized in legal circles and in the media and he was labeled an embarrassment. How did such an unprepared person assume a position on the bench? The answer, according to most accounts, was the support of Boss Pendergast and the Kansas City political machine. Years of partisan control over the political system was further evidence that election schemes had not enhanced democracy.

In addition to the internal strife facing Missouri that placed pressure on the state to change to something other than partisan elections, there was also a growing national movement dedicated to ending partisan elections. Spearheaded by the American Judicature Society and the American Bar Association, awareness of the merit plan grew. As early as 1924, the American Bar Association's Committee on Judicial Selection encouraged the Missouri legislature to return to some type of appointive system. Citing corrosive political influences in Missouri, Ohio, and New York, the American Bar Association strongly encouraged Missouri to abandon partisan elections and suggested that the organization play a prominent role in that transition. While not completely embracing the merit plan at this point in time, the American Bar Association was making a concerted effort to change judicial selection in Missouri and across the United States.

¹²³ Twenty-one Democratic candidates were vying for nine positions open during the primary. Padberg ranked 19 out of the bunch.

By the 1930s, the American Bar Association strongly supported merit selection. American Bar Association reports encouraged states, legal actors, and organizations to be persistent in pressing for merit adoption. The merit selection had spread and had already been voted on in a few states.¹²⁴ Though discouraged with the failures of these proposals, the American Bar Association attributed the failure to the well-funded campaigns opposing merit selection. A 1938 American Bar Association report offered a detailed look at the different selection systems in use across the states. This report extolls the states where versions of merit were beginning to appear and derides the experiences in states that retained judicial elections. The American Bar Association report cites an unnamed Virginia delegate commenting on legislative appointment. This delegate states that “this method has been in effect since the present constitution was adopted in 1902, and has given entire satisfaction to the bar and to the public. There has been no agitation for change and none is anticipated” (Cited in Stith and Root 2009, 413). The report concludes by stating that “in the ten states where judges are not selected by popular election, the courts are able and respected by the bar and the people. Each suggestion of substituting the elective method has been solidly and successfully opposed” (435). It is also strongly asserted that states with electoral systems have devolved into bitter partisan contests and that the public has expressed outrage and strong disapproval of these contests.

Due to internal problems and national support for the merit plan, Missouri was a prime candidate to jettison judicial elections in favor of something else. In addition to national support from the American Bar Association, the Missouri State Bar was well positioned to exert pressure, first on legislators and then to take their message directly to the public. The Missouri

¹²⁴ Ohio and Michigan had both voted down merit selection. Ohio failed to reach enough signatures to place the measure on the ballot in 1938. An initiative in Michigan was voted down by voters in 1938.

Bar Association was well organized and partnered with the Lawyer's Association of Kansas. According to McDonald (1941), the Missouri Bar played a critical role in the passage of the merit plan. When the Missouri legislature voted down the plan, the Bar as well as other state organizations launched a statewide campaign to place merit selection on the ballot. The state bar worked with non-legal organizations such as labor groups to promote passage, and actively courted the public through radio advertising, writing articles in newspapers, holding rallies, and sending people out on speaking and educational tours around the state. The primary message carried to the public was that merit selection was the only way to remove unqualified judges from the bench.

Though unable to obtain success in the state legislature, the organizations supporting the merit system, led by the Missouri Bar Association, were able to secure enough votes to place the measure on the ballot.¹²⁵ The ballot measure won with 56.4 percent support and a margin of 90,000 votes (Dubois 1989). When Missouri became the first state to adopt, it became synonymous with the merit plan. For this reason, the merit system is still referred to as the Missouri Plan. The merit plan has been in existence ever since and remains largely unchanged, although it has expanded into the lower courts. Under Missouri's system, a nonpartisan commission sends three names to the governor from which he or she must choose.¹²⁶ The governor has 60 days to make a selection, after which the commission makes the choice. After serving a minimum of one year, the judges run in a retention election in the next general election. In order to keep their seats, they must win a simple majority of the vote.

¹²⁵ Seventy-five thousand signatures were required to place initiatives on the ballot.

¹²⁶ The commission is composed of the Chief Justice, three lawyers selected by the state bar, and three citizens named by the governor. Commission serve staggered six year terms.

The adoption of merit selection was lauded in professional circles. Reports issued by the American Bar Association and articles published in *Judicature* showered Missourians with praise for their decision. Nevertheless, the plan was greeted with skepticism by some of the public and many in the state legislature. Just a year following the passage of the initiative, the legislature placed a repeal measure on the ballot that was rejected by the voters.¹²⁷ An additional attempt at repealing the merit plan was on the table during Missouri's constitutional convention of 1945, though there was not enough support to achieve this. Other states were also reticent to embrace this plan.

Utah: Late Adaptor/Innovator

Diffusion of the merit plan was slow following Missouri's adoption in 1940. For a full 18 years following this policy change, Missouri was alone in employing merit selection. This changed in 1958 when Kansas adopted merit selection of state supreme court judges. That Kansas is one of the next states to adopt the merit plan is interesting, but not surprising, as Kansas shares a border with Missouri. In the 15 years following merit adoption by Kansas, eleven states followed suit. The final two states to adopt were Utah in 1985 and Tennessee in 1994. The move to the merit system then stalled.¹²⁸

Utah was the fourteenth state to adopt the merit system. Merit selection was implemented via the Judicial Article of 1985 passed by the Utah legislature and then ratified by the public. The path to reform began during the 1970s as part of larger effort to reform the courts. The Utah courts were plagued by long delays and claims of unaccountable judges. The package of reforms designed to redress these issues included the creation of a circuit level court

¹²⁷ The Lauf Amendment would have reinstated partisan elections.

¹²⁸ Although technically Tennessee is the final state to adopt, they had previously selected judges through the merit system from 1971 through 1973.

and judicial performance evaluations. While there was an ongoing discussion over judicial selection, the specific recommendations focused on circuit court creation, uniform rules of practice, bail schedules, and budget allocations for more judges and support staff. These recommendations emanated from the Utah Judicial Council, the primary administrative body that determines court policy.¹²⁹

During this time, the Judicial Council placed judicial reform on the agenda. This was due in part to criticisms levied by reformers and a “judicial election in the early 1980s in which a highly regarded sitting judge was forced to campaign for office providing a vivid reminder of the dangers of this electoral system in terms of demeaning the office of judge and decreasing judicial independence” (May 1998, 15). Beginning in 1981, the Judicial Council began work on determining how to best avoid contentious and politically laden elections for the supreme court.

Fortunately, it is possible to trace the evolution of the judicial selection debates since the meeting minutes were archived by the Judicial Council.¹³⁰ During the first two years of debate, the primary focus was on reforming the complexity of the Utah judicial system and crafting a uniform set of procedures. During this time, when judicial selection was referenced the primary concern was over the problems associated with campaign contributions. Though no concrete plans were introduced in 1981 or 1982, the Judicial Council records include several article clippings from newspapers in other states as well as *Judicature*. These articles were primarily about merit selection and the experience of the states using this method.

¹²⁹ The Utah Judicial Council has constitutional authority to promulgate judicial rules. The 14 member council is composed of the Chief Justice, another member of the Supreme Court, judges from the lower courts, and a state bar representative.

¹³⁰ The official minutes of the Utah Judicial Council are available from the Utah Department of Judicial Services: Division of Archives and Record Services.

By 1983, the Utah Judicial Council was focused on judicial selection. The first option debated was replacing partisan elections with a system that required the governor to nominate a judicial candidate with senate confirmation. A heated battle took place over this method. Of primary concern was too much legislative involvement. Opponents argued that the requirement of legislative consent would erode too much judicial independence. A proposal to create a merit system was then introduced as an alternative option.

On May 20, 1983, the committee tasked with making a recommendation for judicial selection released their initial report on the use of merit selection around the United States. This report contained detailed evaluations of other states currently using the merit system. The report used other states as examples of successful instances of judicial reform and as a justification for their recommendation of the merit system. Then on June 3, 1983, Chief Justice Gordon Hall and the other members of the Supreme Court appeared in front of the commission during which time they threw their full support behind the merit system. The Justices each testified to the pressure they faced when they were forced to run for reelection. Their arguments centered on how inappropriate it is to force judges into the political sphere.

Though he did not appear in person to testify, the governor sent a letter to the Judicial Council introduced at the May 20, 1983, meeting. The letter offered partial support for the merit plan, and opposition to a system that required the governor to go to the Senate for consent. According to the governor, there should to be no legislative voice in the selection of judges in order to preserve the separation of powers. Similar to the Justices that testified, the governor placed a heavy emphasis on judicial independence and cited several other states using the merit plan as support for governor appointment from a list supplied by a commission. Utah Attorney

General David Wilkinson concurred with the sentiments expressed in the governor's letter.

Written testimony introduced during the June 3, 1983, meeting includes his following statement:

Now to the issue I have addressed before. Whereas I have no strong views on how you should solve the judicial selection problem except that it should be solved, I do believe firmly that your decision to delete from the constitution the 88 year old requirement that the prosecuting attorneys in this state be elected by the people is ill advised, runs counter to the express judgment of the drafters of our constitutions, goes against the clear trends of surrounding states, and opens the door to abuse of prosecutorial and other power. I realize I may have an uphill battle in convincing you of this in light of positions you have taken on this issue over the last two years, but I venture to try and change your minds on the assumption that you are always willing to reconsider positions previously taken.¹³¹

While there was broad support at this early stage for the merit plan, not everyone was enthusiastic about abandoning elections. Though the minority, some Utah state officials wrote letters to the council urging them to reconsider adoption of the merit plan. County Attorney Tesch Hufnagel wrote to the council in opposition, citing concerns about the separation of powers and the loss of judicial accountability. Hufnagel believed that the governor should not be afforded such a crucial role in selecting judges. In addition to the erosion of the separation of powers, Hufnagel praised requiring judges to appear periodically before the electorate. According to him, accountability through regular elections forces justices to be responsive to the public thus compelling judges to properly fulfill their duties.¹³²

Eventually, the Council settled on the merit plan as the best alternative to the partisan elections that were in place. After making this recommendation, the Utah State Bar fully endorsed the merit system. Members of the Council and state judges traveled around the state promoting the merit plan. A full-fledged campaign for the merit system was underway by 1984. This included speaking engagements, working with community groups, holding press

¹³¹ Testimony of Attorney General David Wilkinson delivered to the Utah Judicial Council on June 3, 1983.

¹³² Judicial Revision Council Minutes, June 3, 1983.

conferences, and writing editorials in newspapers around the state. This recommendation also had the support of both gubernatorial candidates in the 1984 election. Upon winning the 1984 gubernatorial election, Governor Norman Bangerter created a judicial task force to investigate merit selection. In addition to recommending judicial performance evaluations, merit selection was also supported. According to the Utah Judicial Council, the merit plan had the support of the Utah State Bar and all local bar organizations as well as the Association of Prosecutors, the Women's Legislative Council, and the majority of judges across the state.

In his State of the Judiciary Address, Chief Justice Gordon Hall directly addressed the matter of judicial selection. In his address, Justice Hall's primary contention with elections was the influence of campaign contributions which he said essentially converted judges into politicians. Emphasizing his discontent with this process, he stated that "there is no harm in turning a politician into a judge. He may become a good judge. The curse of the elective system is that it turns every judge into a politician."¹³³ The unfortunate result of this inevitability was a loss of judicial independence that is required if judges are to adequately perform their duties. Directly addressing the ability of state voters to adequately assess a judge's credentials, Hall states that any type of judicial election "gives a heavy advantage to the candidate who has the money to finance a campaign. Either way, voters generally have little or no acquaintance with the judicial candidates and especially their judicial qualifications, and the choices the voters make are mostly blind guesses" (4). In addition to these arguments, Justice Hall cites the experiences of other states on several occasions. Hall stresses in his speech that more than one-third of the states have some form of merit selection which has improved the operation of the

¹³³ State of the Judiciary delivered to the Utah State Bar, July 12, 1984 (4).

judiciary. Among these states, Hall directly references the positive experience of the first state to adopt the merit system, Missouri.

Ultimately, the Judicial Revision Commission released their official report containing their suggestions for judicial reform. Regarding judicial selection, the committee officially endorsed the merit plan. The Governor's task force reached the same conclusion. At the same time, promotion of the merit plan was taking place throughout the state. The culmination of the effort of these groups was the passage of the Missouri Plan in Utah in 1985.

Quantitative Analysis of Merit Selection

Both Missouri and Utah present interesting portraits of states in the run up to adoption of the merit plan. In both cases, the American Bar Association and state bar associations were active in placing merit on the agenda and then lobbying for the success of that program. Partisan politics had resulted in intense conflicts for control of judicial positions. Ultimately, both states adopted the system of judicial selection that has come to define the third transition period in judicial selection.

This analysis uses internal and external variables to model the choice to adopt the Missouri Plan. The models in this chapter deviate slightly compared to the ones used to assess the switch to partisan and nonpartisan elections. Two datasets are utilized to assess the switch to merit selection. The first dataset analyzed follows the format of the previous models. As a result, the adoption of merit is the dependent variable. The start time for the first set of results is 1940, which coincides with Missouri's adoption. This dataset is comprised of 2,892 state years and 15 events. The second set of results examined begins in 1960 and runs through 2014. The reason for this model is to include additional variables that have been found to impact diffusion. These additional variables are the governor's institutional power score and legislative

professionalism.¹³⁴ The measures of legislative professionalism and gubernatorial power do not exist before 1960 and so it is not possible to include them in the full model. The professionalization index is first measured in 1963. The first calculated governor's power score is for 1960.

Before interpreting the model results, a note on the dependent variable is necessary. Coding of partisan and nonpartisan elections was straightforward. Either partisan identification was used on the ballot or it was not. For the merit system, coding is more complex. While the merit system shares the basic concepts of a governor nominating someone from a list supplied by a nonpartisan commission followed by a retention election, several variations of it have occurred over the years. These policy adjustments include the length of terms served following appointment, the size and composition of selection commissions, the influence of selection commissions, as well as states sometimes returning to partisan or nonpartisan contests after an initial retention election. This has generated a significant amount of confusion among those studying judicial elections, to the point that Epstein, Knight, and Shvestova (2000) are critical of the lack of a concrete definition of merit. The lack of consistent standards results in different analyses using different criteria to determine their sample. As a result, some states are labeled merit in some studies and these same states are omitted in other studies of merit selection.

In order to be considered a merit selection state for this analysis, two things are essential. First, a nonpartisan selection commission provides a list to governors that they must choose from. Second, at least the first election following appointment must be a retention election. As a result, this analysis does not include some states that occasionally make appearances in other studies of merit selection. For example, in 1937, California changed their judicial selection system to one

¹³⁴ Legislative professionalism is measured using the King index combined with the Squire Index. Governor strength is measured using Beyle's Governor's Institutional Power Scores.

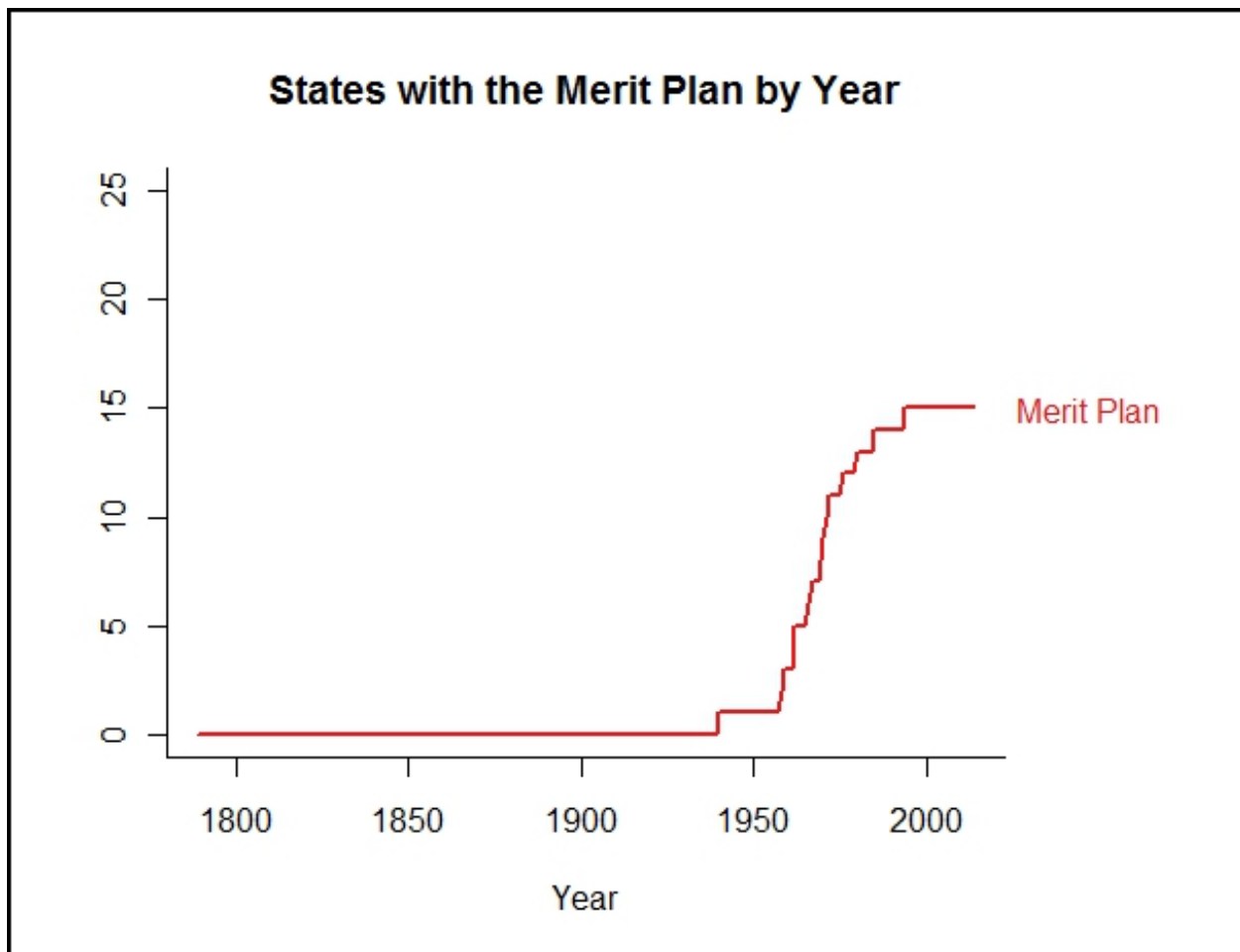


Figure 6.1. Number of States with Merit Selection over Time

where a judicial selection commission provides a list of preferred candidates to the governor.

Following selection by the governor, judges run in retention elections. This is a version of merit and one that was passed three years before Missouri did so. But there is a reason that it is called the Missouri Plan and not the California Plan. The difference in California is that the governor is not bound to the commission's recommendations. Governors are free to select someone on the list or not. Hawaii is also often included in analysis of merit selection. It is true that Hawaii does have a system in which a judicial selection commission provides a list of candidates to the governor from which he or she must make a selection. After their term has expired, however, the

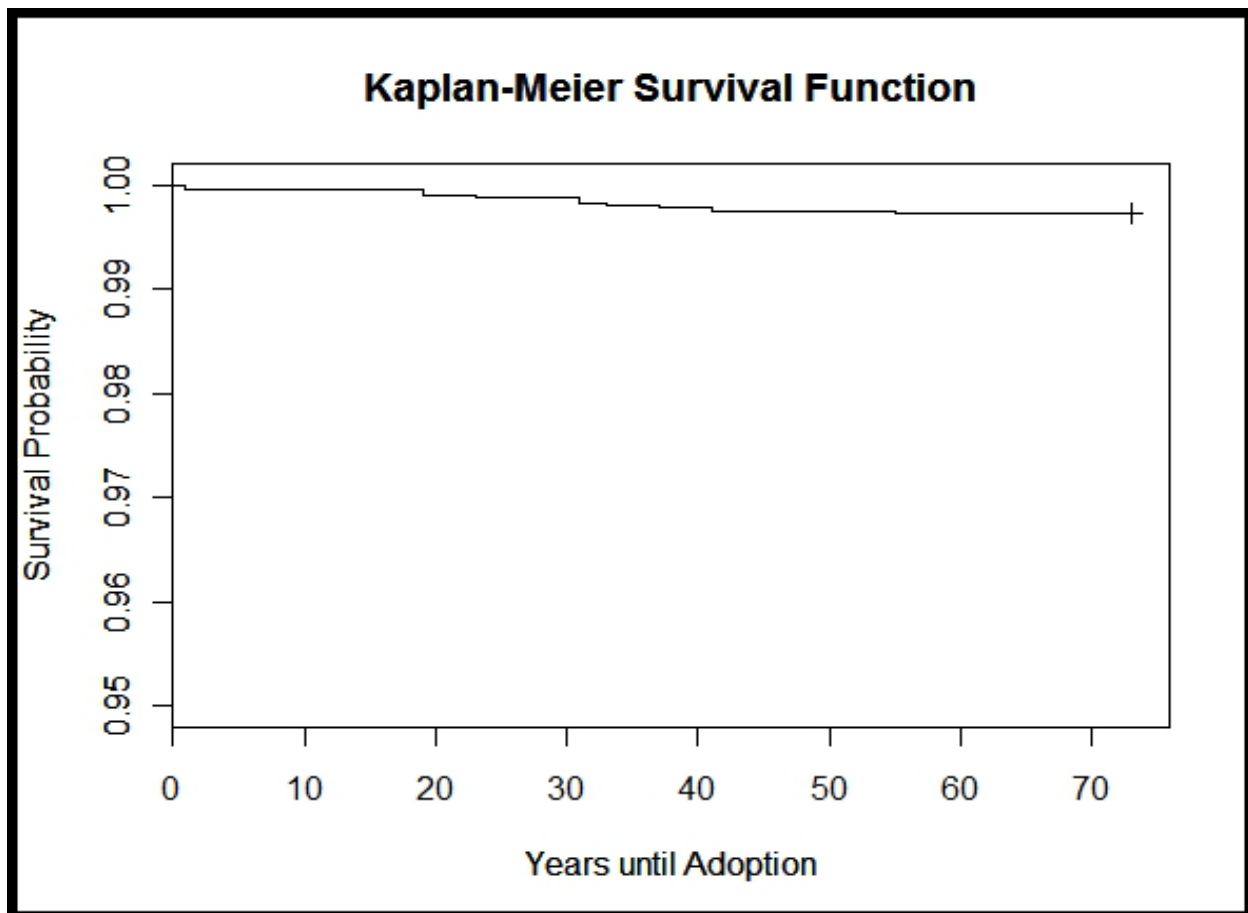


Figure 6.2. Kaplan-Meier Survival Function for Merit Selection: 1940-2014

judges are retained or removed based on a majority vote in the judicial commission. Thus, Hawaii lacks a retention election. Based on these two criteria, 15 states are labeled one and omitted from the dataset upon adoption of their merit system.¹³⁵

Figure 6.1 displays the number of states using merit selection over time. The rate of adoption resembles the typical S-shaped curve. Following Missouri's adoption of merit, there is a long duration of time in which no state decides to follow in their footsteps. Then states rapidly adopt merit represented by the sharp incline which is then followed by a leveling out. Also

¹³⁵ States coded as merit are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming.

Table 6.2. Cox Proportional Hazards Results: 1940-2014

DV: Merit Adoption	Coef. (Std. Error)
Surrounding State Percentage	4.38** (1.70)
Divided Government	-1.29* (.69)
State Bar Organization	-.71 (.56)
Percent Urban	-.00 (.01)
Age of Method	-.07*** (.01)
Number of Prior Changes	-.07 (.30)
Constitution	1.27 (1.3)
Number of Observations	2,892
Number of Events	15
AIC	68.7196

*0.1, **0.05, ***0.01

apparent in the graph is that the adoption of merit monotonically increases. In fact, only one state to adopt the merit plan has ever repealed it. This happened in Tennessee since the merit plan was replaced after only three years in existence. Tennessee eventually returned to the merit plan, which it continues to employ.

In order to get a better picture of why states adopt the merit plan, a Cox proportional hazards model is used incorporating both internal and external variables. Figure 6.2 displays the survival function and illustrates that, while in any given year the probability of adoption is small, the survival rate does decrease over time. This provides only a very general look at the survival rate in the data, without respect to any independent variables. In order to determine the impact of specific covariates, the results of the Cox model using all state years since 1940 must be interpreted. The results of this model are displayed in Table 6.2.

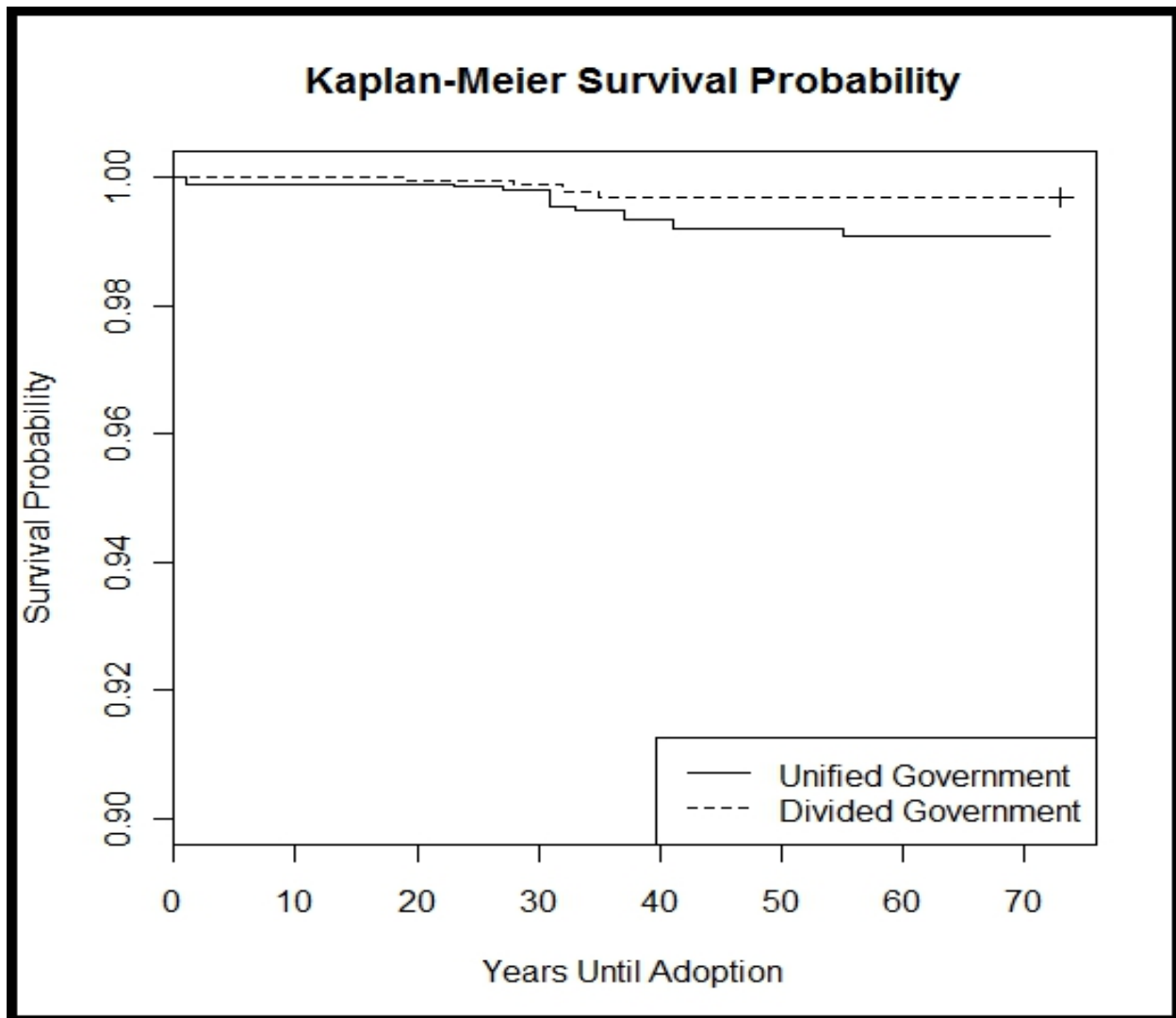


Figure 6.3. Kaplan-Meier Survival Function for Merit Selection by Divided Government

As was the case with adoption of partisan and nonpartisan elections, the impact of the surrounding state variable is both positive and significant, indicating that neighboring states with the merit plan increase the likelihood that state will also adopt this plan. States that are completely surrounded by other states with the merit plan are almost 51 times more likely to adopt the merit plan. While this measure of diffusion has performed consistently across time and in different models, the other measure of diffusion has not produced significant results. Yet

again, the general regional diffusion model fails to influence the rate of adoption in a given year.¹³⁶ Despite the lack of significance of this variable, the main diffusion variable is strong and has been significant every time it has been included in a model. This is compelling evidence that factors external to a state have the potential to play a strong role in a state choosing to adopt the merit system.

With regard to the internal variables, only two exert a measurable influence on the hazard rate. The divided government hypothesis was neutral regarding how this would impact a state. Some suggest that divided government acts as a barrier to policy change, while others posit the opposite effect. The results of this model give weight to the argument that divided government decreases the likelihood of merit system adoption. Figure 6.3 shows the survival function in relation to divided government. As the graph shows, states with divided governments have a lower probability of adopting the merit system compared to their counterparts with unified governments. It appears that, at least for adoption of the merit system, when one political party controls the legislature and executive, they are able to achieve more success when it comes to implementing the merit plan. This could be due to the larger legislative majorities required to pass controversial legislation. Or it could be due to the lack of bipartisan support across the aisle. Further evidence is required to assess the reason for this pattern.

The only other significant variable is the age of the current system. As expected, each additional year under the current system decreases the likelihood of a state adopting the merit system. As the age of the current system increases, the rate of adoption decreases by seven percent. The longer a system is in place, the harder it is to change. These results lend support to

¹³⁶ See Appendix for results.

Table 6.3. Cox Proportional Hazard Results: 1960-2014

DV: Merit Adoption	Coef. (Std. Error)
Surrounding State Percentage	2.70* (1.63)
Divided Government	.02 (.01)
Squire (Legislative Professionalism)	-7.10* (3.78)
Governor Powers	.32 (.40)
Percent Urban	.01 (.02)
Number of Prior Changes	.40** (.19)
Number of Observations	1951
Number of Events	14
AIC	103.214
*0.1, **0.05, ***0.01	n=1951

the idea that politicians and the public are familiar with the system and do not want to disturb the status quo.

Other than divided government and the age of the current system, both of which decrease the hazard rate, none of the other variables are significant. This is surprising given that the anecdotal accounts point to the large influence of bar associations. Additionally, though urbanization, number of prior changes, and institutional barriers to change have been significant predictors in past diffusion analyses, these measures do not achieve statistical significance in this analysis. All of these variables were thought to increase the likelihood that a state would adopt the merit system. The absence of significant results suggests that decisions about judicial selection policy are different from other policy areas and are influenced by different factors.

In order to gain a different perspective on the adoption of merit selection and to take advantage of measures of additional internal variable measures, an additional Cox proportional hazards model was run on data with a more recent start time. Table 6.3 presents the results of models including all states from 1960 through 2014.

Yet again, the variable measuring the proportion of surrounding states with merit selection has a significant and positive influence on the states they surround. The strength of this coefficient is less than in previous models. Nevertheless, this is the fourth time that this variable has influenced the likelihood of states altering their selection procedure. Also consistent is the lack of any effects for the regional diffusion variable.¹³⁷

With respect to the internal variables, only two variables attain significance. The greater number of times a state altered selection procedures in the past, the greater probability that they adopt the merit system. This conforms to expectations and supports the notion that some states are more prone to altering policy than others. Contrary to expectations, legislative professionalism appears to decrease the probability that states adopt the merit system. This is contrary to numerous accounts that suggest the opposite. This is certainly a peculiar result that lacks a clear explanation. Also curious is the lack of significance of the governor powers variable. This suggests that the legislature and not the governor, is more likely to influence judicial selection policy. Although those results are surprising, they are not without precedent (Puro, Bergerson, and Puro 1985; Shipan and Volden 2006). Puro, Bergerson, and Puro (1985) also measured legislative professionalism and the powers of the governor in measuring state lottery reform. Similar to the results in this chapter, they found that legislative professionalism decreased adoption of a lottery and the governor variable did not achieve significance.

¹³⁷ See appendix for results.

Conclusion

This chapter analyzes the most recent trend among judicial transformations and traces the evolution of the merit system. Designed as a compromise between independence and accountability, this system was slow to take off but eventually was embraced by 15 states. Themes of political corruption were ever-present in the descriptive accounts of merit adoption. At the same time, it is also evident that states looked outward to the experiences of others when considering policy changes.

The results of the empirical analysis lend further support to the argument that unified models of diffusion should be used to explain policy change. In both the 1940 and 1960 models, the surrounding state proportion variable exerted a significant influence on the adoption of the merit system. This variable was consistent across the two models in this chapter and has been significant in every model in which it has been included.

Similarly, internal characteristics impacted the hazard rate as well. Divided government was shown to decrease the rate of adoption, as did the age of the current system and legislative professionalism. While the influence of divided government and the age of the current system are not surprising, the legislative professionalism coefficient is not in the direction predicted. Consistently, the contention is that legislative professionalism ought to increase rather than decrease policy innovation.

Despite the insights contained in this chapter, the same deficiencies that plagued the previous chapters are present here. Though the qualitative analysis provides examples of high profile actors attempting to influence policy adoption, the empirical analysis is not able to

capture the individual efforts within the states. Once again, communication channels between the states are not measured. Additional work on capturing these effects would greatly benefit the analysis of diffusion of policies across the states, including the adoption of the merit system.

CHAPTER 7

CONCLUSION

You can't stop change any more than you can stop the suns from setting.

Shmi Skywalker

Changes in judicial selection have occurred throughout the history of the United States. This is a trend that will continue into the future. The goal of this dissertation is to provide insight into this rarely studied aspect of judicial selection. Using a combination of internal and external variables, the results of this analysis shed light on the reasons states alter judicial selection systems over time. All of the variables included in the models have been linked to state adoption of innovations in prior research. These criteria were used to assess the impact that these covariates have in the realm of judicial selection. This chapter reviews the results of this study, the limitations of the models, and finally the pathway forward for scholarship on judicial selection.

Findings

Diffusion literature emphasizes the pressure that neighboring states exert on another state as new policies are considered. Surrounding states influence policy for a variety of reasons. The results of this dissertation reveal a connection between number of surrounding states with a certain policy and the likelihood of another state adopting that same policy. Some scholars postulate that states respond to policy adoption in neighboring states because of economic concerns (Puro, Bergerson, and Puro 1985). In this scenario, the decision to adopt stems from the desire to remain competitive with surrounding states. Other theories are based on the idea

that surrounding states exert an influence because communication with neighboring states is easier and more frequent than communication with states that are geographically distant (Douglas, Raudla, and Hartley 2015, Puro, Bergerson, and Puro 1985). Increased communication with nearby states permits policy makers to take cues from these states. Observing the effects of a new policy implemented in another state reduces uncertainty, a barrier to innovation adoption. This study adds substantial weight to these assertions.

The influence of neighboring states has not been measured consistently in the scholarly literature. Earlier measures of diffusion consisted of a single regional diffusion variable, coded according to census designation codes. This measure can signal a geographical proximity effect, but it does not indicate which regions exert influence. Thus, a single census region indicator demonstrates that region matters, but not where or how. Because of this weakness, new ways of measuring the impact of external influences were devised. For example, studies have utilized a series of binary variables based on geographical region that measure more precisely the spread of policy ideas. This variable provides a more fine-tuned measure indicating which regions are more likely to adopt a policy, but is limited due to the inflexibility of the variable. Relying on fixed regions, this measure misses the impact that states with contiguous borders have on one another if they fall into different regions. The primary diffusion measure utilized in this study, proportion of surrounding states with a specific policy, is state and year specific. As a result, it is updated every year a state remains in the data. This allows for an examination of the influence of border states throughout the history of a given state and is updated to take into consideration the policy changes in all surrounding states.

The qualitative evidence presented in this study indicates that states have looked outward when considering a policy change. Ohio in 1851, West Virginia in 2015, and Utah in 1985, all

referenced the experiences of other states. During the 1851 convention in Ohio, delegates explicitly mentioned other states experimenting with partisan elections. West Virginia representatives, in addition to focusing on their own state-centered problems with partisan elections, made constant references to other states experiencing similar problems. Regarding proposed solutions, the West Virginia legislators also made explicit references to other states with nonpartisan elections. Finally, Utah politicians were concerned with the experiences of other states using the merit system. The Utah Judicial Council minutes were filled with comments and documents referencing other states. While this paints a compelling picture of the power of external influences, these accounts do not show that external factors have a systematic impact on judicial selection reform. For this reason, diffusion variables measuring this impact were included in all models of judicial selection.

Consistently, in all three models, the proportion of neighboring states variable was positive and significant. This is powerful evidence that neighboring states do impact judicial policy innovation within a state. The single regional diffusion variable did not have a significant impact on hazard rates. This variable is not significant in any model in any chapter. Thus, while this measure was a represented an improvement over not measuring regional diffusion, it does not capture the true influence that states have on one another.

A variable that consistently did not perform in any model was the measure of urbanization. While urbanization is consistently postulated to increase the likelihood of innovation adoption, judicial selection policy appears to be unaffected. This is not entirely surprising. While urbanization makes a frequent appearance in diffusion studies, it does not consistently perform (Berry and Berry 1990; Soule and Earl 2001). In some studies, urbanization increases the rate of innovation adoption (Mooney and Lee 2000; Walker 1969) and

in others it does not (Puro, Bergerson, and Puro 1985; Soule and Earl 2001). In this respect the lack of the influence of urbanization is not unprecedented.

On the other hand, it does provide empirical evidence supporting Dubois' (1990) position that reapportionment within a state is not driving the switch to the merit plan. Dubois provided descriptive evidence that the spread of the merit system was not due to rural fears of lost legislative influence. This was contrary to the Puro, Bergerson, and Puro (1985) suggestion that the spread of merit was likely due to the threat that reapportionment presented to rural districts. The results of this dissertation provide empirical weight to the contention that it was not rural states that led the way to merit reform.

Scholarly accounts of the conversion to partisan and nonpartisan elections are rife with references to the prominent movements of the time. The Jacksonian influence is often credited as a main impetus for the states that switched to partisan elections. Likewise, the Progressive movement is frequently cited as the motivation for states abandoning partisan judicial elections. Anecdotal evidence extracted from the states profiled in this analysis buttress this contention. Though not explicitly referencing the Jacksonian movement, the convention debates of Ohio in 1851 are filled with rhetorical arguments in line with the Jacksonian philosophy. Likewise, the Judicial Council minutes from Utah contain similar references to the main themes of the Progressive Era.

Mixed support was found for these influences. For the switch to partisan elections, the variable measuring the Jacksonian influence was not significant in the primary diffusion model. This could be due to the nature of how the variable was coded. After all, it is a binary variable controlling only for the time period in which the Jacksonian movement was prominent. Regardless, this provides empirical support to the few studies that are critical of the influence of

the Jacksonian movement. The variable measuring the influence of the Progressive movement was significant indicating that this movement influenced the adoption of nonpartisan elections. The rate of nonpartisan adoption was higher during the period associated with the Progressive movement.

Notions of the entrenchment of policies and the willingness of states to experiment with policies, also received moderate support. In two of the three judicial selection models, the age of the current method was significant and negative. In the switch to nonpartisan and merit systems, each additional year under a current system decreased the probability of adopting a new judicial selection system. The longer a system is in place, the less likely states are to abandon it.

On the other hand, the more times a state has switched their systems in the past, the more likely they are to adopt a new innovation. This result is also apparent when looking at the patterns among states. For example, states adopting the merit plan are more likely to have experimented with multiple systems in the past. Conversely, some states are reticent to adopt judicial innovations. For example, states along the east coast have been very resistant to change. As a result, the majority of states that retain appointive systems are the ones that have used this method since statehood. This analysis suggests that they are also the least likely candidates to innovate in the future.

Taken as a whole, the results across all different transition periods offer a comprehensive look at the decision to adjust judicial selection over time. A combination of internal and external factors influence the decision to adopt partisan, nonpartisan, and merit selection systems. In some cases, the influence of certain variables is consistent across time and selection system such as the influence of neighboring states, prior alterations to selection, and the amount of time a method has been used. In other respects, some variables perform in some time periods and not in

others. Thus, a constitutional convention increases the likelihood of adopting a partisan selection system, but does not influence the choice to adopt merit. Finally, some variables consistently do not alter the likelihood of a state changing judicial selection methods. These results provide insights into factors influencing judicial selection system policy and ought to be used to guide future research on the decision to alter selection systems.

Limitations and Future Research

This analysis uses prior research as a guide to measuring the factors that induce states to adopt or reject judicial selection systems. Efforts were made to improve upon certain measures, such as the measure of diffusion. Another benefit of this analysis is the unified models that measure internal and external forces that promote or hinder change. Despite the strength of this dissertation, this project is not without its flaws.

There are many ways to measure diffusion. Two approaches are utilized in this analysis. While the proportion of surrounding states with a specific judicial selection method variable did consistently perform, it is possible that different measures of diffusion would provide a more nuanced look at how and *why* policies spread across the states. Another possible way to code the impact of other states would be to code the total number of states that have adopted a given method regardless of their proximity to a state. It is possible that a movement gains steam and exerts pressure on the states simply by the sheer number of total states that have also adopted.

Additionally, the proportion of surrounding states used in this analysis does not pick up the different mechanisms that may be at work as states observe their neighbors. Two theories have been introduced that suggest a reason *why* surrounding states are influential. States may be either learning from or emulating their neighbors. Emulation is typically portrayed as blind imitation without regard to consequences. Thus, quick adoption by a state would signal

imitation. On the other hand, learning entails a state taking a wait and see approach. If a state is learning from surrounding states their adoption will not be immediate. A potential solution to differentiating between these effects would be to introduce lagged variables or a measure of how long it has been since the surrounding states adopted a given system.

Another deficit of this research is the lack of controlling for salient events. The case studies often revealed that certain situations acted as focusing events that prompted change. These took different forms. For example, party machines waging political battles to unseat judges ruling contrary to their view elicited outrage. Also met with disapprobation was the promotion of individuals who were widely deemed unqualified for the position. In other cases, controversial rulings resonated with the public and garnered widespread attention. It is entirely possible that these scandals and unpopular decisions had an impact on the probability that a state adopted a new selection system. Beyond anecdotal accounts and descriptive research, it is extremely difficult to come up with a measure that would capture these events across time in a standardized fashion.

A potential solution, at least one that could be applied to merit selection, would be to measure the total cost of judicial elections per year as an indicator of the growing political nature of the contests. This could lead states to consider and ultimately adopt merit selection. Due to data availability however, this measure would not be available for the full range of data in the partisan and nonpartisan research. An additional path to capturing these state level effects might be to add a variable that measures the violent crime rate per year. The literature shows that increasing crime rates prompt legislatures to take action. It is possible that increasing crime rates would reflect negatively on the judicial system as a whole, prompting legislatures to alter judicial selection.

More recently, diffusion researchers have adamantly encouraged future projects to include measures of communication between states and the effect of policy leaders and entrepreneurs. Unique approaches have been taken to determine the effect that opinion leaders have on a state. Typically, communication networks and policy entrepreneur effects are measured through answers to surveys distributed to state policymakers. For example, Douglas, Raudla, and Hartley (2015) distributed surveys to court administrators in their study of the diffusion of drug courts. Surveys asked court administrators how they had acquired information about drug courts and information about the success or failure of such systems. The responses to the survey determined that most jurisdictions that had employed drug courts had learned about the system from other states and jurisdictions. The results of their survey were descriptive, but provide compelling reasons to suggest that the policy leaders are important in the diffusion of innovations.

Similarly, Mintrom (1997) used surveys to assess the influence of policy entrepreneurs on the spread of school choice programs. Surveys were distributed to officials in the states primarily responsible for education reform. Survey questions asked about the year in which the official first learned of the program from policy entrepreneurs *within* a state. Mintrom then constructed a variable measuring the presence of policy entrepreneurs and used it as a causal variable.

These are novel ways to measure the spread of innovations, yet it would be difficult to transport these to the studies of judicial selection. For one thing, it would be impossible to survey many of those responsible for judicial selection system decisions, especially for those involved in partisan and most nonpartisan election adoptions. Those policymakers are no longer alive to survey. With respect to merit adoption, it would be difficult to identify the policymakers

responsible for the decision to adopt merit, not to mention the difficulty with memory recall since the last merit adoption occurred almost 30 years ago. Thus, these tactics seem promising when analyzing the diffusion of current and more recent policies, but they are not a credible alternative in this case.

Despite the limitations of this analysis, the results of this study are important to both scholars of judicial institutions and reformers interested in promoting judicial selection change. In regard to scholars, this unified model of diffusion provides results showing that internal and external characteristics have been influencing policy change since the 1800s, a time long before modern technology reduced communication barriers between states. At least in the realm of judicial selection policy, states have been taking cues from their neighbors for a long time.

For reformers, this analysis provides reasons to act strategically when attempting to achieve policy reform. The patterns contained within this study show that state adoption of new judicial systems is not random. Based on the conclusions of this work, it would be best for reformers to concentrate their efforts on states within particular regions and those that have a history of altering judicial selection policies. Furthermore, building bipartisan support or focusing on states with unified party control may increase success. Ultimately, these organizations may have some influence within a state, but the larger reason for reform proposal adoption is much more complex and involves factors internal and external to a state.

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APPENDIX

Table A.1. Regional Diffusion Cox Proportional Hazards Results

	Partisan Judicial Elections 1832-2014	Nonpartisan Judicial Elections 1907-2014	Merit Plan 1940-2014	Merit Plan 1960-2014
Independent Variables	Coef. (Std. Error)	Coef. (Std. Error)	Coef. (Std. Error)	Coef. (Std. Error)
Census Region	.45 (.29)	-.19 (.28)	-.34 (.36)	-.73 (.55)
Divided Government	-.59 (.52)	-.36 (.59)	-1.06 (.68)	.00 (.02)
Percent Urban	-.04** (.02)	.00 (.01)	.00 (.02)	.03 (.03)
State Bar	-.33 (.46)	-.03 (.39)	-.38 (.61)	.47 (.81)
Organization				
Number of Prior Changes	1.97*** (.40)	.25 (.18)	-.20 (.28)	.03 (.29)
Age of Method	-	-.06*** (.01)	-.07*** (.01)	-.06*** (.01)
Constitution	4.07*** (.89)	-	1.42 (1.38)	2.72* (1.63)
Legislative Professionalism	-	-	-	-8.75* (4.99)
Governor Powers	-	-	-	.17 (.47)
Jackson	-1.64*** (.55)	-	-	-
Progressive	-	2.80* (1.60)	-	-
Number of Obs.	2,278	3,664	2,892	1,951
Number of Events	37	21	15	15
AIC	140.233	106.5124	75.07774	68.66734
*0.1, **0.05, ***0.01				