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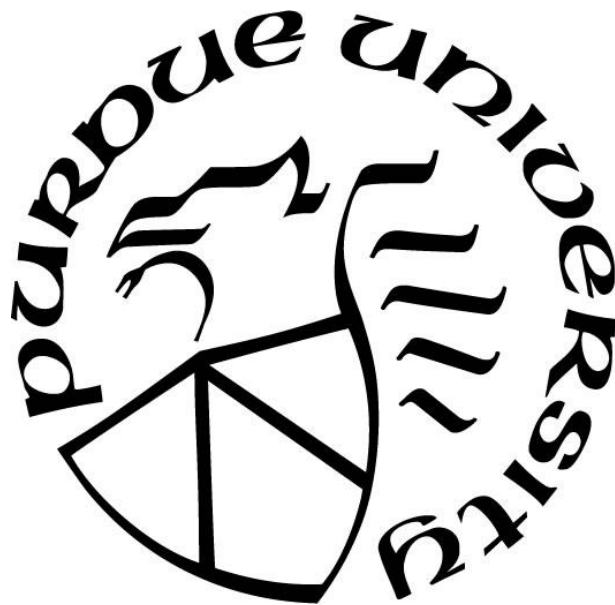
**STATE JUDICIAL SELECTION METHODS AS PUBLIC POLICY:
THE MISSOURI PLAN**

by
James A. Gleason

A Dissertation

*Submitted to the Faculty of Purdue University
In Partial Fulfillment of the Requirements for the degree of*

Doctor of Philosophy



Department of Political Science
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For Lisa
You make my life, Beautiful!

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ABSTRACT

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State judiciaries are foundational institutions of governance in the United States. They are coequal, policy-making branches of government whose members, along with the legislative and executive branches, are constitutionally authorized and empowered in all fifty American states. Extant research on judicial selection in the American states provides neither a comprehensive theory of why states choose their particular judicial selection method nor a comprehensive empirical assessment of this important question. This research seeks to fill this lacuna by increasing understanding of American state courts through the formulation of a theory of state judicial selection, a short but comprehensive history of state judicial selection reform, and an event history analysis of the adoption of merit selection by states for choosing judges to their courts of last.

The major finding is that, similar to other institutional arrangements, state judicial selection methods are highly path dependent. Once established, they are on a trajectory which is difficult to alter. An important secondary finding is that lawyers play a significant role in bringing about judicial selection reform when and where the possibility of change arises. They are incentivized actors who historically have taken the lead in judicial selection reform efforts. Geography also seems to be an influential factor in judicial selection reform, suggesting that reform-minded states take cues and learn and from their neighbors.

CHAPTER 1: THE PROBLEM OF STATE JUDICIAL SELECTION

State Judicial Selection

State judiciaries are foundational institutions of governance in the United States. They are coequal, policy-making branches of government who, along with the legislative and executive branches, are constitutionally authorized and empowered in all fifty states. More than 98% of all legal cases are filed in state courts,¹ and the vast majority of personal experience Americans have with the judicial system occurs at the state-court level (Tarr 1998a). Each state independently decides how to choose its judges and a range of approaches are used.

There are three principal methods of judicial selection in American state courts: popular election, appointment, and merit selection. In turn, there is meaningful variation within each principal method. Popularly elected judges are chosen in either partisan² or nonpartisan races.³ Appointed judges are chosen by both governors⁴ and state legislatures.⁵ Merit selection states employ a wide array of nominating commissions and retention

¹ Figure computed with data drawn from LaFountain et al. (2015) and Hogan (2012).

² Six states elect judges to their court of last resort by partisan ballot: Alabama, Illinois, Louisiana, Pennsylvania, Texas and West Virginia. Also, Ohio uses a partisan primary to select candidates for the general election.

³ Fifteen states elect judges to their court of last resort by nonpartisan ballot: Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington and Wisconsin.

⁴ Three governors have the authority to appoint judges to their state courts of last resort: California, Maine, and New Jersey. California appointees must be confirmed by the state commission on judicial appointments. In Maine and New Jersey, gubernatorial appointees are confirmed by the state senate in a fashion similar to the federal system. However, Maine and New Jersey jurists are initially appointed to a fixed term of seven years. Maine judges are then eligible for reappointment for an unlimited number of seven-year terms. In New Jersey, a judge that is reappointed after his or her initial term is granted tenure during good behavior.

⁵ Judges on their state courts of last resort are appointed by the legislatures of South Carolina and Virginia.

schemes.⁶ To further confuse the situation, many states vary the methods utilized at different levels of courts.⁷

Not surprisingly, then, what constitutes “the best” method for the selection and retention of state court judges is one of the most enduring political questions in the United States and has generated a considerable amount of scholarly attention (Hall 2001). The last half century has witnessed the majority of American states change the methods by which they select all or some of their judges. A prominent judicial scholar once observed, “It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection” (Dubois 1986, 31). A generation later, the situation essentially remains unchanged. Recent reform efforts in Kansas, Minnesota, Nevada, North Carolina, and Tennessee suggest this trend will likely continue.

Reddick (2002) observes that the social science research regarding judicial selection focuses almost exclusively on the impact methods have on the balance between judicial independence and judicial accountability (e.g., Hall 2001, Shugerman 2012). Another well-researched question is whether differing methods of judicial selection result in jurists that are distinguishable in characteristics and quality (Reddick 2002).

In contrast, little research exists regarding the choice of judicial selection methods employed by the individual American states. The contributions of Glick (1981; 1983), Puro, Bergerson, and Puro (1985), Dubois (1990), Hanssen (2002; 2004), and Haydel

⁶ Commissions vary widely in terms of numbers (six to seventeen) and composition (a mix of judges, lawyers, legislators and private citizens). Around half require partisan balance while a similar number mandate geographic representation. Most merit selection states utilize retention elections, although in some states judges can be reappointed while in others jurists serve life tenure (Reddick and Kourlis 2014).

⁷ For example, Kansas, Indiana and Missouri all use merit selection to choose justices to their respective supreme courts, but each uses partisan elections to select some of their trial judges.

(1987) provide a modest yet useful foundation for further research. These researchers address state judicial selection from the context of the adoption of merit selection as a preferred policy and most utilize innovation and diffusion research techniques.

When considered as a whole, however, existing research on state judicial selection methods of the American states has neither formulated a comprehensive theory of why a state chooses its particular judicial selection method, nor has there been a meaningful empirical assessment of this important question. This research seeks to fill this lacuna by increasing our understanding of American state courts through the formulation of a theory of state judicial selection, a short but comprehensive history of state judicial selection reform, and a time-series quantitative assessment of the adoption by states of merit selection judicial selection for choosing judges to their courts of last resort.⁸

Statement of the Problem

The principal research question is this: Why do American states choose to utilize merit-based selection of judges for their courts of last resort? In seeking to discern a recognizable pattern of phenomena that predict a state's decision to formally change its institutions for choosing its most important jurists to merit selection, this research explores the leading theories of institutionalism and the historical record of state judicial selection

⁸ The term "court of last resort" is used herein to identify the ultimate appellate court within a state. Most states designate this court as the state "supreme court." In other states, however, the label "supreme court" is either not used or has other meaning (New York being the most well-known example, where the "supreme court" is a trial-level court). The term "highest state court" is also found in the extant literature to describe the ultimate appellate court within a state. Herein, "court of last resort," "state supreme court," and "highest state court" will be used interchangeably. Oklahoma and Texas each has two state courts of last resort which demark jurisdiction of a case upon whether it is a civil or criminal matter. Both states apply the same selection method to each of their highest courts, and each state will be treated herein as a single unit for purposes of quantitative assessment.

reform. Theory and history provide the basis for conceptualizing the explanatory variables which are tested in the quantitative assessment.

Following the lead of earlier studies, merit selection is posited as the preferred policy outcome (Haydel 1987; Puro, Bergerson, and Puro 1985). Gleason (2010) conducted a one-period pilot study that considered whether demographic, institutional, political, and geographic characteristics of states have a meaningful relationship to whether they utilize merit selection as the method for choosing judges for their courts of last resort. Statistical analysis produced inconsistent results that were often contrary to theorized expectations. Nonetheless, when a parsimonious model was constructed, maximum likelihood estimates produced insightful predictions. The model correctly predicted the nine cases with the highest probability that the state will use merit selection as the method for choosing judges for their courts of last resort and accurately forecasts twelve of the fourteen with the lowest likelihood (Gleason 2010).

A comprehensive theoretical, historical, and quantitative analysis of state judicial selection methods fulfills multiple research objectives. By connecting state judicial selection to existing studies of intuitionism, it allows for theory building on an important subject that is conspicuously lacking theoretical foundation. This study also illustrates the complex historical configuration of why jurisdictions choose particular selection methods, thereby increasing our understanding of factors that enter into making these important institutional choices. Third, it will reveal significant characteristics of jurisdictions that are more or less inclined to adopt and maintain merit selection to choose judges for their state courts of last resort.

When a state chooses to modify the method by which it chooses judges for its court of last resort, it is an instance of institutional design and an expression of preferred ideals by political winners who use their authority to design new structures and impose them on the jurisdiction (Moe 1990). Specifically, if a state uses a merit-based process, its preferred ideal is quality jurists. If a state favors popular election for the selection of its judges, democratic control through electoral accountability is the preferred ideal. Judicial independence, a marked concern of the Founding Fathers and the basis for the life-time tenure of federal judges, is the preferred ideal of an appointed judiciary (Tarr 2007).

The preferred ideals are not mutually exclusive. The appointment of judges, for example, retains some democratic control through the appointing authority being an elected official or group of officials. Similarly, eligibility laws limit those who may run for judge through such requirements as mandating membership in a state bar and a minimum number of years of legal experience and enhance the quality of jurists.⁹ Merit selection, as it is conventionally constituted, combines facets of both appointive and elective approaches.

Judicial institutions reflect the preferred ideals of the political elites and citizens of a particular state. These institutions are subject to refinement, modification, and change in a manner generally *similar* to other phenomena of public policy, and can be properly thought of and treated as a discrete policy. However, it would be a mistake to expect the adoption of an innovative judicial selection method to be *identical* to the adoption of other types of policies. To be sure, the formal requirements for altering a state's judicial selection method are typically more onerous than those necessary for the adoption of other types of

⁹ For example, eligibility to serve as a justice of the Kentucky Supreme Court requires a person to be a citizen of the United States, a current member of the Kentucky State Bar, a resident of the district they represent for no less than two years prior to taking office, and a licensed attorney for at least eight years (KY. CONST. § 122).

policy. But more importantly, altering institutional arrangements that dictate how those who decide public policy are selected will necessarily involve heightened levels of political and public scrutiny. Such determinations implicate basic conceptions of how governance ought to occur and will vary over time and place, which is readily apparent in the context of state judicial selection.

Merit selection seeks to balance the independence of judges by minimizing the political influences brought to bear on their selection while retaining accountability through an appointive process that relies on democratically chosen officials. The preferred ideal, quality jurists, is thought to be found somewhere in the balance. It is this sense of balance that has produced the most widespread judicial selection reform in American history.

Each of the fifty states has a discrete judiciary with its own history, institutions, and procedures—no state currently selects and retains judges in accord with the federal constitution. Every state that entered the Union prior to 1845 provided for the appointment of judges to their courts of last resort (See 2007). The primary appointing authority were state legislatures, although governors and councils were designated in about one-third of the states. Tenure in office varied as well, and most early American state court judges served only short, fixed terms.

In contrast to the founding period, all states admitted to the Union between 1846 and 1912 provided for a predominantly elected judiciary (See 2007). The wave of democratization that enveloped the United States in the decades prior to the Civil War witnessed fifteen of the twenty-nine states existing in 1846 amending their constitutions to provide for popular election as the primary means of selecting judicial officers (Winters 1968).

By the end of the 19th century, however, the Progressive era ushered in widespread dissatisfaction with the functioning of the legal system. In particular, undue partisan influence in the popular election of judges became the scapegoat for the shortcomings of the entire judicial process (e.g., Hall 1919; Perry 1934). Nonpartisan judicial elections were adopted in more than fifteen states between 1908 and 1941. However, continued dissatisfaction with political influences in judicial selection prompted advancement of yet another Progressive reform.

In 1937, the American Bar Association (ABA) endorsed nonpartisan merit-based selection and retention of judges (Wood 1937). The “merit system”—a combined appointive and nonpartisan elective process—was thought to balance judicial independence and judicial accountability, minimize political considerations in the selection of judges, produce highly qualified and capable judges, and stimulate the adoption of other administrative innovations (Reddick 2002; Savage 1985). Missouri was the first state to adopt such a plan in 1940, and the term “Missouri Plan” became synonymous with nonpartisan merit selection of state court judges.¹⁰

With the active support of state bar associations and others,¹¹ the ABA continues to advocate for merit selection. Enthusiasm for the approach has been far from universal, however, as any proposal aimed at changing existing institutions in the American states

¹⁰ In their definitive study of the Missouri Plan, Watson and Downing (1969, 9-10) observe, “It is difficult to determine the precise reasons why Missouri became the first state to adopt the Plan favored by the American Judicature Society and American Bar Association, but certain factors contributed to the successful campaign waged there.” They identify four particular exigencies that appear to have helped further the cause in Missouri, but they are very case specific. I intend to look for possible “triggering” mechanisms as part of the historical analysis.

¹¹ Retired Associate Justice of the Supreme Court of the United States Sandra Day O’Conner has become an outspoken advocate for the use of merit selection by the states. Her efforts include several op-ed pieces in the *New York Times* supporting merit selection initiatives in Nevada and Minnesota. She has also lent her name to “The O’Conner Judicial Selection Plan,” a version of merit section that includes judicial performance evaluations (Reddick and Kourlis 2014).

necessarily involves the redistribution of political power. There has been substantial resistance to merit selection, with much of the opposition emanating from governors and state legislators (Hanssen 2002). The use of merit selection to choose judges for courts of last resort has only been adopted by twenty-four states,¹² with the majority of those adoptions occurring during the 1960s and 1970s.

[Table 1.1 about here]

A great deal of variation exists within the details of merit selection systems as applied by individual states.¹³ The quintessential merit system for selecting judges to its court of last resort includes three features. First, a nonpartisan nominating group, most often a specially constituted judicial selection commission, considers nominees and submits a list of qualified candidates to an appointing authority. Individual state laws dictate the membership of the nominating groups, but they usually include members of the public and the state bar chosen by both the governor and the state bar association (Reddick and Kourlis 2014).

Second, the appointing authority, usually the governor but in several instances the state senate, chooses from the candidates submitted by the nominating group and appoints

¹² Twenty-four states use merit-based selection to choose judges for their court of last resort: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Wyoming. The District of Columbia also uses a merit selection system for choosing its appellate court judges. A judicial nominating commission recommends candidates to the President of the United States who then appoints his preferred candidate.

¹³ The classification of judicial selection method is not as straight-forward as it might appear. In four states where the governor is constitutionally authorized to appoint judges to their state courts of last resort, Delaware, Maryland, Massachusetts, and New Hampshire, it has been the established practice of those states' chief executives to appoint jurists from a list of nominees advanced by a nonpartisan judicial nominating commission pursuant to an established executive order. New Mexico utilized merit selection pursuant to executive order for more than thirty-five years before a constitutional amendment providing for merit selection was enacted in 1988. Of course, a state that utilizes merit selection pursuant to executive order does not employ retention elections.

them to serve on the bench until a subsequent election. In some states where governors appoint, the selection must be ratified by a vote of the state legislature.

Finally, each seated judge who desires to remain on the bench is subject to retention. This is usually accomplished by popular vote at the next general election following a predetermined period after appointment and periodic elections thereafter, at which the electorate is asked whether a seated judge should be permitted to continue as a judge for a set term of years. If a judge fails to receive the necessary percentage of votes in a retention election, the process begins anew (Winters 1968).¹⁴

Problem Significance and Rationale

As Chief Justice John Marshall famously observed more than 200 years ago in *Marbury v. Madison*, “It is emphatically the province and the duty of [judges] to say what the law is.”¹⁵ Today, leading judicial scholars argue the attitude of jurists is the key component of judicial decision making (Brace, Hall, and Langer 2000; Segal and Spaeth 2002).¹⁶ The judicial selection process, therefore, is an *a priori* consideration to the attitudes of judges. Thus, a state’s choice of judicial selection method impacts both who sits on the bench and the policies that are produced.

¹⁴ Only fifteen states utilize all three criteria. They are Alaska, Arizona, Colorado, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Utah, and Wyoming.

¹⁵ 1 Cranch 137, 177 (1803).

¹⁶ The attitudinal model is but one of three analytical approaches to the question of how judges make decisions. The legal model explains judicial outcomes as looking at the facts of a case in light of the plain meaning of the text of the relevant law and prior judicial interpretations. The attitudinal model posits that facts are considered and interpreted entirely in light of the ideological attitudes and preferences of the judges. The strategic model identifies judges as being goal oriented, but outcomes are tempered by the preferences of other decision makers and the institutional context in which cases are decided (Murphy et al. 2005). Research suggests state court judges are more constrained than their federal counterparts, but attitudinal factors still influence outcomes (Randazzo, Waterman, and Fix 2011).

There are three principal reasons for conducting this study. First, there is a lack of sufficient knowledge given the importance of the question. The vast majority of academic literature concerning the institutions of the American judiciary focuses on the federal courts in general and the Supreme Court of the United States in particular. Accordingly, the rationale and consequences of the constitutionally mandated life-tenure of appointed federal judges is well known to students of American politics.

Much less is known about state judicial selection methods, despite the obvious importance of state judiciaries and the significant level of variation between the methods employed by various American states (Dubois 1990). This dearth of extant research has yet to produce either useful quantitative assessments of the question or a sound theoretical approach to the study thereof. Given that state judiciaries are foundational institutions of governance in the United States and reform efforts seem ever-present, such omissions are conspicuous.

Second, this inquiry is unique with respect to the use of time-series data to investigate state judicial selection methods. Previous quantitative studies are generally limited to a single time period (Dubois 1990; Gleason 2010; Glick 1981; 1983; Puro, Bergerson, and Puro 1985; but see, Hanssen 2004). While these studies are interesting, informative, and provide a foundation for further research, they fail to move beyond the mere surface of the question because they fail to consider the question over time. Institutions are conspicuously resistant to change and a comprehensive study of any institutional change must consider a wider span of time. Missouri was the first to adopt merit selection in 1940 and a proper inquiry must consider relevant factors from that time through the present.

This research will employ event history analysis to provide the historical dynamic that is absent from prior research. An event-specific and historical approach provides meaningful insight into the complex social process that is policy adoption and is preferable to cross-sectional and panel designs (Box-Steffensmeier and Jones 1997). There are many possible factors in state decisions, and it is probable that these factors vary over time such that single-period analyses fail to identify critical determinants of state behavior. The historical analysis introduces a degree of rigor unavailable to previous analyses of state judicial selection and provides theoretical insights that are absent in single-period studies.

Third, the proposed study will lend insight into the conditions necessary for future adoption of merit selection as the method of choice for states that do not currently utilize it. If it is possible to estimate with any degree of accuracy why states have previously adjusted their methods of judicial selection, it will permit advocates of merit selection to focus their efforts on certain jurisdictions at an appropriate time. Similarly, the results may be utilized by opponents of merit selection as a signal to anticipate and combat potential reform efforts.

Chapters Roadmap

The analysis to follow will be presented in three substantive chapters and a conclusion. Chapter 2 presents a theory of state judicial selection. The problem is posited as a question of institutional analysis and theoretical constructs of path dependence, the role of actors, and the diffusion of institutions are developed. The study of state judicial selection is analogous to and benefited by consideration of policy innovation and diffusion research, which provides micro-level methodological tools that are notably absent in the

conventional study of institutions. A review of the extant political science literature on state judicial selection reveals a void in received knowledge in need of further theoretical development and empirical assessment. A rudimentary theory of merit selection adoption in the American states is presented and six theoretical propositions are advanced. These propositions serve as the basis for specific hypotheses and models that are quantitatively tested in Chapter 4.

A short history of judicial selection in the American states is presented in Chapter 3. Actual and ideal forms of judicial selection are tracked from Tudor-era England to the present day. The chapter is structured in the familiar approach of preferred reforms: appointment in the colonial and early-U.S. period, partisan elections in the 19th century democratization period, nonpartisan elections in the Progressive era, and merit selection in the mid-to-late 20th century. This discussion provides a qualitative and sometimes anecdotal addition to the qualitative analysis that follows. It also highlights the significant degree of continuity that best characterizes the history of judicial selection in the American states.

Chapter 4 provides a quantitative assessment of the problem of state judicial selection. Fourteen explanatory variables drawn from extant theories of institutionalism, policy innovation and diffusion research, and the history of state judicial selection developed in Chapter 3, are conceptualized and operationalized. A hypothesis for each is formulated and tested. Event history analysis is then used to test a series of general models and the theoretical propositions advanced in Chapter 2. Statistical results demonstrate that the passage of time since last changing its method for selecting state supreme court judges has an overwhelmingly negative impact on the likelihood that a state will adopt merit

selection to choose jurists for its highest court. The results also demonstrate that lawyers play an important role in the adoption of merit selection in instances where an opportunity for reform is available.

The final chapter combines the theoretical, historical, and quantitative assessments of state judicial selection into a single discussion. Following a short, general discussion of the research and results, the six theoretical propositions introduced in Chapter 2 are considered in light of the historical record of state judicial selection discussed in Chapter 3 and the quantitative analysis provided in Chapter 4. The major finding is that state judicial selection institutions are highly path dependent and whether a state will adopt merit selection to choose justices for its state supreme court justices is increasingly unlikely the longer an alternative method has been in place. A secondary finding is that where an opportunity for reform is available, lawyers play a critical role in the adoption of merit selection. These findings comport well with the broader understanding of institutions which holds that institutions are path dependent and institutional change is the result of the efforts of interested actors. The chapter concludes with a short discussion of future research possibilities.

Table 1.1: States Using Merit Selection for Courts of Last Resort

Missouri	1940	Arizona	1974
New Mexico	1952	Massachusetts	1975
Kansas	1958	Florida	1976
Alaska	1959	New York	1977
Nebraska	1962	Delaware	1977
Iowa	1962	Hawaii	1978
Colorado	1966	South Dakota	1980
Oklahoma	1967	Utah	1985
Indiana	1970	Connecticut	1986
Maryland	1970	Tennessee	1994
Wyoming	1972	Rhode Island	1994
Vermont	1974	New Hampshire	2000

Note: Date shown represents the year of implementation of merit selection by a state for choosing judges to its state court of last resort.

CHAPTER 2: A THEORY OF STATE JUDICIAL SELECTION

Introduction

The significance of state judiciaries is difficult to overstate. While U.S. Supreme Court rulings on gay marriage, abortion, and gun control routinely grab headlines, it is state laws and the interpretation of those laws that are most impactful on ordinary Americans. The policy-making role of state supreme court justices on questions of domestic relations, property rights, torts and criminal law affect the lives of millions of people daily.

There is a dearth of social science research on the important question of why and how states choose particular judicial selection methods (Hanssen 2004). This omission is particularly unfortunate since there are existing and underutilized research paradigms that contribute much to our understanding of the topic. The instant research combines important aspects of two well-established research traditions to investigate state judicial selection. Specifically, it seeks to wed the theoretical conventions of institutionalism with the rigorous methodology of policy innovation and diffusion research. This allows the formulation and testing of theoretical propositions about state judicial selection that are currently absent.

The logic of a multiple-paradigm approach to social science inquiry is obvious. An effort to synthesize differing intellectual traditions complements existing knowledge, especially when similar concepts are of concern. Since each has different strengths and weaknesses, the strength of one approach may be used to address the weakness of another. The cross-pollination of research traditions within a disciplinary subfield may seem self-

evident. However, there is greater reluctance to cross theoretical and methodological borders across subfields.

Maintaining boundaries is reasonable where different phenomena are being explored and different questions are being asked. It is unpropitious to ignore potential contributions from other subfields, however, when similar concepts are of concern. The oversight is even more glaring where the conventions complement one another and have the potential to fill conspicuous gaps in existing scholarship.

For example, diffusion is identified as an important causal factor by both institutionalists and public policy scholars. Institutionalism provides a rich theoretical basis for diffusion in the context of institutional change, but suffers from a failure to adequately specify the mechanisms involved in such change. Critical causal concepts remain vague and furtive (Campbell 2004). Conversely, diffusion in the public policy context is the subject of an extensive literature that has developed a sophisticated and well-honed methodology. However, since most diffusion studies confine their study to a single, nonrepeating event—the adoption of a particular policy or program—little attention is paid to the development of a broad theoretical construct (Berry and Berry 2007).

This research seeks to pool the strengths of these two intellectual traditions while simultaneously addressing their weaknesses. In doing so, we gain not only a better understanding of the phenomena of interest but also of institutions and public policy more generally.

The remainder of this chapter starts with an overview of contemporary institutional analysis and a brief discussion of its three primary variants: rational choice institutionalism, organizational or sociological institutionalism, and historical institutionalism. Next, I

discuss theories of institutional change that accentuate the causal mechanisms of path dependence, actors, and diffusion. Significantly, each mechanism is best understood from a different variant of institutionalism than the others. Emphasis then shifts to tracking the evolution of innovation and diffusion research from its genesis of identifying states as innovators to a methodologically sophisticated means to trace and explain a range of policy changes over time. A brief review of the extant literature on the choice of judicial selection methods employed by the American states follows. The chapter concludes with a theory of merit selection adoption which offers six testable theoretical propositions that are scrutinized in later chapters.

The Problem of Institutional Analysis

Institutions are the foundations of social existence (March and Olsen 1984). The basic premise of the study of institutions is that institutions matter; they are the variables that explain much of political life and they require explanation (Peters 1999). The contemporary study of institutions, generally referred to as the new institutionalism,¹⁷ is divided into the three primary variants of rational choice institutionalism, organizational or sociological institutionalism, and historical institutionalism.¹⁸ All three investigate formal and informal institutions, the relationship between institutions and behavior, and are particularly concerned with institutional continuity and change. Important differences exist

¹⁷ To contrast, old institutionalism refers to the intellectual traditions of the late nineteenth and early twentieth centuries. It focused on describing formal institutions such as constitutions and legislative bodies in great detail. It was largely normative in approach; hypothesis formulation and testing was given little attention (Campbell 2004).

¹⁸ The decision to use lower case designations is intentional. New institutionalism and its variations are too loosely connected to be considered a single, coherent school of thought worthy of designation as a proper name.

in terms of their theoretical roots, levels of analysis, and theories of action and constraint (Campbell 2004; Hall and Taylor 1996).

Rational choice institutionalism traces its roots to neoclassical economics. It is predicated on a set of behavioral assumptions that holds that individual actors behave instrumentally to attain and maximize their preferences. Institutions are narrowly defined as “formal and informal rules and compliance procedures” (Campbell 2004, 11). Politics is viewed as a collective action problem where a particular institution is the equilibria of the strategic interactions of self-interested individuals. These conventions permit formal modeling and favor micro-level analysis. Institutions are difficult to create and expensive to change. It becomes increasingly difficult to modify them in fundamental ways the longer they are in place. Actors will continue to pursue their interests within the constraints of existing institutions (Campbell 2004; Hall and Taylor 1996).

Organizational institutionalism places great emphasis on normative and cognitive dimensions. It adapts a broad definition of institutions that includes not only formal and informal rules and procedures, but also “cultural frameworks, cognitive schema, and routinized processes of reproduction” (Campbell 2004, 11). The paradigm evolved from the organizational theory subfield of sociology and from cognitive psychology. Organizational fields and populations are the objects of inquiry. Organizations of a common type share a common institutional environment and are expected to adopt similar forms and practices over time. The particular form of an institution is less about efficiency and more about cultural legitimacy where behavior is rationally bounded by world view (Hall and Taylor 1996). This is especially true where actors do not have a well-defined

sense of self-interest. They will look to existing scripts and practices to guide their behavior as well as constrain it (Clemens and Cook 1999).

Historical institutionalism has emerged as the dominant exemplar of institutionalism, and is the subject of an extensive body of literature (Pierson and Skocpol 2002). It is generally viewed as intellectually lying somewhere in between the rational choice and organizational institutionalisms (Hall and Taylor 1996). Institutions are broadly defined as formal structures as well as formal and informal procedures, rules, norms and conventions. Emphasis is given to historical processes and legacies. The effects of institutions are viewed as a blend of culture (ideas and appropriateness) and utility (self-interest and instrumentalism). Research examines the interaction of institutions, the formation of preferences, the asymmetry of actors, and the mechanisms of change and continuity (Campbell 2004; Ma 2007).

Historical institutionalists are drawn to big-picture problems such as the development of welfare states (Skocpol 1992), variations in national health systems (Immergut 1992), regime development and change (Mahoney 2001), and economic regionalism in Europe and East Asia (Choi 2012). Historical institutionalism developed primarily through scholarship examining how the institutional arrangement of nation-states impacts political and economic decision making in a macro-level, comparative context. A critical takeaway from this research is that institutions tend to constrain outcomes rather than cause them (Thelen and Steinmo 1992). Another important finding, and perhaps the defining characteristic of historical institutionalism, is the deduction that institutions, once established, are path dependent.

Although the literature often views differences between the approaches as more important than their commonalities, a growing second movement of new institutionalism seeks rapprochement and synthesis rather than division within the field of institutional analysis (Campbell and Pederson 2001; Campbell 2004; Pierson 2004). This work is already underway. For example, Katznelson and Weingast (2005) illustrate advancement toward a better understanding of actor preferences. Rational choice institutionalists are inclined to impute preferences upon actors at the micro-analytical level without any consideration of institutional constraints. Historical institutionalists tend to favor the view that preferences are caused by historical developments without considering how they are affected by restricting institutional settings. By focusing their attention on institutions, both sets of scholars have been able to enhance and complement our understanding of situationally induced incentives and preferences without harming extant knowledge (Katznelson and Weingast 2005).

Comprehending causal processes is a central point of inquiry in the social sciences and is crucial to understanding why states choose their particular judicial selection methods. It is therefore necessary to advance accurate theoretical conceptions of the critical causal mechanisms impacting state judicial selection. This research is theoretically grounded in new institutionalism and deliberately borrows from each of the three institutionalism variants where they contribute important insight, particularly to our understanding of causality. The mechanisms of path dependence, actors, and diffusion are key causal concepts that have received much attention from institutional scholars.¹⁹ Each

¹⁹ There is some inconsistency in the language used to describe these mechanisms. For example, organizational institutionalists tend to use the term “choice-within-constraints” instead of “path dependence” (Campbell 2004).

of these mechanisms plays a key role in explaining why states choose their particular judicial selection methods.

Path Dependence and Institutional Change

Historical institutionalists posit that critical junctures establish equilibria in institutional arrangements that launch them on trajectories or “paths” which are very difficult to alter (Capoccia and Kelemen 2007, 342). These paths create various positive feedback processes that reward actors for behaving in ways that are consistent with past behaviors. Each step down the path increases the relative cost of choosing other options, thereby creating greater dependence (Pierson 2000).

These increasing returns lock in institutional forms and associated behaviors in a number of important respects. First, institutions generally have high start-up costs and established actors will avoid seeking change, especially where they view as remote the chances of other actors doing so. Second, established actors will deliberately build institutions and develop procedures in a manner that makes them difficult to dismantle. Third, over time, established actors gain knowledge about how a particular policy or decision-making style has been institutionalized and are hesitant to abandon it. Finally, those who benefit from an existing arrangement will seek to reinforce and perpetuate their advantage. People generally seek only to make modest adjustments to existing institutions that result in path-dependent change (Campbell 2004).

Recognition of path dependence as a guiding principal redefines the object of inquiry in several important respects. First, the timing and sequence of happenings is critical. Events that happen early in the process have key long-term effects injecting

randomness and unpredictability to end-states; seemingly minor, even accidental, events are remembered. Since institutions become increasingly static, sufficient distance down a path will eventually lock in a particular arrangement, even where outcomes are inefficient and generate lower payoffs than alternatives (Pierson 2000). Second, opportunities for change evolve as relevant institutions and actors interact over time creating an ever-changing political game. The calculations of political actors concerning what is at stake and the nature of existing constraints will vary, perhaps even significantly. Though constrained, institutional development is a diverse and dynamic process (Fioretos 2011).

Path dependency strongly suggests a basic pattern of smooth and gradual change in a certain direction for existing institutions. Institutions are sticky and prone to inertia. Change is normally evolutionary in the sense that current forms of institutions strongly resemble the qualities of their forerunners. Much scholarship illustrates this conclusion (e.g., Lindblom 1959; Nelson and Winter 1982; North 1998; Riker 1998).

Change, of course, is not always path dependent. Rapid and profound changes periodically occur when a crisis, revolution, shock or other major event leads to the adoption of institutional structures that are fundamentally different from their predecessors. Scholars commonly refer to a discontinuous pattern of institutional change as a punctuated equilibrium (Capoccia and Kelemen 2007).

Thus, a dual model of institutional development emerges. It begins with a critical juncture (the punctuated equilibrium of an earlier institution) that defines the starting point. A set of institutional constructs and learned behaviors evolve over time as path dependency sets in. Increasing returns reinforce the status quo and maintain it upon a certain trajectory even when more desirable options exist. The older the arrangements get, the higher the

cost of available alternatives becomes and the inertia deepens even further. Finally, a punctuated equilibrium occurs and the long-established institution is gone. A new equilibrium is established and the cycle repeats.

While this dual model provides a useful framework for explaining much about institutional change, a conspicuous omission is how to explain a less revolutionary change that still has important, transformative effects, where many characteristics of existing institutions remain. Campbell (2004) describes an innovative process of such mid-range institutional change as bricolage. He notes that actors often craft new institutional arrangements by reshuffling their existing repertoire of options. Substantive bricolage is designed to accomplish certain goals and is instrumental in nature. Symbolic bricolage is more idealistic and aimed at furthering dominant societal norms. Some bricolage combines both substantive and symbolic elements. The resulting change is meaningful, but stops well short of anything revolutionary. It is path dependent in the sense that reformers are limited to variations of existing schema and change is endogenous (Campbell 2004).

Distinguishing between evolutionary change, punctuated equilibrium, and bricolage is difficult where a situation fails to lend itself to an exact grouping. Institutions do not exist in a vacuum so it is unsurprising that sometimes features overlap categorical definitions. It is still necessary, however, to establish distinguishing parameters. Accurately characterizing the type of change that is occurring is a prerequisite to understanding that change. Evolutionary change is denoted by endogenous, incremental change. Punctuated equilibrium is characterized by exogenous forces that result in fundamental alternation of existing institutions. Bricolage results in an important change to existing arrangements, but the resulting institution retains most of its key features.

Although exogenous forces may have an impact, path dependence will constrain the choice of alternatives.

Actors and Institutional Change

Implicit in any discussion of path dependency is the notion of agency. Whether acting as individuals, groups, or with institutional authority, it is human actors who seek or resist change, and are ultimately responsible for the form of the change that occurs. There is an extensive literature in political science on the duality of structure and agency that is well beyond the scope of this project. However, it is important to observe that both matter in the context of institutional change. Path dependency tends to constrain innovation. Actors bring innovation about.

Rational choice institutionalists take a sometimes extreme view of what motivates actors. They contend that actors are fully rational and self-interested; actors apply a logic of instrumentality and seek to maximize benefits. Organizational institutionalists favor a logic of appropriateness. Actors fashion solutions that are acceptable and legitimate in a broader social context. Institutions must be consistent with the norms and values of their environment in order to survive. Historical institutionalists take the middle ground when contemplating the motives of actors. People act intentionally toward a goal, but do not necessarily have to be acting in self-interest. In some situations, self-interest dominates and actors behave instrumentally. In others, actors fashioning institutional arrangements are sometimes more influenced by ideas and principled beliefs (Knight 1992).

Mahoney and Thelan (2010) investigate the role of change agents within the context of path dependent institutions. They observe that ambiguities inherent in institutions and

uncertainty concerning outcomes sometimes make it difficult to assess who are winners and losers. Actors are working with far less than perfect information. Where people are embedded simultaneously in various institutions, it is not unusual for them to win in one context and lose in another. The key to understanding actors and their activities begins with consideration of their positions in existing social and political arrangements. Identifying relevant change agents and assessing their particular roles and interests, therefore, are context specific (Mahoney and Thelan 2010).

Those wanting change seldom work alone or seek to satisfy a single constituency, especially when they are part of existing institutional arrangements (Mahoney and Thelan 2010). It is important to keep in mind that change agents are seldom able to act alone. If able to position themselves at the intersection of multiple networks, organizations or institutions, they are more likely to bring about change and enhance its magnitude (Campbell 2004). Such placement is particularly helpful in marshaling resources, gaining support, and cultivating ideas. Conversely, actors who are poorly situated find themselves lacking connections, cut off from knowledge of feasible alternatives to existing practices, and wanting for critical resources necessary to innovate (Aldrich 1999).

Change agents in path dependent institutions have the capacity to alter institutional trajectory through creative interpretation and modification of rules. They can interpret, create, elaborate and act in other ways that have transformative effects on institutions. Rule creativity is central to the process of path dependent institutional change. By rethinking and creatively combining rules, actors produce novel practices and establish new precedents for action (Sheingate 2010). They will seek to establish institutional complementarities that fit within existing schema to address new circumstances, interests,

and power relations (Thelen 2004). Often, they will look beyond their own boundaries for successful innovations that seem to best fit their environment.

Diffusion and Institutional Change

Diffusion is the spread of principles and practices through a defined population, such as a set of nation-states (Campbell 2004). It is a complex process that involves the flow of information, communications networks, power relationships, and receptivity to change (Kopstein and Reilly 2000). The adoption of an institution by a neighboring state shows the appropriateness of that feature to other states in a region, especially where they have similar cultural foundations, including ties of language, religion, and ethnicity (Fordham and Asal 2007).

The logic of diffusion is straightforward. States experiencing institutional or policy failure will look to others in search of viable alternatives. Actors will seek and adopt practices when they believe it is in their best interest, because they believe it is an appropriate or legitimate way to operate, or they face uncertainty to a degree that settling on a known outcome is preferred (DiMaggio and Powell 1983). Diffusion is a process where decision makers interpret a given situation and conclude a particular approach offers a preferred solution that creates outcomes they seek, or at least can live with (Walsh 2001).

Tracking institutional diffusion across jurisdictions helps identify patterns of change and requires researchers to make sense of them (Kopstein and Reilly 2000). It touches on three key theoretical questions that are vital to understanding the adoption of specific institutions in particular jurisdictions. First, diffusion considers whether internal or external features drive institutional change. Second, it investigates whether decision

makers are motivated by self-interest, a quest for legitimacy, or other motivational factors. Finally, it explores whether decision makers process information in a systematic, unbiased fashion (Weyland 2008).

Diffusion allows us to compare different states at different levels of social, economic and political development. It looks beyond actors to consider broader contextual and environmental factors that condition the actor's behavior (Kopstein and Reilly 2000). It helps explain commonality amid diversity (Weyland 2008). Another attraction of diffusion is that it does not require the same interests to be present in every situation; the logic of diffusion can be molded to fit unique situations. However, diffusion can be difficult to disaggregate from other process of change because it encompasses a variety of qualifying factors (Kopstein and Reilly 2000).

There is a substantial literature regarding the diffusion of institutions across nation-states that investigate a range of questions. Negretto (2009) looks to diffusion to explain adoption of constitutional designs in Latin American countries. Hariri (2012) examines the development or rejection of democratic institutions in non-European societies. Women's political equality (Fordham and Asal 2007) and whether protests against European Union policies in member nations are endogenous or affected by other nation-states (Reising 1999) are also subjects of inquiry. The targeting of inflation (Mukherjee and Singer 2008), the adoption of information and communication technologies in India (Vijaybaskar and Gayathri 2003), and European monetary policy (Walsh 2001) have also been studied.

These studies tend to stand in isolation from one another. They consider a particular phenomenon of interest but make little effort to talk to one another. Also notably lacking

is the use of time-series, large-N analyses, which permit a precise, empirical comparison of similarities and differences in the decision to adopt. These omissions in the institutional literature are in sharp contrast to the sophisticated methodology utilized in the study of policy innovation and diffusion. The marriage of the theoretical bases of institutionalism with the robust quantitative techniques of innovation and diffusion research offers much promise to our understanding of the problem of state judicial selection.

Innovation and Diffusion Research in Public Policy

Beginning with the foundational work of Walker (1969, 1973) and Gray (1973a, 1973b), policy innovation and diffusion models have been utilized to study a wide range of substantive issues ranging from welfare services (e.g., Allard 2004; Gray et al. 2007; Volden 2006) and environmental policies (e.g., Jeong 2006; Sapat 2004) to state lotteries (e.g., Alm et al. 1993; Berry and Berry 1990; Caudill et al. 1995) and election reform (e.g., Bali and Silver 2006; Krutz 2005). Most research has focused on the activities of the American states (e.g., Allen 2005; McLendon et al. 2006; Mooney and Lee 2000). However, a substantial and growing literature applies policy innovation and diffusion in the international context (e.g., Meseguer 2004; Simmons and Elkins 2004; Way 2005). Similarly, the framework has been extended to explore policymaking by local governments (e.g., Hoyman and Weinberg 2006; Jun 2007; Lubell et al. 2002). Vertical diffusion, the process by which American state governments emulate or respond to the policy directives of the federal government or local governments respond to state governments, has received much recent scrutiny (e.g., Allen et al. 2004; Daley and Garand 2005; Patton 2007). Innovation and diffusion studies have also considered the role of actors (e.g., Balla 2001;

Daley 2007; Minstrom 1997) and ideas (e.g., Boehmke and Witmer 2004; Grossback et al. 2004; Mintrom and Vergari 1998). As would be expected from such a diverse body of scholarship, a variety of approaches and methods have been utilized to further this research.

Leader-Laggard Models

The earliest efforts of political scientists to study policy innovation and diffusion looked to identify policy innovators among the American states. Walker (1969) develops an innovativeness score for each state by computing a scaled value of the relative speed with which a state adopted, or failed to adopt, 88 policies drawn from twelve different issue areas (e.g., welfare, highways, labor, taxes). *Leader* refers to those states with higher innovativeness scores (Gray 1973a, 1184) and *laggard* is used to describe a state whose score is low (Walker 1969, 895). Walker (1969) posits that the key differentiation between leaders and laggards rests on the rules for decision-making employed by policymakers.

Gray (1973a) offers a critical assessment of general innovativeness indices. Borrowing data from Walker (1969) on twelve policies in three issues areas (civil rights, education, welfare), she recalculates state innovativeness scores and finds meaningful variation within the more general scores obtained in the Walker analysis. A case study of Mothers' Aid legislation suggests state party politics are an important factor in the timing of adoption of such policies by individual states. Accordingly, Gray she concludes that policy innovativeness is time and issue specific and suggests innovation indexes are of limited usefulness (Gray 1973a). In an effort to resolve these issues, Savage (1978) uses a new data set to develop and test a measure of general state innovativeness. A total of 181 policy measures from fourteen general areas are incorporated into his analysis. He finds

that while general innovativeness may be a pervasive quality of some state governments, policy adoption is time and issue specific (Savage 1978).

Although clearly falling short of a definitive answer, the research was sufficient to preclude further efforts to utilize general state innovativeness as a dependent variable. Subsequent studies do, however, make use of innovativeness measures as an independent variable. Grattet et al. (1998) and Soule and Earl (2001) find that innovativeness is positively correlated to whether a state adopts hate crime laws. Friedlander and Sawyer (1983) and Regens (1980) discover only a minimal relation between general innovativeness and state-initiated energy policies. Mooney and Lee (1995) find no relationship between abortion regulation and a state's general propensity to innovate. Berger et al. (1991) reach a similar result in their investigation of state rape law reform. All of these studies utilize the Savage (1978) index. Further investigation has failed to reveal an updated general innovativeness index for the American states.

It is not surprising that including state innovativeness as a variable has fallen into disuse. Walker (1969) properly characterizes his efforts as “primarily an exercise in theory building” – an innovativeness measure is not an end in itself. He cautioned that data limitations left his research with “untestable propositions” (881).

Questions of validity and reliability are especially apparent when using an innovativeness score computed for a period other than that which is under analysis. The inconsistency in results also cast doubt on its usefulness as an independent variable. However, identifying which states are policy leaders and which are policy laggards was a useful enterprise. Analysis of leader-laggard models led to the realization that other factors, particularly the political, economic, and social characteristics of states, were

important clues to understanding policy innovation and diffusion. By determining which states were more innovative, and considering their individual and collective characteristics, researchers were able to develop and construct theoretical and statistical models of the correlates of innovation.

Internal Determinants Models

Early research also employs internal determinants models to explain policy innovation. These models utilize statistical analysis of demographic and institutional characteristics of political units to correlate characteristics with policy innovation and diffusion. Such models posit that the political, economic and social characteristics of a state cause it to innovate. Walker (1969) and Gray (1973a) both incorporate internal determinants into their studies of the general innovativeness of states. Walker finds that larger, wealthier, more urban and industrialized states are more likely to be policy leaders. Gray finds that wealthier states and those having greater intrastate party competition are more likely to be policy innovators. Most internal determinant studies, however, attempt to explain the adoption and spread of a particular policy or program. Such studies have investigated abortion (Mooney and Lee 1995), antismoking policies (Shipan and Voldon 2006), economic enterprise zones (Turner and Cassell 2007), grandparents' rights (Hill 2000), and state-level tax policies and programs (Berry and Berry 1992, 1994).

Similarly, a variety of independent variables have been included in internal determinants models. These include citizen ideology (Gray et al. 2007; Nicholson-Crotty 2004), legislative professionalism (Andrews 2000; Shipan and Voldon 2006), religious affiliation (Berry and Berry 1990; Boehmke and Witmer 2004), interest group strength

(Balla 2001; Daley and Garand 2005), and fiscal constraints (Allen et al. 2004; Meyer and Konisky 2007), among many others. Not unlike the general innovativeness measure, however, these independent variables are inconsistent in their explanatory power. For example, in his investigation of the federal impact of state human services policies, Karch (2006) finds that the increased professionalism of a state legislature is positively and statistically correlated to a state adopting a medical savings account program, but negatively associated to adoption of individual development account and family cap policies.

Intuitively, it holds that a particular set of internal characteristics will provide an environment generally suitable for innovation. For example, the finding of Walker (1969) that larger, wealthier, more urban and industrialized states are more likely to be policy innovators is consistent with the availability of the increased financial and organizational resources required of many new policies and programs. It follows that small, poor, rural and less industrialized states are less likely to be innovative. The dynamic of competitive parties within a state heightening electoral accountability is congruent with the perception of legislative willingness to consider new policies in an effort to strengthen popularity with the electorate (Dye 1984). One would similarly expect states with noncompetitive parties to be generally less receptive to innovation. When and where general expectations of innovativeness (or the lack thereof) do not hold, as too often seems to be the case with internal determinants models, it is incumbent upon researchers to identify the reasons for such failures. A blanket, yet far too common, call for further research is inadequate. Noting the failure of received wisdom must be accompanied by a reasoned discussion of possible explanations as to why expected relationships fail to hold in a particular case.

Geographic Diffusion Models

While leader-laggard and internal determinants models are primarily concerned with the propensity of a state to innovate by considering the specific attributes of the state, geographic diffusion models are more focused upon the process by which an innovation “moves” from one jurisdiction to another (Mooney 2001). The main underlying premise of these models is that closely located states regularly interact, communicate, compete with and learn from one another, which lead states to adopt policies that are perceived as successful in other jurisdictions (Berry and Berry 2007). Geographic diffusion models assume that states are especially influenced by their regional and contiguous neighbors. Regional models posit that state-to-state interaction has a regional character – states are more aware of the policy successes and failures of regional neighbors than of more distant states – and a state is more likely to emulate or respond to policies of other states within their region (Canon and Baum 1981; Mooney and Lee 1995; Mooney 2001). Contiguous models similarly assume that states learn from their neighbors, but place particular emphasis on bordering states. These models posit that emulation of and competition with bordering states increases the probability that a state will adopt a similar policy (e.g., a state lottery), especially if there is a perceived negative economic impact in the absence of policy adoption (Berry and Berry 1990; Berry and Baybeck 2005).

Daley and Garand (2005) assess the impact of regional effects on state hazardous materials policymaking using the ten Environmental Protection Agency designated regions. They suggest that use of these regions is particularly appropriate as the regional offices are designed to support state environmental activities within each region, and state governments are likely to learn about the activities of other states within the region through

this process. They find regional diffusion to be a strong influence on the adoption of strong hazardous waste programs (Daley and Garand 2005). Chamberlain and Haider-Markel (2005) also show regional effects are key factors in the diffusion of state policies relating to the filing of frivolous liens by domestic extremist groups, so-called “paper terrorism.”²⁰ Their findings suggest that not only is the adoption of policies by regional neighbors important, the perception of regional threats posed by these groups is more significant to innovation than the perception of intrastate threats (Chamberlain and Haider-Markel 2005). Numerous studies demonstrate that adoption by neighboring states is a critical determinate of adoption of state lotteries (Alm et al. 1993; Berry and Berry 1990; Caudill et al. 1995; Coughlin et al. 2006). Contiguous diffusion models also help explain the adoption and spread of Voluntary Remediation Programs and hate crime laws (Daley 2007; Grattet et al. 1998).

Although geographic diffusion makes intuitive sense for many policies and such models are well represented in policy innovation research, it remains problematic to differentiate between purely regional and purely contiguous effects. Regional models assume that a region border state is affected more by a non-adjacent regional neighbor than an adjacent state that happens to be in a different region. Contiguous models assume a close neighbor with no common border will have no impact on a state’s learning – the identical effect presumed for a state literally on the other side of the country. This reasoning is clearly suspect in some instances. While the reasoning seems to hold where

²⁰ Between 1995 and 1999, 27 state governments enacted policies aimed at combating the filing of harassing liens. The liens purported to create encumbrances on the property of individuals and governments and complicated the sale of such property or its use as collateral. The technique was widely used by right-wing Patriot groups who created the liens under the authority of self-constructed courts, especially in states in the Midwest and the West (Chamberlain and Haider-Markel 2005).

well-defined regional effects are at work (such as hazardous waste programs), it does not in all instances (such as a lottery). Diffusion models based upon geography often lack sufficient theoretical grounding to differentiate between strictly regional and purely contiguous effects, especially to the extent that a state considering a policy may be more affected by regional neighbors in one instance and contiguous neighbors in another. Each inquiry requires a well-reasoned rationale as to why geography matters and in what way. This in turn will allow for better model specification and improved hypothesis testing.

Vertical Influence Models

Whereas geographic diffusion models assess the spread of innovation from country to country or state to state, vertical influence models consider the movement between more central governments and their political subdivisions (in either direction). In the United States, this would include federal-to-state (or vice versa) and state-to-municipal (or vice versa) diffusion. Vertical influences on innovation involve both communication between governmental levels and more direct methods of influence. An important component of federal-to-state relations that is absent from state-to-state relations is the ability of the federal government to reward or punish states through use of financial means to compel adoption of a preferred policy (e.g., the withholding of federal highway funds if a state fails to criminalize operating a motor vehicle with a blood alcohol content of greater than .08 milliliters of alcohol per liter of blood). In an early study, Welch and Thompson (1980) find that federal financial incentives generally influence the speed with which states adopt incentivized policies. Allen et al. (2004) find that the awarding of federal grant money is positively and significantly related to state adoption of criminal truth-in-sentencing laws.

The overall level of federal funding to a state in a particular program area (e.g., environmental policies), however, is distinct from federal incentive programs and appears to have a more modest impact on program diffusion (Daley and Garand 2005).

The federal government effectively communicates with states in a number of important ways other than through use of financial incentives. The raising or lowering of obstacles such as altered tax treatment (Karch 2006) or providing litigation opportunities (Miller 2006) are means by which the federal government expresses opinions on state policy adoption. The U. S. Supreme Court, with its unique and nearly omnipotent constitutional authority, has had a significant impact on state policy adoptions in areas such as abortion (Patton 2007). The failure of federal action in a matter is sometimes sufficient to spark state policy innovation. For example, the 1996 congressional passage and subsequent veto of national partial-birth abortion legislation by President Clinton was a key determinant in the adoption of such policies by thirty states before 2001 (Allen et al. 2004). Thus, vertical diffusion may result either directly through financial incentives or through more subtle, indirect means.

The causal relationship between federal incentive programs and state policy innovation is unsurprising and well tested. There are important theoretical questions, however, concerning the impact of less direct means of vertical diffusion. Such concerns are the result of the difficulties inherent in identifying causality. How does one satisfactorily differentiate between the forces that bring a question to the national spotlight and the result of that attention? Inquiry into the impact of causal mechanisms has become a recent focus of diffusion research. Investigation of the roles of women's groups (Allard 2004), interstate professional organizations (Balla 2001), national advocacy campaigns

(Haider-Markel 2001), and policy entrepreneurs (Minstrom 1997; Minstrom and Vegeri 2000) suggests that a variety of causal mechanisms drive the relationships between variables. Theoretically, it is often difficult to distinguish the role these factors have in placing a policy proposal on the agenda from the eventual impact on whether the policy is adopted in a given jurisdiction (Karch 2006). This is due, at least in part, to the fact that some of the same factors that get an item on the agenda also lead to eventual policy enactment. It should be noted that, due to the special-case requirements of vertical influence models, the approach is limited to a relatively few number of policy issues.

Event History Analysis

The discussion thus far may intimate that the various research frameworks commonly employed in innovation and diffusion policy research have been utilized in isolation. They have not. Starting with Walker (1969, 1973) and Gray (1973a, 1973b), scholars have consistently theorized that both internal conditions and external influences were important determinants of policy innovation and diffusion. Difficulty in integrating internal conditions models (e.g., leader-laggard and internal determinants) with external influences models (e.g., geographic and vertical diffusion), usually due to methodological limitations, caused researchers to analyze statistical results in relative isolation (Berry and Berry 2007). A constellation of inconsistent results followed with a propensity toward conclusions that lack generalizability: leader-laggard models produced innovation indices with limited practical application; internal determinants models lacked consistency in results and failed to establish clear causal relationships; geographic diffusion models often lacked a solid theoretical basis; and vertical influence models applied only to a limited

number of cases. These tendencies resulted in a pattern of false-positive errors, which were later identified by simulations using improved statistical tools (Berry and Berry 1994).

In response, Berry and Berry (1990, 1992, 1994) introduced the use of event history analysis (EHA) to policy innovation and diffusion research, and it has since come to dominate this area of inquiry. EHA models are constructed using individual jurisdictions (again, the American states being the most common) at discrete time periods (usually every year) as the unit of analysis. Independent variables include internal determinants, external effects, geographic diffusion variables, and other variables appropriate for study of the phenomena of interest. The dependent variable is operationalized as a mortality function where a jurisdiction that has yet to adopt a proposed policy is at hazard for doing so during a particular period. If a state *survives* by failing to adopt a policy during a given period, it is included in the next period for additional analysis. Once a jurisdiction adopts a policy, it *dies* and is removed from the model. The model is run for a definite period of years or until the last state adopts the policy in question. EHA allows statistical analysis of each state prior to and at the time of adoption of a policy. By including each jurisdiction for a period of multiple years, EHA harnesses the power of large-N statistics even where the number of “real cases” is relatively small (e.g., the 50 American states). As a result, a more nuanced statistical assessment of the data is obtained (Berry and Berry 1990, 1992, 1994; Box-Steffensmeier and Jones 1997).

EHA provides a depth of analysis that is simply not attainable with any of the other innovation and diffusion models. This event-specific and historical approach provides meaningful insight into the complex social process that is policy adoption and is preferable to cross-sectional and panel designs (Box-Steffensmeier and Jones 1997). It has been

applied to a variety of policy questions in the American states, including abortion regulation reform (Mooney and Lee 1995), bans on same-sex marriages (Haider-Markel 2001), managed care in Medicaid programs (Satterwhite 2002), and telephone regulation reform (Kim and Gerber 2005). Additionally, EHA has been used to analyze the adoption of policy by entities other than the American states, including adoption of pension privatization by nations (Brooks 2005), creation of regulatory agencies in Latin America (Jordana and Levi-Faur 2005), local watershed projects (Lubell et al. 2002), and acceptance of International Monetary Fund rules by nations (Simmons 2000). Unfortunately, as is revealed by the following review of the limited extant literature on the subject, EHA has not been employed to study the question of judicial selection methods employed by the American states.

The Choice of State Judicial Selection Method

Published research on the choice of judicial selection methods by American states comes from just a few sources. When considered as a whole, the extant literature fails to provide either a sound theoretical foundation or a set of identifiable features to distinguish states from one another. This study benefits greatly from progress in developing theoretical bases for the study of institutions and several important methodological advancements that were unavailable to earlier scholars. Nonetheless, the contributions of Henry Glick (1981 and 1983), Marsha Puro, Peter J. Bergerson and Steven Puro (1985), Judith Ann Haydel (1987), Philip L. Dubois (1990) and Andrew F. Hanssen (2002 and 2004) provide a useful starting point for additional research.

Glick posits state judiciary reforms as a process of policy innovation and diffusion. He tries unsuccessfully to link a variety of judicial modernizing policies (in this context, a broad concept encompassing financial, budgetary, rulemaking, and organizational policies, as well as the adoption of merit-based judicial selection) with the diffusion of other, non-judicial, state policy innovations. Judicial innovations, he finds, are best understood as the product of posturing by political factions seeking to either consolidate or expand their power (Glick 1983). Contrary to the expectations of judicial selection reform proponents, merit selection had little or no bearing on the decision of states to develop modernized court systems. Rather, innovation occurs in general patterns closely linked to centralized management of state courts and the overall size of state government (Glick 1981).

The earliest published study focusing specifically on adoption of the Missouri Plan similarly approaches the question as an issue of the diffusion of a policy innovation. Utilizing a determinants model, Puro, Bergerson and Puro (1985) acknowledge that they have no sense, *a priori*, of what variables will most likely explain the adoption of merit selection by the American states. Their single period,²¹ multivariate and ‘kitchen-sink’ approach begins with the regression of the general innovativeness indices of American states developed by Walker (1969) and Gray (1973a). The Walker index produces a positive and statistically significant relationship and the Gray scores were discarded from the model. Next, institutional variables measuring governors’ power (Schlesinger 1972), intrastate party competition (Ranney 1976) and legislative professionalism (Grumm 1971) are added. The addition of these variables negates the effect of the Walker scores and only

²¹ A conspicuous omission from the article is a discrete operationalization of the dependent variable. It is noted that the dependent variable is dichotomous and the context suggests that the values of the dependent variable are as of 1976. Uncertainty arises, however, in that additional states adopted merit selection between 1976 and the 1985 publication date.

the legislative professionalism variable demonstrates statistical significance, albeit negative. The Walker value is removed from the equation and a set of political culture variables is added. These, too, fail to produce any meaningful results and are removed. Positive and statistically significant values are produced when demographic variables measuring urbanization and industrialization are added. The final additions to the research model are dummy regional variables (Puro, Bergerson and Puro 1985).

Overall, the model reveals a statistically significant, yet intuitively weak, model that suggests, “[T]hat states with nonprofessional legislatures and with *relatively* large urban and industrial populations [are] the states most apt to adopt the Missouri Plan” as compared to those states that “are usually involved in innovativeness” (Puro, Bergerson and Puro 1985, 96). Considering these results within the context of history, they posit an interest group driven theory wherein rural legislators pushed merit selection to limit urban influence on the reapportionment of judges in response to *Baker v. Carr*.²² They perceive maintenance of the political status quo as the primary explanation for policy innovation regarding state judicial selection methods. A notable strength of the research is that it produces a model with impressive predictive ability. The final model, which includes variables for legislative professionalism, industrialization, urbanization, and the regional dummy variables, accurately predicts whether a state utilizes merit selection in all but five cases (Puro, Bergerson and Puro 1985).

²² 369 U.S. 186 (1962). Prior to the Court’s ruling in *Baker*, the United States Supreme Court had consistently held that reapportionment issues, the realignment and redistribution of seats in legislative bodies, were ‘political questions’ and therefore not subject to judicial review. The progeny of *Baker*, especially *Reynolds v. Sims*, 377 U.S. 533 (1964), established the concept of ‘one-man, one-vote’ as the benchmark for reapportionment schemes to survive federal constitutional scrutiny.

Dubois (1990) seeks to evaluate the reapportionment theory advanced by Puro, Bergerson and Puro (1985) by qualitatively and quantitatively reviewing the political dynamics at work when individual states were considering merit selection.²³ Utilizing a review of historical accounts of reform efforts and a truncated statistical analysis of state legislative reform bill sponsorships and county-by-county vote totals for merit plan proposals subject to popular vote, he fails to find statistical evidence supporting the reapportionment theory. Instead, Dubois posits that while the available evidence tends to demonstrate that merit selection and retention plans do have a popular political base in urban areas, it is the success of political mobilization campaigns by the ABA, AJS, League of Women Voters and other organizations that are ultimately determinative of reform (Dubois 1990).

The most ambitious effort to date to explain the choice of merit selection in the American states comes from Haydel (1987). She formulates five hypotheses and examines each using multivariate and time series regression techniques. First, merit selection may be a political instrument for elected leaders. As voters become less predictable and uncertainty in electoral outcomes increases, the approach is a means for the party in power to retain control of the judiciary. Educational attainment, voter turnout in presidential elections, and interparty competition variables are formulated as measures of electoral stability and tested. Increased levels of education and decreased voter turnout are found to be related to merit selection adoption, while greater party competition within a state is not (Haydel 1987).

²³ His set of cases differs from that employed by Puro, Bergerson and Puro (1985) and includes two additional states that adopted merit selection between 1976 and 1980 and ten other states that rejected reform efforts between 1941 and 1980 (Dubois 1990).

Related hypotheses involving political culture and general innovativeness are also advanced. A moralistic political culture has a desire to increase the quality and efficiency of government to the betterment of the entire community and is suggested as an impetus to merit selection. Similarly, some states proactively seek innovative policies in response to their changing needs and are more likely to adopt merit selection. Variables are operationalized using the familiar Elazar (1966) political culture categorization and the Walker (1969) composite innovation score for each state. Moralistic political culture shows a minimal positive impact, but it is negated by the inclusion of the general innovativeness variable. Contrary to expectations, general innovativeness and adoption of merit selection are negatively related (Haydel 1987).

A fourth hypothesis is that merit selection is part of a greater process of professionalization in state governance. Beginning in the 1950s, state reform movements sought to increase the efficiency of legislative and executive offices to meet increasing demands on state governments. A range of enhancements such as increased gubernatorial appointment power and larger legislative staffs were varyingly adopted by individual states. Separate indices for executive and legislative professionalism present inconsistent and contrary-to-expectations results across models. One such finding is a negative relationship between executive professionalism and the adoption of merit selection (Haydel 1987).

The final hypothesis argues that bar association activity in judicial reform efforts is positively related to adoption of merit selection by a state. Legal groups are at the forefront of judicial reform efforts as they have the means and interests to lobby for change. Court unification and the establishment of an office of state court administrator are identified as

two indicia of bar association activity in judicial reform efforts. The Berkson and Carbon (1978) unification ratio and whether a state has a state court administrator are included as separate explanatory variables. Direct state-level bar activity in judicial reform is measured through two sets of questionnaires used by Sweeny (1980) and Sheldon (1977, 1986).²⁴ Bar association activity and court unification are found to be positively and significantly related to merit selection across models (Haydel 1987).

Haydel (1987) concludes that her major finding is that bar association activity is the key factor related to adoption of merit selection by individual states between 1950 and 1980. The deduction is based on probit analysis testing simple adoption or non-adoption during the period. She acknowledges, however, that primarily due to data and methodological problems “one is loathe to conclude much from these time series analyses” (Haydel 1987, p. 99). Subsequent research suggests that her findings were at least on the right path.

Support for the bar playing an integral role in the adoption of merit selection and its perpetuation is found in Hanssen (2002). He finds that lawyers gain two important benefits from merit selection. First, lawyers are directly involved in choosing judicial nominees through selecting members to and participating in judicial nominating commissions. Second, demand for legal services is higher in states whose supreme courts are chosen through merit selection. Thus, lawyers are incentivized to seek and maintain merit selection as a means to greater influence and pecuniary gain (Hanssen 2002).

²⁴ The bar association activity measure is difficult to comprehend from the information provided. The text states that the variable is a ranking of state bar associations' responses to five questions, but only four questions (apparently those used in the Sweeny (1980) study) are listed in an endnote. Sheldon (1986) is cited as an unpublished paper entitled “The Effectiveness of State Bar Activities in the Recruitment of State Judges,” which was prepared for the Annual Law and Society Meeting in Chicago, Illinois.

Hanssen (2004) finds substantial cross-sectional and time-series variation in the procedures used to select judges in the American states. He observes that three major reform movements aimed at increasing the independence of state judiciaries occurred during different periods of American history. However, not all states chose to adopt the proposed alternations. He seeks to distinguish between those states that adopted reforms and those that maintained their existing institutions.

Hanssen conducts a multivariate analysis using a probit model. States with higher administrative costs, resistance to change by other branches of government, and a general opposition to change were significantly less likely to adopt the proposed alternation. Administrative costs are measured by considering whether a state held a constitutional convention during the period and is found to be positively related. Resistance to change is operationalized as the size of the majority party in the state legislature and is found to be negatively related. Finally, general opposition to change is measured as the time since a state entered the Union and is also found to be negatively signed (Hanssen 2004).

The extant literature on the adoption of merit selection by the states yields a number of important observations and reveals a research topic ripe for theory construction and quantitative investigation. Since state judiciaries are foundational governmental institutions that are similar to other legal and constitutional institutions in a variety of respects, this research will borrow and build upon the current theoretical understanding of institutional change. In addition, existing studies on policy innovation and diffusion, particularly those that utilize the American states as the unit of analysis, provide additional insight into why and how a state might choose merit selection for choosing judges to their state supreme court. It is to this query we turn next.

A Theory of Merit Selection Adoption in the American States

The foregoing sections argue that our existing knowledge of institutional change, taken together with the methodological erudition of policy innovation and diffusion research as well as the extant literature on state judicial selection, yields a serviceable foundation for the further study of the adoption of merit selection for the selection of state court judges. What follows, then, is an effort to articulate a rudimentary theory of merit selection adoption in the American states. It consists of a set of overlapping theoretical propositions that are derived directly from the arguments advanced above. They are intended as starting points that can then be modified by this and future research.

Every state has had its own judiciary since inception. State judiciaries are co-equal branches of government along with the legislative and executive branches in each of the fifty American states. The purpose and role of state judiciaries remains essentially unchanged over time. Alteration of the structure of state court systems is infrequent and almost exclusively in response to increasing population and case-load demands. Relevant actors who seek change, whether they be judges, lawyers, the public, members of the executive and legislative branches of government, or political parties experience increasing costs over time. Returns increase as the status quo is perpetuated and reinforced; change tends to be evolutionary in nature. To wit,

Proposition 1: *State judicial institutions are path dependent.*

Judicial merit selection is a hybrid of two well-established approaches to picking officials in the American states. It combines a specialized appointive process by duly chosen officials with a unique form of popular election. Each state has a tradition of appointing some officials and electing others that dates back to its inception. The substantive aspects of merit selection, while unique, are clearly within the established parameters of governance in the American states. Merit selection advocates argue it is the best method available for securing the independence of state court jurists. Judicial

independence, arguably the defining characteristic of the federal judiciary, is a key feature of the principal checks and balances as it is expected to function at the state level. Therefore, merit selection also advances symbolic norms. To wit,

Proposition 2: *Adoption of merit selection by a state is an instance of substantive and symbolic bricolage.*

Demand for institutional change becomes relevant when exogenous or endogenous factors arise that give relevant actors the perception that the distribution of power or other resources is changing, or needs to be changed in order to pursue whatever self-interested, altruistic, or other goal they may have. Demand for merit selection is created by a range of factors including increasing populations, political realignment, and the financial interests of lawyers. Actors may fail to recognize or acknowledge this demand. They may also disagree over the seriousness of the problem or the appropriate solution. Alternatively, they may seek to address solutions within existing institutions to avoid the demand for change. To wit,

Proposition 3: *Demand is a necessary, but not sufficient, condition for the adoption of merit selection.*

The assent of decision makers is essential to the adoption of any institutional arrangement. State legislators, governors and political parties respond to calls for judicial merit selection by evaluating the threat to or the enhancement of their power and resources. If they perceive benefit, they are more likely to permit and support change. Conversely, if they perceive threat, they are more likely to resist and oppose change. To wit,

Proposition 4: *Decision makers are more likely to adopt (or reject) merit selection if they perceive it will increase (or decrease) their power and/or resources.*

It is essential that advocates of institutional change are able to effectively frame situations as problems, else there would be no need to take action. Additionally, they must communicate their preferred solution in clear and simple enough terms that decision makers and constituents can understand. It is particularly helpful when a change advocate is able to express the need for reform in terms of a greater principal. Public interest groups are particularly capable of advancing a reform agenda where they appear to gain no particular benefit other than the greater good. The ability of actors to frame and communicate merit selection of state court judges as an appropriate response to real problems that are consistent with prevailing beliefs such as the need for judicial independence enhances the likelihood of a state to adopt. To wit,

Proposition 5: *Merit selection is more likely to be adopted where there are advocates who can effectively frame and communicate its needs and benefits.*

The final piece of the puzzle is the ability of advocates to point at a proposed reform and confidently pronounce that it will work in the instant jurisdiction. Decision makers tend to copy practices that have solved similar predicaments in other places. In the context of the American states, this often relies on the experience of other states, especially contiguous and regional neighbors who share history, political culture, and economic interests. The credibility of merit selection of state judges rests on the simple notion that it has worked in other similarly-situated jurisdictions. To wit,

Proposition 6: *Merit selection is more likely to be adopted where relevant actors are able to present evidence to decision makers that it has worked effectively elsewhere and is likely to work for the decision makers and their constituents.*

These propositions address the key theoretical aspects of understanding the adoption of merit selection in the American states. They are predicated upon existing

theoretical constructs and are consistent with extant knowledge. In addition, each proposition is testable and falsifiable using well-accepted techniques. This will be done in Chapter 4. Such scrutiny allows us to determine whether adoption occurs due to common factors across jurisdictions, the idiosyncrasies of individual states, or some combination of both.

Conclusion

Bridging the scholarly gulf between the theoretically rich traditions of institutionalism with the methodologically robust conventions of innovation and diffusion research and applying them to the question of state judicial selection provides an opportunity to develop knowledge of an important, yet understudied, phenomena. This research advances six propositions that collectively advance the mechanisms of path dependence, actors, and diffusion, key mechanisms in theoretical constructs of institutional change, as being significant in the adoption of merit selection for choosing state supreme court justices in the American states. Each of these propositions is further developed, tested, and assessed in the remaining chapters.

Chapter 3 is a short history of state judicial selection. A close reading of the historical record provides many qualitative indicators that are consistent with the broader themes of institutional change raised in this chapter, including path dependence, the role of actors, and the diffusion of preferred forms of judicial selection. The next chapter also serves as a basis for the operationalization and conceptualization of independent variables utilized in Chapter 4. The historical record, along with the extant theoretical understanding

of institutional change and the methodology of innovation and diffusion research, is an integral part of gaining understanding of the problem of state judicial selection.

CHAPTER 3: A BRIEF HISTORY OF STATE JUDICIAL SELECTION

Introduction

This chapter presents a brief survey of the history of state judicial selection in the United States. Understanding that history is a prerequisite to comprehending the phenomena in the modern context. It is also critical to the instant study. The tale provides the philosophical foundations of the various forms of judicial selection and explains the circumstances that gave rise to the perceived need for reform in different epochs. In particular, it tracks the intellectual development and rise of merit selection. In identifying some of the key factors involved in that process, it helps establish a basis for the conceptualization of the variables to be included in the quantitative models which are the subject of Chapter 4. It also provides qualitative and anecdotal evidence that is essential to this assessment of state judicial selection. Ultimately, the historical record is a chronicle of considerable continuity in the midst of seemingly constant change.

This chapter is divided into six parts. The next section provides an analytical framework for dividing discussion of the history of state judicial selection into four distinct periods based upon the preferred method of would-be reformers. The historical antecedents of judicial selection in the American states and the founding period, when each of the original states chose to appoint their judges, follows. A discussion of the wave of democratization which enveloped the American states in the early 19th century and gave rise to the popular election of judges is explored in the third part. The Progressive Era and advocacy of nonpartisan elections by the bench and bar is the subject of the fourth segment. Part five tracks the evolution of merit selection from a Progressive idea to its current form

and application in thirty-eight states. The chapter concludes with a brief discussion of key phenomena identified in the historical survey and how these factors apply to the analyses in the remaining chapters.

The Standard Story

The history of judicial selection in the American states illustrates the difficult and sometimes arduous trade-off between the ideals of judicial independence and judicial accountability. It highlights the political dimensions of trying to attain conflicting ideals by deciding who gets to select state court judges and why: should they be appointed by elected leaders in a republican fashion, elected by the people through direct election, or selected through a process which combines the positive aspects of both appointment and direct elections, while limiting the negative effects of the two approaches? The current arrangement of state judicial selection systems is a result of the variation, over time and from jurisdiction to jurisdiction, of which ideal was preferred and who was politically best situated to decide how that ideal should be realized. Scholars have developed a “standard story” of the history of state judicial selection which holds that states choose the system deemed best by reformers during a particular period (Epstein, Knight, and Shvetsova 2002). The saga is divided into four overlapping phases distinguished by the selection method most preferred by those states entering the Union or choosing to alter their selection process during the span (e.g., Berkson 1980; Berkson, Beller, and Grimaldi 1981; Bonneau and Hall 2009; Carrington 1999; DuBois 1980; Escovitz, Kurland, and Gold 1975; Friedman 1985; Goldschmidt 1994; Haydel 1987; Hanssen 2004; Haynes 1944; Hurst 1950; Nelson 1993; O’Conner 2009; Price 1996; Sheldon and Maule 1997; Streb 2007;

Tarr and Porter 1988; Volcansek and Lafon 1988; Watson and Downing 1969; Winters 1966b, 1968).

The standard story begins with the founding period, which lasted from the nation's creation until around 1846, when appointment was the near exclusive method by which states chose their jurists. A wave of democratization enveloped the country during the first half of the nineteenth century and created a move toward the popular election of state officials. By mid-century, popular election had become the preferred method of reformers for choosing state court judges and would remain so throughout the remainder of the century. As the twentieth century approached, popular elections had become embroiled in partisan politics and reformers pushed to remove partisan labels from candidates for judicial offices. The nonpartisan election of judges gained momentum during the early twentieth century and was instituted in more than a dozen states. Simply removing party labels proved insufficient, however, as contested elections of any form required judges to be politicians. Merit selection, a Progressive reform which traces its genesis to the early twentieth century but gained real momentum only after World War II, was first adopted by Missouri in 1940. The standard story concludes in the present day with a total of thirty-eight states having adopted some form of merit-based plan for the selection of some or all of their jurists.

The standard story, however, is not accepted by all scholars. Epstein, Knight, and Shvetsova (2002) reject it as an oversimplification that fails to consider important political factors. As such, it is directly at odds with other theoretical accounts of institutional change in the political science literature. They contend that as political uncertainty periodically

diminished, states adopted systems for selecting, retaining and granting tenure to their judges that created greater accountability (Epstein, Knight, and Shvetsova 2002).

Alternatively, Shugerman (2012) argues the history of judicial selection in the American states is the unfolding pursuit of judicial independence. Each succeeding generation feared evils apparent in their immediate past and were willing to entrust judges with significant power and independence as a hedge to counter them. A change in judicial selection reflected the ever-evolving ideal of which method best permitted judges to properly do their jobs. He contends there are five stages of development roughly equating to the colonial period (unseparated judiciary), the founding period through the mid-nineteenth century (judicial aristocracy), the mid-nineteenth century through the mid-twentieth century (judicial democracy), the third quarter of the twentieth century (judicial meritocracy), and the current era (judicial plutocracy). The point of demarcation between periods is the particular individuals or groups who came to dominate the judicial selection process (Shugerman 2012).

Numerous scholars, including some who generally acquiesce to the standard story, acknowledge that purely political motives entered into the choice of judicial selection institutions in a range of contexts (e.g., Carrington 1998; Daugherty 1997; Fitzpatrick 2009; Hall 1983, 1984c; Hanssen 2002; Haydel 1987; Haynes 1994; Nelson 1993; Volcansek and Lafon 1988; Watson and Downing 1969). It bears mentioning that Epstein, Knight, and Shvetsova (2002) and Shugerman (2012) are explicitly engaging in developing a theory of judicial institutional development and change, the former being political scientists and the latter an historian, while the other scholars include a historical discussion of state judicial selection to add context to quantitative analyses (e.g., Hanssen 2002;

Haydel 1987), normative arguments (e.g., Carrington 1998; O’Conner 2009), or exploring a particular period of American history (e.g., Hall 1983; Nelson 1993).

Despite these varied motives and approaches, scholars consistently draw two key conclusions. First, the preferred method of each period was a direct and thoughtful response to the perceived problems of the preceding epoch. Reform advocates consistently offered their new design as the best remedy to past shortcomings. The willingness to sacrifice independence for accountability or vice versa expressed what champions of change believed most appropriate to recruit and secure quality judges. Second, political self-interest played an important role in the motivation of many relevant actors. Nonetheless, the key philosophical arguments offered by proponents of each selection method invariably focused on benefits to society.

Founding Period

The authors of the first state constitutions were primarily concerned with the intrastate distribution of political power, including the selection and tenure of judges, in a way that embodied and effectuated republican political principles (Tarr 1998b). Draftsmen of judicial articles found themselves caught in a veritable tug-of-war between their admiration for the English system of laws and their contempt for the Crown’s abuse of it. The manipulation of judges by the King and their insecure tenures had a marked effect on the framers of early state constitutions (Sheldon and Maule 1997). The key reform was to separate the judicial function from the executive.

Borrowing from English tradition, appointment was instituted as the basic method for staffing state judiciaries; however, important checks were placed upon the appointive

power (Escovitz 1975). The legislatures of eight²⁵ of the original thirteen states directly selected judges while the governors of the four²⁶ others chose jurists together with or subject to the approval of their state executive councils. The governor of Massachusetts appointed judges subject to the consent of the state senate, a process later duplicated by the federal constitution.²⁷ Tenure was typically during good behavior,²⁸ although six states²⁹ provided shorter terms of office. Thus, the principles of republicanism and, to a lesser degree, judicial independence were applied to state judicial selection in a deliberate effort to avoid the more egregious foibles of the colonial judicial system and the historic conflict between the Crown and Parliament over the English judiciary.

A century-long struggle between the Stuart monarchs and British Parliament involving control of the English judiciary helped inform views on the proper fabrication of American state judiciaries. James I assumed the throne in 1603 claiming virtually absolute power over questions of public policy and insisted upon being consulted in advance regarding important cases (Haynes 1944). He dismissed judges at will, including the much-revered Lord Edward Coke, the most famous and respected jurist of the age (McIlwain 1913). In 1616, James called the justices of the King's Bench together and demanded they

²⁵ Connecticut (CHARTER OF CONNECTICUT – 1662, REVISED 1776), Georgia (Ga. CONST. OF 1777, ART. LIII), New Hampshire (N.H. CONST. OF 1776), New Jersey (N.J. CONST. OF 1776, ART. XII), North Carolina (N.C. CONST. OF 1776, ART. XIII), Rhode Island (CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS – 1663, REVISED 1776), South Carolina (S.C. CONST. OF 1776, ART. XX), and Virginia (VA. CONST. OF 1776).

²⁶ Delaware (DEL. CONST. OF 1776, ART. XII), Maryland (MD. CONST. OF 1776, ARTS. XLVIII), New York (N.Y. CONST. OF 1777, ARTS. XXIII), and Pennsylvania (PA. CONST. OF 1776, § 20).

²⁷ MASS. CONST. OF 1780, CH. 2, § I, ART. III.

²⁸ Delaware (DEL. CONST. OF 1776, ART. XII), Maryland (MD. CONST. OF 1776, ARTS. XL), Massachusetts (MASS. CONST. OF 1780, CH. 2, § I, ART. III), New York (N.Y. CONST. OF 1777, ARTS. XXIV), North Carolina (N.C. CONST. OF 1776, ART. XIII), South Carolina (S.C. CONST. OF 1776, ART. XX), and Virginia (VA. CONST. OF 1776) all provided for tenures of good behavior for their judges.

²⁹ Connecticut (CHARTER OF CONNECTICUT – 1662, REVISED 1776), Georgia (Ga. CONST. OF 1777, ART. LIII), New Hampshire (N.H. CONST. OF 1776), New Jersey (N.J. CONST. OF 1776, ART. XII), Pennsylvania (PA. CONST. OF 1776, § 23) and Rhode Island (CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS – 1663, REVISED 1776).

stay a suit when ordered. The other members of the court capitulated, but the chief justice defiantly refused (Shugerman 2012). Coke was fanatical in his veneration of the law and judicial process. He staked his career on the ability of judges to remain independent of the Crown – and lost (Bailyn 1965). James was also personally involved in the divorce of the Countess of Essex, and the trials that resulted from the murder of Sir Charles Overbury (McIlwain 1913). When Charles I succeeded his father in 1625 and continued the tactic of royal interference with judges, a constitutional crisis ensued.

Shortly after Charles' ascent, the House of Commons impeached his chief advisor. The King responded by dissolving Parliament, the Crown's primary source of revenue. The ensuing financial situation forced Charles to look to other, legally dubious, means for raising revenue (Haynes 1944). Judges who refused to certify the legality of royal loans and new taxes were dismissed, including the new chief justice of the King's Bench, Sir Randolph Crew, in 1626 (McIlwain 1913). Royal threats and promises ensued and the questionable methods by which the Crown was raising money were upheld by the courts (Haynes, 1944). In 1634, the chief justice of the Common Pleas, Sir Robert Heath, was dismissed and four days later the controversial writ for ship-money, a royal levy, issued (McIlwain 1913). Thus, taxation without the assent of Parliament was accomplished by royal manipulation of the judiciary. The royal victory, however, proved short lived.

Charles was forced to reconvene Parliament in 1640 in order to raise revenue and support against a worsening Scottish rebellion that had commenced three years earlier. Parliament seized the occasion to restore constitutional balance and exert legislative and judicial authority over the Crown. The King was summarily forced to consent to a series of statutes, including a provision that granted judicial tenure during good behavior rather

than at the pleasure of the King. His principal counselor, the Earl of Stafford, was tried and condemned pursuant to a bill of attainder and executed. Royalist judges were impeached and imprisoned, or otherwise disabled from holding judicial office due to their support of the Crown against the authority of Parliament (Haynes 1944). For his part, Charles honored his promise and appointed several judges during good behavior (McIlwain 1913).

The King and many of his supporters nevertheless fled London in 1642 and the English Civil War soon commenced. Parliament temporarily assumed authority of the appointment and removal of judges. The brief English Commonwealth, occasioned by the execution of Charles in 1649, witnessed the rule of Oliver Cromwell and his council of state. Cromwell was duly authorized to appoint judges subject to the approval of Parliament and proved adept, not unlike his royal predecessors, at maintaining a loyal judiciary (Haynes 1944). In 1655 alone, despite having tenure of good behavior, Baron Thorpe, Judge Newdigate, and Chief Justice Rolle were either removed or resigned from the bench (McIlwain 1913). The death of the Lord Protector in 1658 led quickly to the demise of the English Commonwealth and restoration of the monarchy two years later (Haynes 1944).

The Restoration and reign of Charles II ostensibly represented a reversion to the ideas of earlier times, but fundamental change had occurred. He initially honored his father's decision to appoint judges during good behavior and appears to have made an effort to appoint good men to the bench. England soon divided again between King and Parliament, however, and Charles found it expedient to remove judges who were too independent or opposed to the policies of the Crown (Haynes 1944). In 1672, he attempted to remove Sir John Archer from the court of common pleas. Archer refused to surrender his patent, however, as he held office during good behavior. Charles stripped Archer of his

salary and appointed a replacement, although he still received fees derived from fines and other activities of the court. Succeeding judicial appointments were held during pleasure, and transfers and removals were common (McIlwain 1913). In 1681, Charles dissolved Parliament and ruled alone until his death four years later.

James II replaced his brother and ascended the throne for three plus years. His great aim was to reestablish Catholicism in England which set the monarchy, yet again, at odds with Parliament. Initially proroguing Parliament and later dissolving it, James issued a royal declaration suspended application of the penal laws established by Parliament against religious dissenters, and sought to convene a reconstituted Parliament to support his agenda. The courts were enlisted to uphold the King's prerogative power to override Parliament. James dismissed judges opposed to his efforts and the retention of judges was based solely upon sympathy to the Crown (Haynes, 1944). The rate of removals during this time was unprecedented. Four were removed in one day in 1686 for refusing to side with the Crown while two others were dismissed the following year for declining to transfer the site of an execution to a place where the King thought it would have a greater effect (McIlwain 1913). When James had a son and the threat of a Catholic dynasty took shape, key Protestant members of Parliament invited the King's son-in-law, William of Orange, to assume the throne. James was soon forced to flee England (Haynes 1944).

The aftermath of the Glorious Revolution of 1688 appeared to settle the issue of the Crown breaking judges. William and Mary, his wife, were named dual monarchs upon their acceptance of a Declaration of Rights, which ceded considerable authority to Parliament (Haynes 1944). The Settlement Act of 1701 provided that judges would serve during good behavior, their salaries would remain certain, and they could only be removed by both

houses of Parliament through the process of address which required the Crown's consent (Shugerman,2012). Nonetheless, the next three monarchs, Anne, George I and George II, all subsequently dismissed judges notwithstanding their apparent tenure (Haynes 1944).

The last major issue regarding judicial tenure was cessation of judicial commissions upon the death of the King. A 1696 law provided that judges would continue in office for six months after the appointing sovereign died (McIlwain 1913). Prior to that time, judicial patents ceased with the death of the King. A 1760 statute finally decreed that judicial appointments would remain in effect during good behavior, notwithstanding the death of the monarch (Shugerman 2012). The prolonged battle between the Crown and Parliament over control of English judges underscored the desire for an independent judiciary, but, ironically, did not apply directly to the American colonies.

Royal charters and governor's commissions were the *de facto* constitutions of the individual colonies. They granted legislative authority, within the context of English law, but no such power was devised with respect to the judiciary. For example, assemblies were permitted to create courts for the hearing of minor cases, but the power to erect and constitute the general courts was reserved and judicial authority was vested in governor and council, creatures of the King (Goebel 1971). There was a blurred line between the judicial function and that which was political. Colonial assemblies routinely heard private petitions involving only one individual or group against another and entered judgment (Wood 1969).

The King nevertheless maintained absolute control over the appointment and removal of colonial judges (Goldschmidt 1994). This aspect of British rule became particularly poignant after 1760, when George III assumed the throne. As part of his

determination to regain royal prerogatives ceded to Parliament, he limited the tenure of judges in the American colonies (Volcansek and Lafon 1988). The same year he decreed that English judicial commissions survive the death of the appointing monarch and any of his or her successors, George announced that colonial judges would serve at the pleasure of the Crown (Shugerman, 2012). The justification offered was that in the colonies education was so poor and men of ability were so few that it was essential to the proper administration of justice that incompetent judicial officials could be easily replaced (Ervin 1970).

Colonists found some refuge from unpopular royal legislation in the courts where judges, unwilling to openly defy English laws, refused to enforce them (O’Conner 2009). In response, the Crown took additional steps to control the colonial judiciary. Colonies were prohibited from compensating judges (Volcansek and Lafon 1988) and judicial salaries were funded through revenue collected under the Townsend Act of 1767 (O’Conner 2009). Although difficult to measure, royal patronage exerted an influence on colonial affairs that furthered antagonism toward the power of appointment (Wood 1992). These affronts to judicial independence were famously encapsulated within the list of grievances specified in *The Declaration of Independence*: “He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.”

The leaders of the American Revolution were drawn from a range of professions and backgrounds and the contribution of clergy, merchants, physicians and newspaper publishers is well documented. However, no group was better equipped to articulate the colonial argument than members of the legal profession and the roster of well-known

lawyers active in the cause is impressive: Thomas Jefferson, John Adams, George Mason, James Otis, John Jay, Patrick Henry, Jarod Ingersoll, James Iredell and William Smith, Jr., to name but a few (Klein 1960). Many of the men who participated in the constitutional conventions that followed were lawyers³⁰ and all of them were familiar with the on-going struggle for judicial independence in England (Ervin 1970).

Responding to a resolution of the Continental Congress, individual colonies set about instituting and establishing their own independent governments. Between January, 1776 and April, 1777, ten³¹ adopted new constitutions. Two others³² chose to alter their colonial charters and a thirteenth, Massachusetts, did not adopt a formal constitution until 1780 (Tarr and Porter 1988).³³ The constitutional abuses of the Crown and the lessons of royal interference in the colonies were well known to the authors of these early state charters (Volcansek and Lafon, 1988). Some of the similarities found among the founding period state constitutions can be traced to this shared experience of British tyranny and understood in terms of a shared republican political theory of governance (Tarr and Porter 1988).

Written by men weary of excessive executive authority, these constitutions assigned primary responsibility for governance in the new states to legislative bodies. The

³⁰ My research fails to reveal an exact rendering of the number of lawyers in attendance at the original state constitutional conventions, but their roles were clearly significant. More than half of the signers of the Constitution of the United States were lawyers, including fifteen signers who had also attended their respective state conventions. Of these, ten were lawyers (Lloyd, *n.d.*).

³¹ Delaware (DEL. CONST. OF 1776), Georgia (Ga. CONST. OF 1777), Maryland (MD. CONST. OF 1776), New Hampshire (N.H. CONST. OF 1776), New Jersey (N.J. CONST. OF 1776), New York (N.Y. CONST. OF 1777), North Carolina (N.C. CONST. OF 1776), Pennsylvania (PA. CONST. OF 1776), South Carolina (S.C. CONST. OF 1776), and Virginia (VA. CONST. OF 1776).

³² Connecticut (CHARTER OF CONNECTICUT – 1662, REVISED 1776) and Rhode Island (CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS – 1663, REVISED 1776).

³³ MASS. CONST. OF 1780. Upon the advice of the Continental Congress, Massachusetts resumed use of the Charter of 1691 during the summer of 1775. For most of the revolutionary period, the state was managed without a governor and the council acted as the executive (Wood, 1969).

specific provisions for judicial selection embodied this approach and signified rejection of how a preferred legal system had actually operated in the colonies (Sheldon and Maule 1997). State judiciaries were made subservient to legislatures who had primary responsibility for electing judges, some for very limited terms, and the authority to remove judges by a mere majority vote of the legislature (Tarr and Porter 1988). The state legislatures assumed control over judicial salaries and fees, further weakening the independence of many state courts. This acute republican form of control over the judiciary represents the culmination of the struggle of colonial assemblies against the Crown for control of the colonial courts (Wood 1969).

The original constitutions of North Carolina,³⁴ South Carolina³⁵ and Virginia³⁶ provided for the appointment of judges by the legislature for terms of good behavior. The legislatures of Connecticut,³⁷ Rhode Island,³⁸ Georgia,³⁹ New Hampshire⁴⁰ and New Jersey⁴¹ were empowered to appoint judges, but for short, fixed terms. The chief executives

³⁴ N.C. CONST. OF 1776, ART. XIII.

³⁵ S.C. CONST. OF 1776, ART. XX. South Carolina adopted a second constitution in 1778 which also provided for appointment of judges by the legislature for terms of good behavior (S.C. CONST. OF 1778, ART. XXVII).

³⁶ VA. CONST. OF 1776.

³⁷ Connecticut did not write a formal constitution until 1818. Rather, all mention of royal authority was removed from the colonial Charter of Connecticut – 1662 by the general assembly in 1776 and it continued as the governing document for the new state. Judges were selected annually (Wood, 1969).

³⁸ Like Connecticut, Rhode Island chose in 1776 to operate under the Charter of Rhode Island and Providence Plantations – 1663 and continued to do so until 1842. Rhode Island judges were chosen annually (Eaton 1905).

³⁹ Ga. CONST. OF 1777, ART. LIII. The chief justice of Georgia was appointed annually while other jurists held their tenure at the pleasure of the legislature (Wood, 1969).

⁴⁰ The New Hampshire Constitution of 1776 is silent with respect to the judiciary but provides “That all civil officers for the colony and for each county be appointed, and the time of their continuance in office be determined by the two houses” of the state assembly (N.H. CONST. OF 1776).

⁴¹ The justices of the supreme court of New Jersey held seven year terms; other judges five year terms (N.J. CONST. OF 1776, ART. XII).

of Delaware,⁴² Maryland,⁴³ Massachusetts⁴⁴ and New York,⁴⁵ with input from their legislatures and executive councils, appointed judges to serve during good behavior. The governor of Pennsylvania, together with his executive council, appointed judges for a period of seven years.⁴⁶

Between 1784 and 1798, five of the original thirteen states adopted six new constitutions. Georgia⁴⁷ established discreet terms for its judges while New Hampshire⁴⁸ and Pennsylvania⁴⁹ adopted good behavior as tenure for their jurists. Delaware⁵⁰ and South Carolina⁵¹ did not meaningfully alter their judicial articles. When Vermont entered the Union in 1791, its constitution provided for the legislature to select state judges annually.⁵² Kentucky mirrored the federal model when it joined the United States in 1792 as its governor appointed judges with the advice and consent of the state senate.⁵³

Although the federal constitution has since become the object of almost reverential praise, it did not have an immediate impact on state constitution making. Rather, the Massachusetts constitution served as the primary model for other early state compacts (Tarr and Porter 1988). Federal judicial selection and tenure support an English liberal view of

⁴² The chief executive of Delaware was chosen by the legislature, designated the “president or chief magistrate” and together with the general assembly selected judges (DEL. CONST. OF 1776, ART. XII).

⁴³ The governor of Maryland, with the advice and consent of his council, appointed judges to commissions held during good behavior (MD. CONST. OF 1776, ARTS. XL, XLVIII).

⁴⁴ Massachusetts provided that judges be appointed by the governor with the advice and consent of his council (MASS. CONST. OF 1780, CH. 2, § I, ART. III).

⁴⁵ Judges in New York were chosen by an appointment committee comprised of the popularly elected governor and a committee of the state senate (N.Y. CONST. OF 1777, ARTS. XXIII, XXIV).

⁴⁶ The chief executive of Pennsylvania, designated the “president” and chosen by the state legislature, together with his council appointed judges for terms of seven years (PA. CONST. OF 1776, §§ 20, 23).

⁴⁷ GA. CONST. OF 1789, ART. III, § 5 and GA. CONST. OF 1798, ART. III, §§ 1, 4.

⁴⁸ N.H. CONST. OF 1784, ART. 73.

⁴⁹ PA. CONST. OF 1790, ART. V, § 2.

⁵⁰ DEL. CONST. OF 1792, ART. VI.

⁵¹ S.C. CONST. OF 1790, ART. III, § 1, ART. VI, § 1.

⁵² VT. CONST. OF 1786, § IX. A subsequent constitution provided for the annual selection of all judges by the state legislature (VT. CONST. OF 1793, CH. 2, § 9). From 1777 through 1786, a sovereign and independent Vermont chose common plea judges in popular elections (VT. CONST. OF 1777, ART. XXVII).

⁵³ KY. CONST. OF 1792, ART. II, § 8 AND ART. V, § 2.

republican governance. French intellectual concepts of democratic republicanism can be seen in early state constitutions as the power of appointment was largely held by popularly elected legislatures (Volcansek and Lafon 1988). These early state constitutions embody political principles and represent the best efforts of their framers to develop processes and create institutions that carry those principals into effect. They represent an evolution of governance, not a series of political compromises between such factions as those present at the federal convention (Tarr and Porter 1988).

The divergence of the federal constitution and state constitutions is well illustrated by the provisions for judicial selection and tenure of the thirteen states that joined the Union between 1796 and 1845. Appointment authority was vested entirely in the governor of four states⁵⁴ and in the legislature of seven others.⁵⁵ Indiana was unique in that the governor was the appointing authority for the state supreme court, the legislature chose presiding circuit judges, and associate circuit judges were chosen by popular election.⁵⁶ Supreme Court judges in Michigan were appointed by the governor with all others being elected.⁵⁷ Eight states granted their jurists tenure during good behavior⁵⁸ while five prescribed fixed terms.⁵⁹

⁵⁴ Louisiana (LA. CONST. OF 1812, ART. III, § 9), Maine (ME. CONST. OF 1820, ART. V, § 8), Missouri (MO. CONST. OF 1820, ART. V, § 13); and Texas (TEX. CONST. OF 1845, ART. IV, § 5).

⁵⁵ Alabama (ALA. CONST. OF 1819, ART. V, § 12), Arkansas (ARK. CONST. OF 1836, ART. VI, § 7), Florida (FLA. CONST. OF 1838, ART. V, § 12) Illinois (ILL. CONST. OF 1818, ART. IV, § 4), Mississippi (MISS. CONST. OF 1817, ART. IV, § 17); Ohio (OHIO CONST. OF 1803, ART. III, § 8), and Tennessee (TENN. CONST. OF 1796, ART. V, § 2).

⁵⁶ IND. CONST. OF 1816, ART. V, § 7.

⁵⁷ Michigan (MICH. CONST. OF 1835, ART. VI, §§ 2, 4).

⁵⁸ Alabama (ALA. CONST. OF 1819, ART. V, § 13), Florida (FLA. CONST. OF 1838, ART. V, § 13), Illinois (ILL. CONST. OF 1818, ART. IV, § 4), Louisiana (LA. CONST. OF 1812, ART. IV, § 5), Maine (ME. CONST. OF 1820, ART. VI, § 4), Mississippi (MISS. CONST. OF 1817, ART. V, § 9), Missouri (MO. CONST. OF 1820, ART. V, § 13), and Tennessee (TENN. CONST. OF 1796, ART. V, § 2).

⁵⁹ Arkansas (ARK. CONST. OF 1836, ART. VI, § 7), Indiana (IND. CONST. OF 1816, ART. V, § 4), Michigan (MICH. CONST. OF 1835, ART. VI, §§ 2, 4), Ohio (OHIO CONST. OF 1803, ART. III, § 8), and Texas (TEX. CONST. OF 1845, ART. IV, § 5).

The Democracy Movement

The first half of the nineteenth century witnessed a unique and fundamental change in judicial selection in the American states. A marked swing toward democratization gave rise to the widespread popular election of judges (Haynes 1944). By the outbreak of the Civil War, twenty-four of thirty-four states employed popular election to choose some or all of their judges (Berkson 1980). This innovation marked a break with both European tradition and the early practices of America states (Volcansek and Lafon 1988). At its zenith, more than 70% of the American states employed popular election to determine who their judges would be (DuBois 1980). The transition from more traditional appointive methods to popular elections was neither sudden nor complete (Sheldon and Maule 1997). It did, however, leave a permanent and indelible mark on conventions of democratic norms and American republicanism. Today, the United States is the only nation in the world that selects most of its judges through popular election (Brandenburg and Schotland 2008).

The rise of popular election of judges in the American states is rooted in Jeffersonian democracy. Thomas Jefferson distrusted the judiciary and contributed materially to the contention that judges should be popularly elected for short terms (Haynes 1944). Like many of his founding contemporaries, he had originally believed that judges should be independent and hold their offices for life. In the 1780s, he had become concerned about the “elective despotism” of state governments that had so concentrated power in the legislative branch that it was impeding the efficient administration of justice. However, in the wake of the French Revolution of 1790 Jefferson and his supporters began to openly champion popular democracy (Volcansek and Lafon 1988).

His “vital principles of republics” expressed in his first inaugural address included respect for the power of the state governments, the right of election by the people, and acquiescence to majority rule (Volcansek and Lafon 1988). The U. S. Supreme Court decision in *Marbury v. Madison*⁶⁰ and his ensuing feud with Chief Justice John Marshall over judicial review led Jefferson to openly support popular election and limited tenure for jurists (Haynes 1944). He charged that the judiciary was out-of-control, aristocratic and unaccountable (Epstein, Knight, and Shvetsova 2002), and efforts at impeachment proved unsuccessful for removing contrarian judges at both the federal and state levels (Haynes 1944; Volcansek and Lafon 1988). Discontent with judges who held office during good behavior led many, including Jefferson, to advocate alternate methods for staffing the judiciary.

Change in methods of selecting state court judges was slow in coming. Rather, state judiciaries were weakened in the first third of the eighteenth century by ripper bills,⁶¹ the implementation of shorter terms, and by political punishment of judicial review through impeachment (Shugerman 2012). These efforts tended to make the judiciary more accountable to the legislative branch than to the people.

Two other tenets of Jeffersonian thought, majority rule and universal suffrage, would have important implications for those who desired to have an elected judiciary, particularly in the West. In the years immediately following the War of 1812, the constitutions of the states entering the Union provided for universal suffrage⁶² and

⁶⁰ 1 Cranch 137 (1803).

⁶¹ “Ripper bills” circumvented service during good behavior by eliminating the courts upon which jurists with life tenure served and replacing them with reconstituted judicial offices with new judges. The purpose of the legislation was “purely partisan” (Shugerman, 2002, p. 72).

⁶² In this context, “universal suffrage” is limited to free white male persons aged twenty-one and older who have not otherwise been disqualified to vote through felony conviction or otherwise. However, it was an extension of the franchise from early state constitutions which usually required electors to own property of a

apportioned representation based on population rather than geography.⁶³ This egalitarian form of democracy permitted farmers, artisans, mechanics, and later, industrial laborers from Eastern urban areas, to participate in government (Volcansek and Lafon 1988).

During the 1830s, Andrew Jackson succeeded Jefferson as the champion of popular democracy. He believed people were virtuous and was supremely optimistic about the capacity of Americans for self-governance. Jacksonian democracy was built on the familiar fear of unrepresentative officials using government to promote narrow interests and confer special privileges (Nelson 1993). It emphasized extension of the franchise, attacks on privilege and deference, and the spirit of popular rule. Jacksonians thought of the independent judiciary as the bastion of the aristocracy, insulated from any direct responsibility to the people (Volcansek and Lafon 1988).

The momentum of the democratic movements created a groundswell for constitutional change. Between 1821 and 1860, more than half of the states existing in 1820 adopted new constitutions and Louisiana, New York and Virginia replaced their constitutions twice.⁶⁴ Michigan and Iowa, two states that joined the Union between 1821 and 1860, were also compelled to replace their original constitutions prior to the outbreak

certain value or to have paid a property tax as a condition of their eligibility to vote (e.g., PA. CONST. OF 1790, ART. III, § 3 and CONN. CONST. OF 1818, ART. VI, § 2).

⁶³ Indiana (IND. CONST. OF 1816, ART. III, §§ 2, 6 and ART. VI, § 1); Mississippi (MISS. CONST. OF 1817, ART. III, §§ 1, 8, 10); IL (1818); Illinois (ILL. CONST. OF 1818, ART. II, §§ 5, 27); Maine (ME. CONST. OF 1820, ART. II, § 1, ART. IV – FIRST PART, § 2, and ART. IV – SECOND PART, § 2), and Missouri (MO. CONST. OF 1820, ART. III, §§ 4, 6, 10).

⁶⁴ N.Y. Const. of 1821, VA. CONST. OF 1830, DEL. CONST. OF 1831, MISS. CONST. OF 1832, TENN. CONST. OF 1835, PA. CONST. OF 1838, N.J. Const. of 1844, LA. CONST. OF 1845, N.Y. Const. of 1846, ILL. CONST. OF 1848, KY. CONST. OF 1850, IND. CONST. OF 1851, MD. CONST. OF 1851, OHIO CONST. OF 1851, VA. CONST. OF 1851, and LA. CONST. OF 1852. Rhode Island jettisoned its colonial charter and adopted its first formal constitution in 1842. R.I. CONST. OF 1842.

of hostilities.⁶⁵ All told, the 40 years prior to the Civil War witnessed two-thirds of the American states adopting new constitutions.

The fundamental issue confronting state constitution-makers of the period was how to best secure republican government (Tarr 1998b). The conventions focused on controlling the legislatures and limiting their power to regulate (Shugerman 2012). Although not the primary concern, how to make the judiciary more responsive to the people was an important aspect of that question. The answer given was popular election of judges for limited terms.

While uncommon, judicial elections were not unheard of in the United States. The first incidence of popular election of judges occurred in Vermont in 1777.⁶⁶ Georgia amended its constitution in 1811 and again in 1812 to allow for the election of inferior judges.⁶⁷ In 1816, the new state of Indiana chose to elect its associate circuit judges and justices of the peace,⁶⁸ while Michigan entered the Union in 1836 providing for the popular elections of trial judges.⁶⁹ Mississippi, beginning in 1832, was the first state to require all of its judges to be chosen by popular election.⁷⁰

The embrace of popular election for all its judges by the important state of New York in 1846⁷¹ marked a critical juncture. Fourteen⁷² other then-existing states switched to

⁶⁵ MICH. CONST. OF 1850 and IOWA CONST. OF 1857.

⁶⁶ Vermont was an independent state from 1777 until it joined the United States in 1791. Its original constitution called for the popular election of common pleas judges (VT. CONST. OF 1777, ART. XXVII).

⁶⁷ GA. CONST. OF 1798, AMENDS. II AND III.

⁶⁸ IND. CONST. OF 1816, ART. V, §§ 7, 12.

⁶⁹ MICH. CONST. OF 1835, ART. VI, §§ 4, 6.

⁷⁰ MISS. CONST. OF 1832, art. IV, §§ 2, 5, 11, 16, 18, 23.

⁷¹ N.Y. CONST. OF 1846 ART. VI, §§ 2, 12, 14, 17-18.

⁷² Alabama, all judges except chancellors and judges of the supreme court (ALA. CONST. OF 1819, ART. V, § 12 AS AMENDED 1850); Arkansas, circuit and county court judges only (ARK. CONST. OF 1836, ART. VI, §7 AS AMENDED 1848); Florida, all judges (FLA. CONST. OF 1838, ART. V, §§ 11, 12 AS AMENDED IN 1852); Illinois, all judges (ILL. CONST. OF 1848, ART. V, §§ 3, 9, 17, 19, 27); Indiana, all judges (IND. CONST. OF 1851, ART. VII, §§ 3, 9, 14); Kentucky, all judges (KY. CONST. OF 1850, ART. IV, §§ 4, 20, 30, 35, 40, 41); Louisiana, all judges (LA. CONST. OF 1852, TITLE VI, ARTS. 64, 78, 81); Maryland, all judges (MD. CONST. OF 1850, ART.

popular election for some or all of their judges within ten years and every state except Iowa⁷³ that joined the Union between 1846 and 1912⁷⁴ provided that all of their judges be chosen through popular election. At the brink of the Civil War, 60% of the states elected judges to their courts of last resort and two out of every three states elected their trial judges (Nelson 1993).

There is an interesting and relevant scholarly debate surrounding the reasons behind the rise of judicial elections, much of it less than flattering for proponents of the method. Prominent legal scholar James Willard Hurst (1950, 100) argues “the movement was based on emotion rather than on a deliberate evaluation of the experience under the appointive system” and “[t]here is no evidence that the spread of the elected bench after 1850 was the result of anything but imitation and sentiment.” Evan Haynes (1944, 100-1) similarly observes, “It seems reasonable to say that the fundamental causes of that change had very little to do with the relative merits of this or that system of judicial selection and tenure, but were rather . . . completely without regard for the particular considerations of policy

IV, §§ 4, 8, 9, 12, 13, 17, 19); Michigan, all judges (MICH. CONST. OF 1850, ART. VI, §§ 2, 6, 13, 17); Missouri, supreme court and circuit court judges only (MO. CONST. OF 1820, AMENDMENTS ARTS. VI AND VII); Ohio, all judges (OHIO CONST. OF 1851, ART. IV, §§ 2, 3, 7, 9, 10); Pennsylvania, all judges (PA. CONST. OF 1838, ART. V, § 2, AS AMENDED 1851); Tennessee, all judges (TENN. CONST. OF 1834, ART. VI, §§ 3, 4 AS AMENDED 1853); and, Virginia, all judges (VA. CONST. OF 1850, ART. VI, §§ 6, 10, 27, 34).

⁷³ Iowa chose to elect district court judges and supreme court judges were appointed by the legislature (IOWA CONST. OF 1846, ART. VI §§ 3, 4).

⁷⁴ Wisconsin (WIS. CONST. OF 1848, ART. VII, §§ 2, 6, 7, 14, 15), California (CAL. CONST. OF 1849, ART. VI, §§ 3, 5, 8, 14), Minnesota (MINN. CONST. OF 1857, ART. VI, §§ 3, 4, 7, 8, 9), Oregon (OR. OF 1857, ART. VII, §§ 2, 10, 11), Kansas (KAN. CONST. OF 1859, ART. III, §§ 2, 5, 8, 9), West Virginia (W. VA. CONST. OF 1863, ART. VI, §§ 4, 7), Nevada (NEV. CONST. OF 1864, ART. VI, §§ 3, 5, 8), Nebraska (NEB. CONST. OF 1866, ART. III, §§ 1, 5), Colorado (COLO. CONST. OF 1876, ART. VI, §§ 6, 12, 22), North Dakota (N.D. CONST. OF 1889, ART. IV, §§ 90, 104, 110, 112, 113), South Dakota (S.D. CONST. OF 1889, ART. V, §§ 5, 11, 15, 19), Montana (MONT. CONST. OF 1889, ART. VIII, §§ 6, 12, 20), Washington (WASH. CONST. OF 1889, ART. IV, §§ 3, 5, 10), Idaho (IDAHO CONST. OF 1890, ART. V, §§ 6, 11, 22), Wyoming (WYO. CONST. OF 1889, ART. V, §§ 4, 19, 22), Utah (UTAH CONST. OF 1896, ART. VIII, §§ 2, 5, 8), Oklahoma (OKLA. CONST. OF 1907, ART. VII, §§ 3, 9, 11, 18), New Mexico (N.M. CONST. OF 1912, ART. VI, §§ 4, 12, 26), and Arizona (ARIZ. CONST. OF 1910, ART. VI, §§ 3, 5, 9).

and principle which arise out of the nature and functions of the judicial arm of the government.”

Caleb Nelson (1993, 224) is critical of the suggestion that reformers were “. . . simple minded democrats. [T]he elective judiciary was intended to enlist some officials—judges—in the process of weakening officialdom as a whole. At the same time, other reforms were curtailing the independent power of judges themselves, in a concerted effort to rein in the power of all officials to act independently of the people.” Francis Aumann (1940, 186-7) points to partisan concerns. “Politics had a great deal to do with [it]. Jeffersonian Democracy viewed the judicial branch as a bulwark for the opposition group.” Finally, Kermit Hall (1983, 354) posits, “The decision to elect state court judges was neither emotional nor expedient. It was an essentially thoughtful response by constitutional moderates in the legal profession to ensure that state judges would command more rather than less power and prestige.” Although Hall’s theory has not gained widespread acceptance among historians, it raises interesting points about the role of lawyers in the judicial selection process.

Hostility toward lawyers in the United States had been rife since the Revolution (Bloomfield 1968). A strong feeling of hostility toward lawyers arose in the post-Revolution period because of their role in the debt crisis (Haynes 1944). The subsequent economic and political success of lawyers occasioned opposition to the class structure of the organized bar which sought to limit their ranks by establishing qualifications for the practice of law. The Jeffersonians capitalized on anti-lawyer sentiment that resulted from their economic success and the presence of a disproportionate number of lawyers in government offices (Volcansek and Lafon 1988).

Despite their questionable standing in the community, lawyers were an important presence at the antebellum state constitutional conventions. They comprised half of the delegates at the 1832 Mississippi convention, better than forty percent of those at the 1846 New York convention, and were represented in significant numbers at other conventions (Nelson 1993). At every convention, lawyers and judges who had personal and professional stakes in the outcome controlled the committees on judicial articles as well as floor debate once the issue of judicial selection reached the convention floor (Hall 1983). Irrespective of whether the efforts of lawyers was the reason for the shift to popular election of judges or merely contributed to an inevitable outcome, members of the bench and bar had established themselves as important actors in deciding how judges were to be chosen.

The Civil War and its aftermath led to the busiest period of constitutional revision in the history of the American states, but had minimal long-term effect on state judicial selection. Between 1861 and 1900, fifty-eight state constitutions were adopted, of which thirty-three were in the former Confederate states. By comparison, only seven of the twenty-three states that remained a part of the Union created new state charters during the span (Tarr 1998b). Reconstruction led six former Confederate states to temporarily adopt gubernatorial appointment for selecting judges,⁷⁵ but all later returned to popular election as their primary means to select jurists (Haynes 1944). Among Southern states, Virginia was distinctive in that it abandoned popular election of judges and returned to legislative appointment while the war was still on-going.⁷⁶ All eleven states that joined the United

⁷⁵ Arkansas, all judges (ARK. CONST. OF 1868, ART. VII §§ 3, 5); Georgia, all judges except justices of the peace (GA. CONST. OF 1868, ART. V, § 9); Florida, all judges (FLA. CONST. OF 1868, ART. VI §§ 3, 7, 9, 15); Louisiana, supreme court only (LA. CONST. OF 1868, TITLE IV, ART. 75); Mississippi, all judges except justices of the peace (MISS. CONST. OF 1868, ART. VI, §§ 2, 11, 17, 23); and, Texas, all judges except justices of the peace (Tex. CONST. OF 1869, ART. V, §§ 2, 6, 19).

⁷⁶ VA. CONST. OF 1864, ART. IV §§ 1, 6, 10. South Carolina had maintained legislative appointment as the exclusive means of choosing its judges since 1776.

States between the outbreak of hostilities and the turn of the century chose popular election as the exclusive means of selecting their judges⁷⁷ and most of the North steadfastly maintained popular election (Hall, 1984c). New England remained distinctive from the rest of the country due in part to its isolation from several movements for constitutional change, including the popular election of judges (Tarr 1998b). At the end of the 19th century, the six New England states, Delaware and New Jersey retained their historical methods of choosing judges either by gubernatorial or legislative appointment. When Mississippi reinstated popular election for all judges in the second decade of the 20th century,⁷⁸ thirty-eight of the forty-eight U. S. states used the method as the primary means for selecting their jurists while the other ten favored an appointive method.

Progressive Reform

Significant dissatisfaction with popular elections arose in the closing decades of the nineteenth century (Goldschmidt 1994). State court judges were widely perceived as incompetent, corrupt and under the control of political machines (Berkson 1980). The electorate had proven unable to monitor and control the activities of judges as advocates of popular election had envisioned. Instead, popular election had allowed the courts to be captured by party machines (Hanssen 2004).

Lawyers led the assault on popular election of judges (Hall 1984a). For many, the concept of judicial accountability had changed from democratic accountability to

⁷⁷ West Virginia (W. VA. CONST. OF 1863, ART. VI, §§ 4, 7), Nevada (NEV. CONST. OF 1864, ART. VI, §§ 3, 5, 8), Nebraska (NEB. CONST. OF 1866, ART. III, §§ 1, 5), Colorado (COLO. CONST. OF 1876, ART. VI, §§ 6, 12, 22), North Dakota (N.D. CONST. OF 1889, ART. IV, §§ 90, 104, 110, 112, 113), South Dakota (S.D. CONST. OF 1889, ART. V, §§ 5, 11, 15, 19), Montana (MONT. CONST. OF 1889, ART. VIII, §§ 6, 12, 20), Washington (WASH. CONST. OF 1889, ART. IV, §§ 3, 5, 10), Idaho (IDAHO CONST. OF 1890, ART. V, §§ 6, 11, 22), Wyoming (WYO. CONST. OF 1889, ART. V, §§ 4, 19, 22), and Utah (UTAH CONST. OF 1896, ART. VIII, §§ 2, 5, 8).

⁷⁸ MISS. CONST. OF 1890, ART. VI §§ 145, 153, AS AMENDED 1916.

professional accountability (Hall 1984b). Bar leaders initially worked within the existing framework of popular elections to effectuate change by minimizing the power of political parties (Watson and Downing 1969). They eventually joined forces with progressives⁷⁹ who advocated a range of electoral reforms including nonpartisan elections for judges and other officials (DuBois 1980).

Lawyers hoped taking politics out of the process would permit them to fill the void of who chose judges (Sheldon and Maule 1997). By 1920, more than a dozen states had adopted nonpartisan elections to choose at least some of their judges. Nonpartisan elections failed to become the dominant form of state judicial selection, but it is used today in some form in twenty states.⁸⁰

The half-century following the end of the Civil War witnessed a profound series of changes in the United States. The economy transformed from an agricultural and commercial base to one of manufacturing and industry, causing a dramatic increase in urban populations (Hall and Karsten 2009) and giving rise to political machines in large cities. These machines took advantage of the political ignorance and complacency of the urban electorate toward judicial candidates and seized control of the local bench, such as the Tammany organization in New York City (Escovitz 1975). Electoral rules that

⁷⁹ Progressivism was a reform movement that sought to inject efficiency and expertise into government. It took the form of numerous, independent reform-minded groups that proposed a variety of programs ranging from electoral to administrative reform (Goldschmidt 1994, 6-7). Progressives were able to secure legislative support for many reforms in the late 19th and early 20th century. However, they also suffered major setbacks in the courts, the most notable being *Lochner v. New York*, 198 U.S. 45 (1905). This helped give rise to two other legal reforms supported by progressives, the recall of judges and a supermajority voting rule for the exercise of judicial review by state supreme courts (Shugerman 2012).

⁸⁰ Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin select all of their judges in nonpartisan contests, although Michigan state supreme court justices are nominated at party conventions. Ohio judges are nominated in partisan primaries and run without party affiliation in the general election. California, Florida, Oklahoma, and South Dakota choose all of their trial judges in nonpartisan elections, while Indiana elects only some of its trial court judges through nonpartisan means.

permitted party list ballots allowed voters to mark their ballots once to cast votes for all party candidates, including judges, thereby effectively making judges responsible to party strongmen (Sheldon and Maule 1997). The corruption was so apparent that the “stench from the courtroom” and lawyer resentment over party control of the local bench contributed to the establishment of the Association of the Bar of the City of New York City in 1870, the first modern bar association (Friedman 1985, 373-4).

A generation earlier, New York had taken a leading role in the implementation of popular election of judges. By 1867, corruption on the state bench was viewed as rampant and bar elites made judicial reform a top priority. At the state’s constitutional convention that year, delegates were able to secure an extension of judicial terms to fourteen years—what some delegates saw as tenure for life. Reform efforts continued in the midst of yet another corruption scandal that implicated Tammany Hall over railroad business deals, led to the resignation of trial court judge Albert Cardozo, and reached almost every level of state government. An 1873 referendum to reinstate judicial appointments nevertheless failed, despite the efforts of reformers and a record number of judges awaiting trial for corruption (Shugerman 2012).

The American Bar Association (ABA) formed in 1878 and came out in favor of eliminating partisanship in judicial elections on the grounds that the partisan process rendered judges susceptible to undue and damaging political pressure (Hanssen 2004). The efforts of bar associations to minimize partisan influence in judicial races and to replace it with input from lawyers included the appraisal of candidate qualifications, active support of approved candidates, and explicit opposition to those found to be unqualified (Hurst 1950). However, these efforts proved largely unsuccessful (Watson and Downing 1969).

In 1906 Roscoe Pound, the future dean of Harvard Law School, delivered a famous address to the annual meeting of the ABA entitled “The Causes of Popular Dissatisfaction with the Administration of Justice.” He argued the judiciary failed to address modern problems like rapid population growth and the transition of the economy from agriculture to manufacturing. Drawing parallels with the prior transformation of the colonial legal structure away from the English magistrate system into a series of decidedly American institutions, Pound called for an overhaul of the substantive law through both legislation and judicial empiricism. His most famous observation aimed squarely at limiting untoward influences on the courts: “Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench” (Pound [1906] 1962, 66).

Pound was not alone in his disenchantment. Speakers at legal symposia and bar association meetings throughout the nation took aim at the causes and effects of the diminishing reputation of the judiciary and a series of proposals were offered and debated. At the 1913 ABA annual meeting, then-former U. S. President and future chief justice of the U.S. Supreme Court William Howard Taft addressed the assembly of delegates on the question of judicial selection. He lobbied against popular elections and endorsed the appointive system. Taft viewed politics as evil and an irreconcilable impediment to the proper administration of justice (Winters 1968).

Progressives shared in the frustration of partisan political influence in the popular election of judges. They sought scientific efficiency in government and viewed partisan control of judicial selection as inefficiency in need of reform (Goldschmidt 1994). In their view, being a partisan had little to do with being a judge and it often resulted in unqualified

persons being placed on the bench (Sheldon and Maule 1997). They offered a range of alternatives to the status quo which were adopted in many states including nominating committees, direct judicial primaries, shortened ballots and, most importantly, nonpartisan elections (Goldschmidt 1994).

Beginning in 1908, Washington became the first state to employ nonpartisan judicial elections. Judges of the supreme and superior courts were to be chosen on a nonpartisan judiciary ticket that was separate from the regular ballot. The enabling legislation⁸¹ also called for the use of a direct primary for the selection of essentially all public offices. The state legislature quickly retreated, however, and the following year mandated that supreme court judges be nominated in party conventions and voted upon at the regular general election ballot.⁸² The Washington experience of partisan retrenchment was soon to repeat in several other states.

In 1913, the legislative assemblies of Kansas,⁸³ Iowa,⁸⁴ and Pennsylvania⁸⁵ all passed legislation providing for nonpartisan judicial elections. Kansas abandoned reform almost immediately, repealing the act at the next legislative session.⁸⁶ In 1919, Iowa discarded nonpartisan elections in favor of partisan nomination of judges at special judicial nomination conventions held separately from regular state party conventions with

⁸¹ Act of Mar. 15, 1907, ch. 209, 1907 Wash. Laws 457 (providing for nomination of candidates for public office).

⁸² Act of Mar. 12, 1909, §11, ch. 28, 1909 Wash. Laws 169 (providing that supreme court justices be nominated at party conventions and their names placed on the general election ballot designating the party that nominated them).

⁸³ Act of Mar. 11, 1913, ch. 193, 1913 Kan. Sess. Laws 309 (concerning the nomination and election of justices of the supreme court and judges of the district court).

⁸⁴ Act of April 11, 1913, ch. 104, 1913 Iowa Acts 91 (providing for nonpartisan nomination and election of judges of the supreme, district and superior courts of Iowa).

⁸⁵ Act of July 24, 1913, No. 457, 1913 Pa. Laws 1001 (regulating and providing for nonpartisan nomination and election for all offices of judge of a court of record).

⁸⁶ Act of Mar. 24, 1915, ch. 207, 1915 Kan. Sess. Laws 264 (repealing chapter 193 Kansas Session Laws of 1913).

nominees facing off during the general election.⁸⁷ Similarly, the Pennsylvania reforms survived less than a decade when the state returned to the use of partisan primaries and party-competitive general elections.⁸⁸ Despite these setbacks, nonpartisan judicial elections found favor in other reform-minded states.

Ten Midwest and Western states, where progressive influence was strongest, adopted nonpartisan judicial election for some or all of their judges between 1909 and 1921. The North Dakota⁸⁹ legislature acted earliest and was joined two years later in 1911 by their Ohio⁹⁰ and California⁹¹ counterparts. Beginning the following year, judges in the new state of Arizona were nominated in party primaries and selected in nonpartisan general election contests (Dunn 1967, 298). Minnesota adopted nonpartisan election for judges, as well as some school and municipal officers, at a 1912 special session.⁹² Nebraska,⁹³ Wisconsin,⁹⁴ Wyoming,⁹⁵ Nevada⁹⁶ and South Dakota⁹⁷ also adopted nonpartisan means for nomination and election of their judicial officers.

⁸⁷ Act of March 17, 1919, ch. 63, 1919 Iowa Acts 75 (relating to the nomination and election of judges of the supreme, district and superior courts).

⁸⁸ Act of May 9, 1921, No. 198, 1921 Pa. Laws 423 (providing for the nomination and election of judges of courts of record, and repealing certain acts).

⁸⁹ Act of March 6, 1909, ch. 82, 1909 N.D. Laws 84 (providing for the nomination and election of judges of the supreme and district courts)(codified at N.D. CENT. CODE §§ 904-906 (1913)).

⁹⁰ Act of Feb. 8, 1911, S.B. 2, 1911 Ohio Laws 5 (providing for the election of judicial officers by separate ballot without party designation).

⁹¹ The Direct Primary Law, ch. 398, 1911 Cal. Stat. 769 (providing for partisan primaries for most offices and making judicial and school offices nonpartisan).

⁹² Act of _____, 1912, § 2, ch. 2, 1912 Minn. Laws 4 (providing for non-partisan primary ballot for judiciary and other offices).

⁹³ Act of Apr. 11, 1913, ch. 96, 1913 Neb. Laws 247 (providing for the nonpartisan nomination and election of judicial officers).

⁹⁴ Act of June 17, 1913, ch. 492, 1913 Wis. Laws 558 (relating to nomination and election of school and judicial officials).

⁹⁵ Act of Feb. 24, 1915, ch. 74, 1915 Wyo. Sess. Laws 71 (relating to the nomination and election of judges and providing for the nonpartisan selection thereof)(codified at WYO. STAT. ANN. §§ 31-1001 to 31-1005 (1945)).

⁹⁶ Act of March 22, 1917, ch. 148, 1917 Nev. Laws 249 (defining judicial officers and offices and school officers and offices, and declaring them nonpartisan)(codified at NEV. STAT. §§ 2568-2569 (1929)).

⁹⁷ An Act to Provide for the Non-Political Nomination and Election of Judges of the Supreme, Circuit and County Courts, ch. 224, 1921 S.D. Laws 331 (codified at S.D. CODIFIED LAWS §§ 7205-A to -H (1930)).

The Progressive era and the accompanying spirit of wide-spread legal reform had ended by the early 1920s, but the adoption of nonpartisan elections as a method of state judicial selection continued. During the 1930s, Oregon,⁹⁸ Idaho,⁹⁹ Montana¹⁰⁰ and Michigan¹⁰¹ all adopted such measures. A 1941 Maryland law prohibited the use of party designations in judicial races at general elections, although the nomination process continued to be partisan. A provision was added two years later which permitted judicial candidates to cross-file in party primaries thereby reducing, to some extent, the effect of party membership in judicial elections (Martineau 1963).

By the dawn of the Second World War, nonpartisan elections had supplanted partisan elections as the primary means of selecting judges in the American states.¹⁰² Nevertheless, would-be reformers soon turned toward their attention to another progressive solution – merit selection – as the preferred method of judicial selection.

⁹⁸ Act of Mar. 11, 1931, ch. 347, 1931 Or. Laws 607 (providing for the nonpartisan nomination and election of judges of the supreme, circuit and district courts)(as amended codified at OR. STAT. §§ 36-2501 to 36-2507 (1935))

⁹⁹ Act of Feb. 13, 1933, ch. 36, 1933 Idaho Sess. Laws 48 (providing a form of non-partisan judicial ball at general elections for election of justices of the supreme court and district judges)(as amended codified at IDAHO CODE §§ 33-6A101 to 33-6A108 (1940)).

¹⁰⁰ Act of Mar. 14, 1935, ch. 182, 1935 Mont. Laws 389 (regulating the nomination and election of justices of the supreme court and judges of the district court)(codified at MONT. REV. CODE ANN. §§ 812.1 – 812.1 (1936)).

¹⁰¹ MICH. CONST. OF 1908, ART. VII, § 23 (as amended 1939).

¹⁰² General nonpartisan judicial selection reforms have since been enacted in Kentucky (KEN. CONST. § 117 AS AMENDED 1975), Georgia (GA. CONST., ART. VI, § 7, PARA. 1 RATIFIED 1983), Mississippi (Nonpartisan Judicial Election Act, §§76-87, ch. 564, 1994 Miss. Laws 809 (establishing nonpartisan elections for all appellate and most trial judges)), and Arkansas (ARK. CONST., AMEND. 80, (RATIFIED 2000)). North Carolina enacted separate measure for superior court judges (Act of Aug. 2, 1996, §7, ch. 9, 1996 N.C. Laws 2nd Ex. Sess. 1 (establishing nonpartisan election of superior court judges)(codified at N.C. Gen. Stat. §§163-321 through 163-335)), district court judges (Act of Aug. 29, 2001, §1, N.C. Session Law 2001-403 (establishing nonpartisan election of superior court judges)(codified at N.C. Gen. Stat. §§163-321 through 163-335)), and appellate court judges and justices (Act of Oct. 2, 2002, § 7, N.C. Session Law 2002-158 (establishing nonpartisan election of supreme court justices and appellate court judges)(codified at N.C. Gen. Stat. §§163-321 through 163-335)).

Merit Selection

For many Progressives and lawyers alike, the establishment of nonpartisan judicial elections was more a placebo than a cure aimed at restoring the balance between accountability and independence (Atkins 1976a). The American Judicature Society (AJS),¹⁰³ a quintessential Progressive group founded in Chicago in 1913, undertook the task of developing and promoting an improved method for selecting state court judges (Belknap 1992). Albert M. Kales, a professor of law at Northwestern University and the head of the AJS drafting program, offered an early proposal where a popularly elected chief justice would be responsible for appointing judges who would later run unopposed in retention elections (Kales 1914).

Over the next two decades and numerous machinations later, the Kales plan had evolved into a merit-based selection system for choosing judges (Gleason 2013). The approach won widespread support among lawyers nationwide and gained the official endorsement of the ABA in 1937 (Wood 1937). Missouri became the first state to adopt merit selection for choosing some of its judges in 1940 and, as a result, merit-based selection is often referred to as “The Missouri Plan” (Winters 1968, 63). In the seventy

¹⁰³ The organization was incorporated in Illinois on June 15, 1913 under the name “American Judicature Society to Promote the Efficient Administration of Justice” (Belknap 1992). The initial group of directors was a veritable who’s who of Midwestern legal talent. The Chairman was Harry Olson, the Chief Judge of the Municipal Court of Chicago. Board members included the governor of Michigan, the deans of the Northwestern and University of Chicago schools of law, an additional faculty member from each of those schools along with a former professor of law at Northwestern, a former Solicitor General of the United States and past president of the ABA, two former presidents of the Illinois Bar Association, and the sitting Chief Justice of the Wisconsin Supreme Court. The two non-Midwestern directors were Pound, who by that time had assumed the position of Dean at Harvard Law School, and another faculty member from the Harvard School of Law (“Introduction” 1917). Within several years of its founding, AJS was able to boast of a council comprised of 180 lawyers from forty states, including representatives of the ABA and state bar associations. Council members Louis Brandeis, George Sutherland, and former President Taft were all future members of the U. S. Supreme Court (Belknap 1992).

years since, bar associations, AJS and other reform-minded advocates have sought to educate lawmakers and citizens about the benefits of merit selection over popular election of judges. Though it takes many different forms today, merit selection is used by 32 states to choose some or all of their judges.

Early reform proposals differed greatly from the Missouri Plan. Kales advocated filling court vacancies through appointment by the chief justice who would be chosen by frequent, popular election. An appointed judge would serve a short probationary period (he proposed three years) and then submit themselves to retention election. If successful, they would serve a longer term (something in the range of six to nine years) at the conclusion of which the retention process would repeat (Kales 1914). Harold J. Laski, a professor at the London School of Economics and Political Science, proposed gubernatorial appointment with the assistance of the judges of the state supreme court, the state attorney general, and the president of the state bar association (Laski 1926). The inclusion of citizens on a nominating commission to make recommendations for judicial elections was first discussed in a 1931 editorial in *The Panel*, a publication of the Grand Jury Association of New York (Winters 1968).

A roundtable discussion at the 1931 annual meeting of AJS on the topic of selecting judges marked the first time all of the elements of merit selection and retention that came to be known as the Missouri Plan were discussed before a national body. Walter B. Spencer spoke of a Louisiana bar plan that would create a nominating council composed of judges, lawyers and lay citizens that was charged with submitting the names of qualified candidates to the governor for consideration and appointment to judicial offices (“Various Ways” 1931). Also discussed was a California proposal allowing seated judges to face

noncompetitive, retention elections of decreasing frequency (“Various Ways – II” 1931). The union of these two ideas held promise to the bar for an escape from the perceived ills of the popular election of judicial officials.

The ABA officially endorsed merit selection in 1937 as the preferred method of selecting and retaining state judicial officials. An ABA resolution called for the initial appointment of judges by an elected official from a list compiled by an independent agency. If confirmation of appointees was deemed warranted, it would be done by the state senate or some other legislative body. Finally, those seeking reappointment would periodically stand before the electorate for retention on their record with no opposition candidates (Wood 1937).

The ABA action came on the heels of a high level of unsuccessful bar activity seeking a range of reforms. Georgia, Kansas, Florida and Utah lawyers had advanced proposals that called for the appointment of judges by governors from lists of nominees chosen through bar plebiscites (Gleason 2013). The Washington bar had developed a novel plan that called for an eleven-member judicial council comprised of the governor, three lay people and seven lawyers to appoint state judges (“Washington Bar’s Plan” 1935). In 1934, California voters had rejected a state bar sponsored plan for the selection of trial court judges in Los Angeles under which the governor would have the power to appoint from a list submitted by the chief justice of the state supreme court, the presiding justice of the court of appeals, and a state senator (Winters 1968). Coincidentally, a plan initiated by the California Chamber of Commerce was approved by voters the same day. The constitutional amendment¹⁰⁴ provided for the governor to nominate all state appellate court judges subject

¹⁰⁴ CAL. CONST., ART. VI, §§ 3, 16.

to confirmation by the chief justice of the state supreme court, the presiding justice of the court of appeals, and the state attorney general (Gleason 2013; Winters 1968).

By 1938, the state bars of Illinois, Indiana, Iowa, Michigan, Missouri, Ohio, Utah and Wisconsin had submitted for legislative consideration recommendations based on the ABA resolution (“Present Status” 1938). The Michigan and Ohio proposals found their way onto the fall ballot that same year but were defeated by wide margins (Barkdull 1939; Brand 1939).

In Missouri, lawyers had been unable to gain legislative support for their reform efforts. The state bar association shifted strategy and decided to take the issue directly to the voters. The plan offered included selection of all state appellate judges and trial judges in the St. Louis and Kansas City metropolitan areas. Other jurisdictions could adopt the merit-based procedures by local referendum (“Ambitious Program” 1940).

The endeavor of securing the requisite number of voters’ signatures required to ensure a place on the November 1940 was successful in obtaining more than double the required number. The Missouri Institute for the Administration of Justice (MIAJ), a state-wide organization of more than 20,000 members which included 3,000 lawyers, aided in the signature-gathering process and took the proposal directly to the voters with an educational campaign (“Vote on Missouri Court Plan Assured” 1940).

The Missouri Plan was adopted by voters with a comfortable margin on the same day five other statewide ballot initiatives went down to defeat. The geographic areas with the highest level of support for the proposal were the metropolitan jurisdictions which would also be required to use the scheme to select their trial court judges (“Missouri Voters Approve” 1940).

In their definitive study of the Missouri Plan, Richard A. Watson and Rondal G. Downing (1969, 9-10) observe, “It is difficult to determine the precise reasons why Missouri became the first state to adopt the Plan favored by the American Judicature Society and American Bar association, but certain factors contributed to the successful campaign waged there.” They identify four particular exigencies that appeared to have helped further the cause. First, a well-publicized fight between political factions in Kansas City over the selection of state supreme courts justice in 1936 and the electoral success of a pharmacist turned judge in St. Louis who was severely criticized by the press as incompetent provided rich fodder for reform advocates. Also, proponents were able to learn from the experiences of the Michigan and Ohio reform efforts, particularly regarding the involvement of the lay community. Third, the bar was well organized and coordinated at the state and local levels. Finally, and perhaps most importantly, the MIAJ brought prominent lay persons into the adoption campaign. The extensive involvement of non-lawyers helped blunt the charge that the Missouri Plan was merely a creation for the benefit of the bar (Watson and Downing 1969).

Reformers heralded the victory as proof that they could be successful in obtaining ideal political outcomes if it would only take the time to learn the necessary techniques, such as cooperation between bar associations and lay agencies (“Bar Learns” 1940). John Perry Wood, the draftsman of the ABA resolution on merit selection, viewed the results as a “source of hope” for those working to find an effective substitute to the direct election of judicial officials (Wood 1943, 142). However, the momentum advocates of merit selection hoped for from its success in Missouri never materialized. World War II soon came to

occupy the attention of the nation and it was a decade later before the next major change occurred.

In 1950, Alabama voters approved Amendment 83 to the Alabama Constitution which provides that vacancies on the circuit court in Jefferson County be filled by appointment by the governor from a list of nominees provided by a nominating commission. Appointed judges are required to run for reelection in partisan contests.¹⁰⁵ Later amendments similarly provide for merit-based appointment for vacancies in Madison,¹⁰⁶ Mobile,¹⁰⁷ Talladega,¹⁰⁸ Baldwin,¹⁰⁹ Tuscaloosa,¹¹⁰ Shelby,¹¹¹ and Lauderdale¹¹² Counties.

In 1951, New Mexico Governor Edwin L. Mechem adopted a plan for filling judicial vacancies in anticipation of passage of a proposed state constitutional amendment implementing a full merit selection and tenure system set to go into effect the following year. The amendment failed. Undeterred, Mechem continued to use the plan which in turn was kept by his successors. Under the plan, a state bar committee was responsible for developing and submitting to the governor a list of qualified and willing applicants for both the appellate and trial benches. The appointed judges who sought retention then had to run in partisan elections (Lowe 1971).

Alaska voters in 1956 approved a judicial article as part of their original constitution¹¹³ that provided for merit selection of state supreme and superior court judges

¹⁰⁵ ALA. CONST., AMEND. 83.

¹⁰⁶ ALA. CONST., AMEND. 334.

¹⁰⁷ ALA. CONST., AMEND. 408.

¹⁰⁸ ALA. CONST., AMEND. 615.

¹⁰⁹ ALA. CONST., AMEND. 660.

¹¹⁰ ALA. CONST., AMEND. 741.

¹¹¹ ALA. CONST., AMEND. 804.

¹¹² ALA. CONST., AMEND. 819.

¹¹³ ALASKA CONST., ART IV.

who would then stand unopposed for retention on their records (Stewart 1958). Kansas voters adopted similar selection and tenure provisions¹¹⁴ for their supreme court judges in 1958 (Winters 1968).

In late 1959, the ABA, AJS and a third-organization co-sponsored¹¹⁵ the National Conference on Judicial Selection and Court Administration. The Chicago conference reinvigorated the judicial reform movement and marked the beginning of a massive and innovative campaign for change (Belknap 1992).

In May 1962, AJS began sponsoring and conducting a series of citizens conferences around the country. State bar associations were almost always co-sponsors. Conference participants included business and community leaders, clergy, newspaper editors, labor leaders, and representatives of civic groups, women's organizations and service clubs. They were given comprehensive resource books on state court systems, listened to lectures about the need for a wide range of court reforms, and often heard from representatives from states where innovative reforms had been adopted, such as Judge Elmo Hunter of Missouri who spoke on the state's merit selection system. Each conference concluded with a general assembly that would adopt a statement of recommendations (Belknap 1992).

The conferences produced immediate and significant results. By August 1966, constitutional amendments implementing conference recommendations had been approved in seven of the fifteen states where conferences had been held prior to the end of 1964. Between 1967 and 1974, it was common for six to eight states to adopt court reform

¹¹⁴ KAN. CONST., ART. 3, § 5 (AS AMENDED 1958). In 1972, the Kansas Constitution was again amended to provide individual judicial districts the option of having their judges chosen through a merit-based nominating system (Jackson, 2000).

¹¹⁵ The third co-sponsor was the Institution of Judicial Administration (IJA), a nonpartisan research organization located at New York University's Law Center (Belknap, 1992). Research suggests that IJA did not take part in the citizens conferences that followed.

amendments to their constitutions during each election cycle (Belknap 1992). Of the twenty-two states that adopted merit selection to choose some or all of their judges between 1958 and 1974, conferences had been held in seventeen (Hanssen 2002). All told, AJS would hold or co-sponsor more than 100 conferences during the fourteen-year series (Belknap 1992).

The 1960s and 1970s have been described as “the real heyday” of merit selection (Anderson 2004, 793). The voters of Iowa,¹¹⁶ Nebraska,¹¹⁷ Colorado,¹¹⁸ Oklahoma,¹¹⁹ Indiana,¹²⁰ Wyoming,¹²¹ Arizona¹²² and Florida¹²³ approved constitutional amendments implementing merit selection and unopposed retention elections for some or all of their state court judges. The Tennessee legislature temporarily instituted merit-based selection and retention for all appellate court judges in 1971,¹²⁴ but repealed its action with respect to supreme court justices three years later.¹²⁵ Vermont voters revised their constitution to provide for the appointment of judges by the governor from a list provided by a nonpartisan nominating commission, subject to the consent of the state senate, and chose to vest the

¹¹⁶ IOWA CONST., ART. V, §§15-16 (AS AMENDED 1962).

¹¹⁷ NEB. CONST., ART. V, § 21 (AS AMENDED 1962).

¹¹⁸ COLO. CONST., ART. VI, §§ 24-25 (AMENDED 1966).

¹¹⁹ OKLA. CONST., ART VII-B, §§2-5 (AS AMENDED 1967).

¹²⁰ IND. CONST., ART VII, §§10-11 (AS AMENDED 1970).

¹²¹ WYO. CONST., ART V, §4 (AS AMENDED 1972).

¹²² ARZ. CONST., ART VI, §§ 36-38 (AMENDED 1974).

¹²³ FLA. CONST., ART. V, §§10-11 (AS AMENDED 1976).

¹²⁴ Act effective July 1, 1971, ch. 198, 1971 Tenn. Pub. Acts 510 (providing for a nonpartisan nominating commission and retention election of appellate court judges and justices)(codified at Tenn. Code Ann. §17-701 (repealed 2009)). This attempt to depoliticize the selection and retention of jurists did just the opposite. The unexpected election in 1972 of a Republican governor in a heavily-Democratic state combined with the death of one member of the supreme court and the expected retirement of three others led the legislature to pass a provision making the nominating commission not applicable to the state’s highest court. When the governor vetoed the measure, the politically wheels were sent into even higher gear. Eventually, the governor’s veto was overridden in a deal that included trading Democratic votes for a medical school in eastern Tennessee in exchange for Republican votes to override (Pierce, 2002; Behm and Henry, 2014).

¹²⁵ Act of _____, 1974, ch. ____, 1974 Tenn. Pub. Acts 433 (removing the supreme court from the purview of the nonpartisan nominating commission).

authority of whether to retain judges with the state legislature.¹²⁶ New York¹²⁷ and Hawaii¹²⁸ voters approved constitutional amendments creating judicial commissions empowered to nominate prospective appointees to their governors. Illinois¹²⁹ and Pennsylvania¹³⁰ voters adopted constitutional provisions that implemented unopposed retention elections for judges initially chosen through partisan elections and Maryland¹³¹ voters adopted unopposed retention election for judges appointed by the governor.

During the 1970s, governors in Maryland,¹³² Florida,¹³³ Georgia,¹³⁴ Massachusetts,¹³⁵ Delaware¹³⁶ and Wisconsin,¹³⁷ all constitutionally empowered to fill empty judicial seats, issued executive orders creating judicial commissions to screen and recommend nominees for vacant state judgeships (Healy 2012; Lowe 1971; Scott et al.

¹²⁶ VT. CONST., CH. II, §§ 32-34 (AS AMENDED 1974).

¹²⁷ N.Y. CONST., ART. VI, § 2 (AS AMENDED 1977).

¹²⁸ HAW. CONST., ART. VI, § 3 (AS AMENDED 1978).

¹²⁹ ILL. CONST., ART. 6, § 12 (AS AMENDED 1964).

¹³⁰ PENN. CONST., ART. V, §§ 14-15 (AS RATIFIED 1968).

¹³¹ MARY. CONST., ART. IV, § 5A (AS RATIFIED 1976).

¹³² By two executive orders entered in July, 1970, Maryland Governor Marvin Mandel created separate nominating commissions for appellate and trial court judges. This was particularly significant as all vacant judicial offices in Maryland are appointed by the governor (Lowe 1971). The use of judicial nominating commissions by the governor of Maryland has continued uninterrupted and was recently extended by current Governor Lawrence J. Hogan, Jr. (Maryland Executive Order 01.01.2015.09).

¹³³ A series of nonpartisan nominating commissions was created pursuant to executive order by Florida Governor Reubin Askew (Lowe 1971). The use of commissions by executive order remained in effective until Florida adopted its version of the Missouri Plan in 1976.

¹³⁴ 1972 Executive Order by Jimmy Carter (need to find better evidence). Uninterrupted through current governor (NCSC website). Current order in effect, Gov. Nathan Deal Exec. Order 01.10.11.03.

¹³⁵ Governor Michael J. Dukakis implemented the first in a long series of executive orders providing for the use of judicial nominating commissions in Massachusetts on January 3, 1975 (Massachusetts Executive Order No. 114). Current Governor Charles D. Baker issued Executive Order No. 558 February 5, 2015 directing the continued use of judicial nominating commissions, the latest in the uninterrupted line of governors who have done so since Dukakis (Healy 2012).

¹³⁶ Delaware Governor Pierre S. du Pont, IV issued Executive Order No. 4 on February 24, 1977 creating a nonpartisan judicial nominating commission. The use of such a commission by subsequent governors appears uninterrupted (Scott et al. 2009). Current Governor Jack Markell issued orders continuing the commission on March 26, 2009 shortly after taking office and most recently on May 22, 2015 (Delaware Executive Order No. 4; Delaware Executive Order No. 50).

¹³⁷ Acting Governor Martin J. Schreiber was the first Wisconsin chief executive to enlist the assistance of a judicial nominating commission to fill interim vacancies (Wisc. Exec. Order No. 54, April 12, 1978). The use of judicial nominating commissions by the governor of Wisconsin has continued uninterrupted and was most recently extended by current Governor Scott Walker (Wisc. Exec. Order No. 29, May 11, 2011).

2009). Similarly, between 1967 and 1976, Idaho,¹³⁸ Montana,¹³⁹ Kentucky,¹⁴⁰ North Dakota¹⁴¹ and Nevada¹⁴² each adopted statutory or constitutional provisions employing judicial nominating commissions to fill vacancies. In all, twenty-four states adopted some aspect of the Missouri Plan during the 1960s and 1970s.

The pace of adoption of merit-based provisions for choosing and retaining state judges has since slowed considerably. During the 1980s only four states, South Dakota,¹⁴³ Utah,¹⁴⁴ Connecticut¹⁴⁵ and New Mexico¹⁴⁶ adopted merit-based reforms. Minnesota,¹⁴⁷ Rhode Island,¹⁴⁸ and South Carolina¹⁴⁹ all instituted new merit-based measures in the

¹³⁸ Act of _____, 1967, ch. 67, 1967 Idaho Sess. Laws 153 (providing for a nonpartisan judicial nominating commission)(codified at Idaho Code § 1-2102 through 1-2104).

¹³⁹ Act of _____, 1973, ch. 470, Mont. Sess. Laws ____ (creating a judicial nomination commission)(codified at Mont. Code §§ 3-1001 through 3-1014).

¹⁴⁰ KEN. CONST. § 118 (AS AMENDED 1975).

¹⁴¹ N.D. CONST. ART. VI, § 13 (AS RATIFIED 1976).

¹⁴² NEV. CONST. ART. VI, § 20 (AS RATIFIED 1976).

¹⁴³ South Dakota voters amended their constitution to require the governor to fill by appointment circuit and supreme court vacancies from nominees provided by a judicial qualifications commissions. The amendment also provides that supreme court justices are subject to retention elections after three years in office, while appointed circuit judges run for reelection when the term they are filling expires (S.D. CONST. ART. V, § 7 (AS AMENDED 1980)).

¹⁴⁴ The appointment of vacancies on all courts of record in Utah are made by the governor from a list provided by a judicial nominating commission. All appointees who wish to remain in office are subject to periodic retention elections thereafter (UTAH CONST., ART. VIII, §§ 8-9 (AS AMENDED 1985)).

¹⁴⁵ All Connecticut appellate and superior court judges are to be nominated by the governor from a list submitted by a judicial selection commission and confirmed by the state legislature (CONN. CONST., ART. II, § 2, AS AMENDED BY AMEND. ART XXV (as amended 1986)).

¹⁴⁶ In November 1988, the voters of New Mexico approved a state constitutional amendment that provided for the filling of judicial vacancies by gubernatorial appointment from lists provided by nonpartisan nominating commissions. Three separate types of commissions were created to nominate appellate, district and municipal judges (N.M. CONST., ART. VI, §§ 35-37 (AS AMENDED 1988)). Seated judges who wish to maintain their positions must prevail in a single partisan contest and are thereafter subject to nonpartisan retention elections (N.M. CONST., ART. VI, § 33 (AS AMENDED 1988)).

¹⁴⁷ Minnesota created a commission on judicial selection to recommend to the governor three to five nominees to fill any vacancy on either a district court or Worker's Compensation Court of Appeals (Elections and Ethics Reform Act of 1990, art. I, § 1, ch. 608 1990 Minn. Sess. Laws ____ (codified at Minn. Rev. Stat. § 480B.01)).

¹⁴⁸ Voters in Rhode Island approved a constitutional amendment creating an independent judicial nominating commission tasked with providing nominees to the governor for appointment to judicial offices (R.I. CONST., ART. X, § 4 (AS AMENDED 1994)).

¹⁴⁹ A merit selection commission was added by constitutional amendment to recommend qualified candidates to the South Carolina legislature, which in empowered to appoint judges (S.C. CONST., ART. V, § 27 (AS AMENDED 1996)).

1990s, and Tennessee revised its judicial selection and retention paradigm with the adoption of the so-called “Tennessee Plan.”¹⁵⁰ New Hampshire,¹⁵¹ West Virginia¹⁵² and North Carolina¹⁵³ are the most recent states to integrate merit-based provisions into their judicial selection and retention schemes.¹⁵⁴

Today, thirty-eight states use some form of merit-based selection and retention method for some or all of their judges. Of those, twenty-five use a nominating commission to screen all prospective members of their state courts of last resort.¹⁵⁵ Nominating commissions are used by eight others to fill interim vacancies on their highest courts.¹⁵⁶

¹⁵⁰ The soap opera-like saga that is judicial selection in Tennessee entered witnessed a new chapter in 1994 with passage of the Tennessee Plan (Act of _____, 1974, ch. 942, § 3, 1994 Tenn. Pub. Acts ____)(creating a new judicial selection commission for the nomination of all appellate court judges and justices and implementing retention elections for all those nominated by the commission). A bevy of state and federal lawsuits ensued, and the resulting frenzy led the state supreme court to observe, “We take judicial notice that following issuance of our orders in these cases something approaching legal chaos ensued” (State of Tennessee *ex rel.* Hooker v. Thompson, 249 S.W.3d 331, 335 (1996)). In the wake of the tumult Justice Penny White, who had to sue in order to be placed on a retention ballot, became the only jurist to be rejected by the voters of Tennessee in a retention election (Behm & Henry, 2014).

¹⁵¹ Beginning in 2000, the governors of New Hampshire have created by executive order and relied upon a judicial nominating commission to assist them in the appointment of judges (N.H. Exec. Order No. 2000-9, N.H. Exec. Order No. 2005-2, N.H. Exec. Order No. 2013-06).

¹⁵² A judicial vacancy advisory commission was created by the legislature of West Virginia to assist the governor in filling judicial vacancies (Act of Mar. 20, 2010, ch. 77, 2010 W. Va. Acts ____ (codified at W. Va. Code § 3-10-3a).

¹⁵³ By executive order, North Carolina Governor Beverly Perdue established a judicial nominating commission in 2011 to assist her in the appointment of judges (N.C. Exec. Order No. 86, Apr. 5, 2011). The order was temporarily suspended less than a month before she left office after her unsuccessful reelection bid (N.C. Exec. Order No. 137, Dec. 5, 2012). Her successor, Pat McCrory, subsequently issued an executive order explicitly superseding the prior orders (N.C. Exec. Order No. 1, Jan. 7, 2015). North Carolina recently adopted retention elections for justices of the state supreme court (Act effective June 11, 2015, ch. ____, 2015 N.C. Sess. Laws ____ (to be codified, in relevant part, at N.C. Gen. Stat. §§7A-4.1 through -4.2)).

¹⁵⁴ An epilogue to the drama that is staffing Tennessee courts is in order. The Tennessee Plan was repealed by a now Republican-dominated Tennessee legislature effective June, 2013 and substantial uncertainty ensued. In a strange twist of events, a majority of the legislature rejected a proposal supported by chamber leadership and Republican Governor Bill Haslam to provide for merit selection of judges through a constitutional amendment. Instead, a constitutional amendment placing judicial appointment power with the governor subject to confirmation by the legislature was presented to voters November 3, 2014 (Behm & Henry, 2014). The measure passed (TENN. CONST., ART. VI, § 3 (AS AMENDED 2014)) and three days later Governor Haslam issued an executive order reinstating the previously disbanded judicial nomination commission (Tenn. Exec. Order No. 41, Nov. 6, 2014).

¹⁵⁵ Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont and Wyoming.

¹⁵⁶ Georgia, Idaho, Kentucky, Montana, Nevada, North Dakota, Pennsylvania, Wisconsin and West Virginia.

Twenty states utilize retention elections for those who wish to serve on their state court of last resort beyond their initial term.¹⁵⁷

Conclusion

The history of judicial selection in the American states is a study in the on-going search for the proper balance between judicial independence and judicial accountability. The saga easily divides into four overlapping periods that equate with the preferred method espoused by the reformers of the day as the best combination of the two competing ideals. The founding period through the 1840s witnessed the appointment of judges by governors and legislatures, which was viewed as the appropriate response to the historic abuses of the English monarchy.

Reliance on popular elections as a means to establish more democratic controls began to take hold in the second quarter of the eighteenth century and by the time of the Civil War partisan elections became the most commonly employed method for selecting state jurists. The rise of party machines in the second-half of the nineteenth century raised the ire of Progressives who pushed for the nonpartisan election of judges as part of a general reform agenda as a means to take politics out of judicial selection.

In 1937, the ABA formally adopted merit selection as its ideal method for selecting judges in an effort to combine the positive aspects of judicial elections and appointment while avoiding the pitfalls of each. Lawyers and other reformers have since focused their efforts on expanding adoption of merit selection. Along the way, some states retained their

¹⁵⁷ Alaska, Arizona, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah and Wyoming.

existing methods for selecting jurists while others adopted reform. The resulting configuration of judicial selection is as varied as the fifty states. Members of the bench and bar were active participants in judicial selection reform at each stage.

The historical record also provides insight and meaning to the quantitative analyses to follow. For example, lawyers are shown to be deeply involved in each period of reform from the establishment of state judiciaries in the founding period to the adoption of merit selection in the late-20th century. Therefore, the strength of the bar in each state is included in explanatory models. Key features of the development and implementation of merit selection are also considered. The Progressive Era was a reaction to a larger, wealthier, more educated and increasingly urbanized American society. Accordingly, the impact of population, wealth, educational attainment, and urbanization are estimated and tested. Similarly, historical evidence suggests that the AJS-sponsored citizens conferences played a conspicuous role in the development and implementation of merit selection so the level of reform activity within each state by the organization is considered.

Chapter 4 presents a quantitative assessment of why states alter their existing judicial selection institutions and adopt merit selection for choosing jurists to their courts of last resort. Fourteen explanatory variables drawn from this history of state judicial selection, institutionalism theory, and policy innovation and diffusion research, are conceptualized and operationalized. A hypothesis for each is formulated and tested. Event history analysis is then used to test a series of general models and the theoretical propositions advanced in Chapter 2. The quantitative analysis adds yet another part to the puzzle that it is the problem of state judicial selection.

CHAPTER 4: EVENT HISTORY ANALYSIS OF STATE JUDICIAL SELECTION

Introduction

This chapter seeks to add to our understanding of merit selection in the American states by means of a time-series quantitative analysis that combines the theoretical and historical dimensions of state judicial selection discussed in the preceding chapters. Like many other social processes, the current status of state judicial selection is an extension of past experiences and of people's future expectations. It is a phenomenon that is constantly in flux yet likely trends in a predictable way or exhibits patterns that recur over time. Identifying and understanding causal relationships between key variables over time is necessary to explain and forecast past and future adoptions of this important institutional feature (Box-Steffensmeier, et al. 2014). This analysis tests hypotheses relating to individual explanatory variables as well as the more intricate theoretical propositions advanced in Chapter 2. In turn, the results of this study can then be applied as a vehicle for understanding institutional processes in a broader, more general, context (Berry and Berry 2007).

This chapter begins with a short description of event history analysis and explain why Cox proportional hazards modeling is the appropriate statistical tool to employ in this study. In the next section, the explanatory variables are conceptualized and operationalized and the data sources for each is identified, including distinguishing missing information that requires interpolation of data points or the omission of individual cases. A hypothesis is posited about the expected relationship of each covariate to the dependent variable. The third part lays out a series of equations and models designed to test the hypotheses and

theoretical propositions advanced in this dissertation. A discussion of the statistical results follows with emphasis on the overall explanatory power of the models tested and the impact of individual explanatory variables. The chapter concludes with a depiction of the synergy between the statistical results, historical record, and theoretical foundations of institutions in understanding the choice of merit selection by states for choosing jurists to their courts of last resort.

Event History Analysis and Cox Proportional Hazards Models

Event history analysis is the ideal tool for investigating the adoption of merit selection by states to choose judges for their courts of last resort (Berry and Berry 2007). It accentuates the issues of timing and change, which are critical to assessment of the theoretical propositions and hypotheses advanced in this dissertation. Understanding an *event history* involves examination of not only whether something happened, but also when it happened. The *analysis* occurs through statistical examination of longitudinal data collected on a set of theoretically relevant variables (Box-Steffensmeier and Jones 2004). Event history models conceive of a single *risk set* – here, whether a state is able to adopt merit selection during a given time period. A dependent variable measuring risk status is coded ‘1’ if a state adopts and ‘0’ if it does not. If a state adopts a nonrecurring event such as merit selection, it is removed from the risk set for subsequent periods (Berry and Berry 2007). Coefficient estimates of the explanatory variables provide information on the relative impact of each variable and permit computation of a hazard rate – the likelihood a state in the risk set will adopt – for each covariate that is consistent over time (Alison 2014).

Cox proportional hazards models will be employed in this study. They are routinely employed in event history analysis due to their flexibility and capacity to adequately address common methodological issues (Mills 2011). Event history data often involve censored and time-varying explanatory variables, both of which are present in my data set, which are problematic for more standard statistical techniques such as linear regression and ordinary least squares regression (Allison 2014; Box-Steffensmeier and Sokhey, 2010). Similarly, while other forms of hazard modeling are quite limiting in regard to available theoretical assumptions regarding time to adoption, Cox modeling permits less rigorous assumptions (Allison 2014; Box-Steffensmeier and Jones 2004; Mills 2011).

Yamaguchi (1991) argues that, although none of the disadvantages to Cox regression are serious, they do require some qualification. None of the major disadvantages to Cox regression are relevant to this study. First, the technique is not recommended with a very small sample size as parameter estimates become more precise as the number of cases increase. The number of cases in the instant data set is 640 and constitutes a medium to large data set for purposes of partial likelihood estimation (Colosimo, Chalita, and Demétrio 2000). A second potential disadvantage is an excessive number of simultaneous failures of at risk cases. Due to computational factors, marginally biased estimates are produced in the presence of tied events. In this study, the larger sample size mitigates any bias and ties are never greater than 10% in a single interval (Hertz-Picciotto and Rockhill 1997). Accordingly, the Cox regression technique is well-suited to test the theoretical propositions and hypotheses advanced in this dissertation.

The status variable for all models in this study is MERIT. It is a binary variable coded '1' when a state adopts merit selection to choose judges for its court of last resort

and '0' when a state uses some other method. The data used to compile the variable were obtained from numerous sources over the course of my research for the Chapter 3.

Risk Set, Covariate Conceptualization and Measurement

Institutional theory, innovation and diffusion research, and the history of state judicial selection explicate various circumstances and events that influence the choice of judicial selection methods in a particular jurisdiction. They collectively provide meaningful insight into potential causal factors that may be confirmed through statistical analysis and instill confidence that a discrete set of characteristics exists that distinguish those states that utilize merit selection for choosing judges to their courts of last resort from those that do not. Against this background, fourteen explanatory variables are formulated that can be utilized to test this contention, as well as the theoretical propositions formulated in Chapter 2. Each is grounded in the extant literature and collectively represent the key determinants of state judicial selection. Of course, there is also the possibility that there is no discernable pattern and that the adoption of merit selection is a result of inconsistent, idiosyncratic factors that are unique to a particular jurisdiction.

The risk set has 620 cases and is comprised of fourteen covariates.¹⁵⁸ The unit of analysis is an individual state in a given year. The applicable time period spans from 1935 to 2010 and is divided into five-year intervals. Thus, for a given variable, each of the fifty states will have a single data point for 1935, 1940, 1945 . . . 2010.¹⁵⁹ At such time as a state adopts merit selection, it is no longer at risk and is dropped from subsequent periods.

¹⁵⁸ Explanatory variables in fully or partially parametric models are called *covariates* because they estimate the effects on hazard rates rather than on the value of dependent variables (Yamaguchi 1991).

¹⁵⁹ Alaska and Hawaii are not included until 1960 since they did not become states until 1959.

For example, only two Missouri cases are included since the state adopted merit selection in 1940. In contrast, 16 Virginia cases are included since the state has never adopted merit selection. 1935 was chosen as the starting time point as it the nearest period preceding the official endorsement of merit selection by the American Bar Association in 1937 (Wood 1937). Right-censored states are able to contribute what is known about them during a given time period, even though they never adopt merit selection. Similarly, time-varying explanatory variables are easily included as each period at risk is treated as a distinct observation for each state (Allison 2014; Mills 2011). Summary statistics are shown in Table 4.1.

[Insert Table 4.1 about here]

LASTCHANGE

The temporal aspect of state judicial selection is a phenomenon that warrants investigation and can be addressed quantitatively. Path dependence suggests that a state is less likely to seek change the longer an institution is in place. Existing institutional arrangements are on trajectories or “paths” which, once established, are very difficult to alter (Capoccia and Kelemen 2007, 342). These paths create various positive feedback processes that reward actors for behaving in ways that are consistent with past behaviors. Institutions become more stable over time as vested interests become resistant to change. Every step down the path increases the relative cost of choosing other options, thereby creating greater dependence (Pierson 2000). It is therefore reasonable to expect that the longer a judicial selection process has been in place, the less likely a state is to adopt merit selection. Accordingly, the following research hypotheses are advanced:

Hypothesis 1: *There is a negative relationship between the length of time states have utilized their current judicial selection methods and the choice of merit selection to choose judges for state courts of last resort.*

LASTCHANGE measures the passage of time in years since a state has last altered its method for choosing judges to its court of last resort.¹⁶⁰ In instances where a state has never made such a change, time since the state was admitted to the Union is used. I compiled the data for this covariate from various sources while researching Chapter 3. The natural log transformation is used to normalize the distribution of the standards errors for this variable, as a few unusually large cases (e.g., South Carolina has not changed its method for choosing judges since the nation's founding) tend to positively skew results. LASTCHANGE is expected to be *negatively* related to the status variable.

CHANGEASE

While vested interests may well seek to reinforce existing institutions and resist change, the formal barriers that must be overcome to implement merit selection are also of interest. The easier it is for a state to change its judicial selection method, the more likely it will do so. Since merit selection is necessarily a policy reform – all states except Alaska¹⁶¹ and Hawaii¹⁶² had state judicial systems in 1935 – it is appropriate to consider what impact the difficulty of change has on the likelihood of this policy choice. For example, Delaware, Maryland, and Massachusetts have each established merit selection by executive order. Formally, the governor of each of these states is granted the constitutional

¹⁶⁰For purpose of this variable, five different methods of judicial selection are considered distinct. They are partisan election, nonpartisan election, gubernatorial appointment, legislative appointment, and merit selection. A change from any one to any other resets the value of the variable to zero in the year of adoption.

¹⁶¹ Alaska adopted merit selection as part of its initial state constitution adopted in 1958 and effective upon statehood in 1959.

¹⁶² Hawaii initially provided for the appointment of judges to its state court of last resort. It adopted merit selection in 1978.

authority to appoint judges to their state courts of last resort. In contrast, some states require constitutional amendments supported by super-majorities of both the legislature and the electorate in order to modify their judicial selection systems. To test the effect of the ease with which a state may change its state judicial selection method, I test the following research hypothesis:

Hypothesis 2: *There is a positive relationship between the ease in amending states' judicial selection method and the choice of merit selection of judges for state courts of last resort.*

CHANGEASE is the covariate that measures the difficulty of changing a state's choice of judicial selection method. Data for this variable are obtained from *The Book of the States* (various years). CHANGEASE essentially measures the number of different decision makers who must give their assent to modify a state's judicial selection method. Thus, the values for CHANGEASE are assigned as follows based upon the formal action required to modify judicial selection within a state: a constitutional amendment with the support of a supermajority of the legislature plus a supermajority of the electorate = 1; a constitutional amendment with a supermajority of the legislature and a majority of the electorate = 2; a constitutional amendment with a legislative majority and a majority of the electorate = 3; only a legislative majority is required = 4; and, where a governor may issue an executive order = 5. It is expected that the fewer number of individuals who are formally required to assent to a change of a state's judicial selection method, the more likely a state is to adopt merit selection. Accordingly, CHANGEASE is expected to be *positively* related to the status variable.

IDEOLOGY

Ideology is another determinant that has been linked to a range of state policy adoptions. Berry et al. (1998) developed an ideology score for each state that integrates measures of citizen ideology and government ideology into a single score. This score has been found significant to state efforts to privatize prisons (Nicholson-Crotty 2004), develop economic enterprise zones (Turner and Cassell 2007), adopt hate crime laws (Soule and Earl 2001), respond to paper terrorism (Chamberlain and Haider-Markel 2005), and promulgate animal cruelty laws (Allen 2005). Other measures of ideology are linked to state tax innovation (Berry and Berry 1992), abortion policy (Mooney and Lee 1995), electricity regulation and deregulation (Ka and Teske 2002), and adoption of the proposed Equal Rights Amendment to the U.S. Constitution (Wohlenberg 1980). State ideology is ordinarily expressed in the familiar liberal/conservative continuum. Certainly since the New Deal, progressive-type reforms are commonly associated with political liberalism. Accordingly, the following research hypothesis is advanced:

Hypothesis 3: *There is a positive relationship between the ideological liberalism of states and the merit selection of judges for state courts of last resort.*

The state ideology covariate used in this study is IDEOLOGY. The data used to compute the values of the covariate are taken from the Poole (1998) congressional common space scores (CSS).¹⁶³ CSS for individual members of Congress and the U.S. Senate are compiled by tallying all legislative roll call votes cast during their legislative tenure and a single point estimate is generated for each member. Score values range from -1.0 for very conservative to 1.0 for very liberally and are intended to be comparable across time. CSS

¹⁶³ The Berry et al. (1998) data set covers an insufficient period for use in the instant study. In contrast, CSS are available online at www.voteview.com and include scores from the 1st through the 111th Congress.

are used in a range of contexts including separation of powers models (Owens 2010), turnout in congressional midterm elections (Plane and Gershtenson 2004), and congressional conference committee appointments (Lazarus and Monroe 2007). IDEOLOGY is computed by adding the average of the CSS for the state congressional delegation to the average of the CSS for its senate delegation and dividing by two. The resulting figure represents a single ideological extremism measure of a state for a given period. IDEOLOGY is expected to be *positively* related to the status variable.

LEGPRO

An institutional feature that is regularly employed in the innovation and diffusion literature is the professionalism of state legislatures. Efforts to increase legislative professionalism were most prevalent during the 1960s and 1970s, or roughly simultaneous with the hey-day of merit selection. State legislative professionalism is shown to be positively related to innovative electricity regulation (Ka and Teske 2002), establishing state enterprise zones (Turner and Cassell 2007), anti-smoking policies (Shipan and Volden 2006) and performance-accountability standards (McClendon, Hearn, and Deaton 2006). Legislatures that have greater technical, informational and decisional capacity are characterized as being more professional; these attributes allow state legislatures to be more innovative (Hays 1996; Squire 1993; Walker 1969). Similarly, more professional legislatures are likely to attract sophisticated legislators willing to implement innovative approaches (McClendon, Heller, and Young 2005). The relationship between merit selection of judges and legislative professionalism is tested by Puro, Bergerson, and Puro (1985) and found to be positive and statistically significant. Thus, to test the effect of

legislative professionalism on whether a state employs merit selection to choose judges for its state court of last resort, the following research hypothesis is tested:

Hypothesis 4: *There is a positive relationship between professionalism of state legislatures and merit selection of judges for state courts of last resort.*

The explanatory variable that measures legislative professionalism is LEGPRO. The value for each state is taken from Squire (2012). Linear interpolation of the values measured in the period before and after is used to account for missing data from 1940, 1955, 1965, 1970, 1975, 1980, 1985, 1990, 1995, and 2000.¹⁶⁴ The 2009 score is imputed for 2010. LEGPRO is comprised of percentage comparisons of each state's legislature against the U. S. Congress—the assumed ideal legislative body—averaged for each of the following qualities: legislator compensation including salary and benefits; legislative days in session; and, staff per legislator¹⁶⁵ (Squire 2012). A value of 1.0 represents a state legislature that was, on average of these factors, equal to the U. S. Congress in these categories. This particular legislative professionalism measure is developed by Squire (1992), but is similar to other measures of the variable (Carey, Niemi, and Powell 2000; Thompson and Moncrief 1992). LEGPRO is expected to be *positively* related to the dependent variable.

GOVPOWER

The formal authority granted to the governor of a state is another institutional feature that warrants analysis. Similar to legislative professionalism, the mid- to late-20th

¹⁶⁴ Squire (2012) computes state legislative professionalism scores for 1935, 1945, 1954, 1960, 1979, 1986, 1996, 2003 and 2009.

¹⁶⁵ The 1935, 1945, 1954, and 1960 scores are computed using expenditures for services and operations minus legislator compensation per legislator rather than staff per legislator (Squire 2012).

century witnessed a general increase of gubernatorial power. It is shown to be a key determinant of Medicaid nursing home reimbursement policies (Miller 2006), electricity regulation (Ka and Teske 2002), privatization of corrections facilities (Nicholson-Crotty 2004), and the establishment of state enterprise zones (Turner and Cassell 2007). The institutional power of governors varies greatly from state to state, with some governors having a large set of tools at their disposal such as extensive appointment powers and the line-item veto while others do not (Beyle 1996). Where governors have sufficient authority, they can be expected to act as “policy entrepreneurs” and take the initiative to effectuate innovation (Kingdon 1984; Minstrom 1997; Minstrom and Vegari 1998). In the context of states where some governors are granted the authority to appoint judges to state courts of last resort, meaningful variation is expected. Similarly, since merit selection provides a formal role for a governor in the selection of judges to state courts of last resort, either through direct appointment or by selecting nominees advanced by a judicial nominating commission, it follows that stronger governors would welcome merit selection. To test the effect of gubernatorial power on whether a state employs merit selection to choose judges for its state court of last resort, the following research hypothesis is tested:

Hypothesis 5: *There is a positive relationship between the formal power of state governors and merit selection of judges for state courts of last resort.*

The independent variable that measures a state’s governor is GOVPOWER. The data used to assemble the variable are gathered from *The Book of the States* (various years). The computation of the covariate follows the rating scheme Schlesinger (1972) developed which assigns a 1 - 5 value for each of the following aspects of gubernatorial authority:

tenure in office,¹⁶⁶ appointive powers,¹⁶⁷ budgetary powers,¹⁶⁸ and veto powers.¹⁶⁹ The ratings of the components are averaged to produce a value between 1.0 and 5.0, where the lower figure would represent minimal gubernatorial power and the higher figure denotes maximum formal authority for a governor. GOVPOWER is expected to be *positively* related to the dependent variable.

POPULATION

Demand for change is an essential prerequisite to reform. Progressives argued that larger populations create a need for improved and more efficient government activities, such as merit selection of judges. The innovation and diffusion literature demonstrates that states with larger populations witness higher levels of demand for government services, have greater complexity and size to their infrastructure, and have a greater propensity and willingness to innovate (McClendon, Heller, and Young 2005). Population has been shown to be a significant predictor of the innovation of energy policies (Regens 1980), child health

¹⁶⁶ Points for tenure in office are assigned as follows: Four-year term with no restraint on reelection (5 points); Four-year term with one reelection permitted (4 points); Four-year term with no consecutive reelection permitted (3 points); Two-year term with no restraint on reelection (2 points); and, Two-year term with one reelection permitted (1 point) (Schlesinger 1992, 143).

¹⁶⁷ Appointive powers points are computed based upon a numeric formula which measures the degree to which the governor controls the following sixteen functions or offices: Administration, Agriculture, Attorney General, Auditor, Budget, Comptroller, Education, Environmental Protection (Conservation), Finance, Health, Highways, Insurance, Labor, Secretary of State, Treasurer and Welfare. The states are then ranked according to total appointive authority of the governor and the top quintile of states is given 5 points, the second quintile of states is awarded 4 points, the third quintile of states is assigned 3 points, the fourth quintile of states is credited with 2 points, and the bottom quintile is allowed 1 point (Schlesinger 1972, 145).

¹⁶⁸ The governor's budget powers are assigned points as follows: Full responsibility (5 points); Shares with a civil service appointee or with a person appointed by someone else (4 points); Shares authority with the state legislature (3 points); Shares authority with another popularly elected official (2 points); and, Shares authority with several others with independent sources of strength (1 point) (Schlesinger 1972, 147).

¹⁶⁹ Points for a governor's veto power are assigned as follows: Line-item veto plus at least a 3/5 of elected members of legislature required to override (5 points); Line-item veto plus majority of elected members of legislature required to override (4 points); Line-item veto plus majority or more of legislature present to override (3 points); No line-item veto, but super majority required to override (2 points); and, No line-item veto and simple majority required to override veto, or no veto authority at all (1 point) (Schlesinger 1972, 147).

insurance programs (Volden 2006), state lotteries (Alm, McKee, and Skidmore 1993), and in post-secondary education (McClendon, Heller, and Young 2005). A similar relationship is anticipated with respect to a state's adoption of merit selection. Accordingly, the following research hypothesis is advanced:

Hypothesis 6: *There is a positive relationship between the population size of states and the choice of merit selection of judges for state courts of last resort.*

POPULATION is operationalized as the natural log of a state's population in units of 1,000. The natural log transformation is used to normalize the distribution of the standards errors for this variable, as a few unusually large cases (e.g., California, Texas and New York) tend to positively skew results. Data for this explanatory variable are obtained from the *Statistical Abstract of the United States* (various years). POPULATION is expected to be positively related to the status variable.

WEALTH

Wealthier states benefit from having greater resources available to support new policies and programs (Berry and Berry 1990). It has also been demonstrated that higher levels of state wealth are consistent with a propensity to adopt innovative policies that do not require significant financial commitments (Walker 1969), such as merit selection of judges. The wealth of a state has been shown to be positively related to the adoption of state-level environmental initiatives (Sapat 2004), enterprise zone development (Turner and Cassell 2007), state lotteries (Pierce and Miller 1999), Medicare nursing facility reimbursement programs (Miller 2006), and abortion regulation (Mooney and Lee 1995).

Similarly, it is anticipated that wealthier states are more likely to adopt merit selection. Accordingly, the following research hypothesis is advanced:

Hypothesis 7: *There is a positive relationship between the wealth of states and the choice of merit selection of judges for state courts of last resort.*

WEALTH is operationalized as the personal income per capita of a state in thousands of real U.S. dollars. Data for the covariate are obtained from the *Statistical Abstract of the United States* (various years) and the Bureau of Labor Statistics historical price index for all consumers (1982-1984 = 100). Linear interpolation of the values measured in the period before and after was used to account for missing data from 1935 and 1945. WEALTH is expected to be *positively* related to the status variable.

URBAN

Level of urbanization is another variable that impacts demand for particular policies.¹⁷⁰ Progressives observed a need for better selection methods for choosing judges in highly urban areas, particularly those firmly under the control of political influences. Those living in closer quarters will seek and prioritize a different set of policies than their more rural neighbors. For example, more densely populated jurisdictions support the adoption of hate crime laws (Soule and Earle 2001), while less urbanized states spend more money on the construction of highways (Hwang and Gray 1991). Levels of urbanization is shown to be an important determinant of state income tax adoption (Mooney 2001), energy policy (Freeman 1985), and environmental waste programs (Daley and Garand 2005). As population density increases, interpersonal familiarity decreases and the

¹⁷⁰ Urbanization as a variable has been utilized for a range of purposes in the innovation and diffusion literature. For example, in one study urbanization is used as a proxy for the litigiousness of a jurisdiction (Grossback, Nicholson-Crotty and Peterson 2004).

dynamics of conflict change requiring improved methods of conflict resolution. Notably, Puro, Bergerson, and Puro (1985) find a positive and statistically significant relationship between urbanization and merit selection of judges for state courts of last resort. Accordingly, the following research hypothesis is advanced:

Hypothesis 8: *There is a positive relationship between the urbanization of states and merit selection of judges for state courts of last resort.*

URBAN is operationalized as the percentage of a state's population residing within urban areas as classified by the U.S. Census Bureau. Although the precise definition changed in 1950 and 1990, since 1910 an urban area is any territory with 2,500 or more people in an incorporated community or specially delineated fringes with more than 500 people per square mile (Bureau of the Census, 2010). Data for the variable are obtained from the *Statistical Abstract of the United States* (various years). Linear interpolation of the values measured in the period before and after was used to account for missing data from 1935, 1945, 1955, and 1965. URBAN is expected to be *positively* related to the dependent variable.

EDUCATION

Educational attainment is a key characteristic associated with higher stocks of human and social capital, which tends to evidence greater levels and more active support for innovation (Lubell, et al. 2002). Higher levels of educational attainment within a state is positively related to the adoption of innovative postsecondary education programs (McClendon, Heller, and Young 2005), energy policies (Freeman 1995), and hazardous waste schemes (Daley and Garland 2005). Given these robust findings, the literature suggests a strong rationale for asserting the role of educational attainment in determining

whether states will adopt merit selection to choose judges for their state courts of last resort (Holbrook and Van Dunk 1993; McLendon, Hearn, and Deaton 2006; Lubell et al. 2002).

Accordingly, the following research hypothesis is advanced:

Hypothesis 9: *There is a positive relationship between a state's level of educational attainment and merit selection of judges for state courts of last resort.*

EDUCATION is the percentage of highly-educated adults within a state over the age of 25. Data for the variable are obtained from the *Statistical Abstract of the United States* (various years). Prior to 1990, the Census Bureau delineated the highest level of educational attainment as a person having four or more years of college. Only persons with a bachelor's degree or higher have since been included in the top educational echelon. Linear interpolation of the values measured in the period before and after was used to account for missing data from 1935, 1945, 1955, 1965, 1975, and 1985. EDUCATION is expected to be *positively* related to the dependent variable.

LAWSTRENGTH

The strength of key interest groups is another institutional phenomenon that is often considered in the innovation and diffusion literature. Interest group strength has been correlated to abortion policy reform (Mooney and Lee 1995), the adoption of animal cruelty laws (Allen 2005) and hate crime legislation (Soule and Earle 2001), as well as diffusion of a model health care act (Balla 2001). Organizations with large memberships have a greater ability to mobilize lobbying efforts, utilize resources, and influence policy decisions by appearing formidable to government officials (Allen 2005). Similarly, interested organizations can exert influence through developing preferred policies,

educating officials about those policies, and highlighting the success of such policies when applied in other jurisdictions (Balla 2001). To the extent that the ABA has actively endorsed merit selection since 1937 and the efforts of state and local bar associations have followed suit, the strength of lawyers as an interest group is another potentially key explanatory variable. Merit selection allows for an increased role for the bar in judicial selection. Research also suggests that lawyers benefit from merit selection as the increased judicial independence the method provides tends to increase litigation (Hanssen 2002). Accordingly, the following research hypothesis is tested:

Hypothesis 10: *There is a positive relationship between the influence of lawyers within states and merit selection of judges for state courts of last resort.*

The independent variable that will measure the influence of lawyers within a particular state is LAWSTRENGTH. Values for the computation of the covariate are taken from *The Lawyers Statistical Report* (various editions). Linear interpolation of the values measured in the period before and after was used to account for missing data points. LAWSTRENGTH is measured as the number of lawyers per 1,000 residents of a state. Relative size, of course, is an inexact proxy to measure the strength of an interest group, but one that is well-represented in the literature (Mooney and Lee 1995; Soule and Earl 2001; Allen, Pettus and Haider-Markel 2004). However, size does estimate resource capacity and the number of potential voters. This is particularly true where the members of the group being measured are elites that tend to be politically active, such as attorneys. LAWSTRENGTH is expected to be *positively* related to the status variable.

PARTYCOMP

A commonly-employed political determinant of state policy adoption is the level of partisan political competition within a state. Levels of intrastate party competition has increased dramatically in the sixty years (Rosenthal 1995). Party competition within a state is shown to be positively related to abortion regulation reform (Mooney and Lee 2000), the adoption of state lotteries (Pierce and Miller 1996), and codification of animal cruelty laws (Allen 2005). States that have competitive partisan political systems produce better policy than noncompetitive states (Key 1949). This phenomenon is due to two primary features. First, fearing electoral defeat, elected officials in competitive states will be more responsive to constituency needs in an effort to expand support (Berry and Berry 1990; Mintrom 1997; Walker 1969). Second, higher voter turnout rates in competitive states mean that voters from lower socioeconomic backgrounds will constitute a larger percentage of the voting electorate. Therefore, competitively elected officials are more likely to adopt progressive policies (Holbrook and Van Dunk 1993). To gauge the effect of party competition on whether a state employs merit selection to choose judges, the following research hypothesis is tested:

Hypothesis 11: *There is a positive relationship between levels of party competition within states and merit selection of judges for state courts of last resort.*

Intrastate political party competition is measured by the covariate PARTYCOMP. A variation of the familiar Ranney (1976) index, data for computing PARTYCOMP was compiled from *The Book of the States* (various years). It is an index variable of five separate components. The first two values are the percentage of Democrats holding seats

in the state house and state senate.¹⁷¹ The third factor is the percentage of votes received by the Democratic candidate in the last gubernatorial election. A fourth value is assigned for the party affiliation of a state's governor.¹⁷² The final item is the percentage of the state institutions (state house, state senate, governorship) held by Democrats. The five components of PARTYCOMP are then averaged and "folded" to create a common measure of intrastate competition between 0.5 and 1.0 regardless of which party controls, where 0.5 demonstrates absolute one-party control of state offices and 1.0 denotes perfect competition (King 2000). PARTYCOMP is expected to be *positively* related to the status variable.

AJSCONF

Among other efforts to implement merit selection in state courts, the American Judicature Society ("AJS") sponsored a series of citizens conferences beginning in 1958. The conferences educated participants on the benefits of merit selection and encouraged reform (Winters 1966a, 1967). Dubois (1990) suggests that this effort was instrumental in producing reform in some jurisdictions. As an independent and not-for-profit group, AJS was and continues to be well-situated to advocate change in the process of selecting state court judges. The organization frequently combines its reform effort with other civic groups, such as The League of Women Voters, as well as state and local bar associations.

¹⁷¹ Minnesota and Nebraska have coding issues that make assigning values to PARTYCOMP unreliable. Today, the Minnesota Democratic-Farmer-Labor Party considers itself an affiliate of the Democratic Party, but historically that relationship did not always hold true. Nebraska has the only unicameral legislature in the nation and elections to that body are nonpartisan. Since accurate values for PARTYCOMP cannot be computed for Minnesota or Nebraska, cases for those states are not included in any model that includes the covariate.

¹⁷² A value of 1 is assigned if the governor is a Democrat, a value of 0.5 if the governor is an independent, and a value of 0 if the governor is a Republican.

In addition, AJS published a journal¹⁷³ that was a potent and readily available propaganda machine with a compelling history of pro-merit selection efforts (Gleason 2013).

Accordingly, the following research hypothesis is tested:

Hypothesis 12: *There is a positive relationship between the number of citizens conference held in states and merit selection of judges for state courts of last resort.*

AJSCONF will measure the cumulative number of citizens conference advocating merit selection to choose judges held in a state. The information used to compile these variables is obtained from *Judicature*¹⁷⁴ (various volumes) and from on-site research conducted in the archives of the American Judicature Society in Des Moines, Iowa.

REGIONMERIT and CONTIGMERIT

Geographic effect, most notably regional and contiguous states effects, is another phenomena considered in the adoption and diffusion of policy. Mooney (2001) suggests that geographic effects are customarily considered an artifact of states either learning from one another or from competing against one another. Information gained from assessing the choices of neighboring states improves domestic policy decisions and reduces political risk (Mooney 2001; Boehmke and Witmer 2004). Imitating policies already in place within other states also will reduce economic loss, such as instances of state lottery adoption where states concerned with their citizens crossing into other states to purchase tickets can minimize the effect by establishing a lottery within their own state (Berry and Berry 1990;

¹⁷³ The *Journal of the American Judicature Society* began publication in 1917 and its name was changed to *Judicature* in 1966. Although, AJS ceased operations September 30, 2014 due to lack of membership and related issues, the journal continues to be published by my alma mater, Duke University School of Law. This affiliation will surely serve to further enhance the reputation of the *Judicature*.

¹⁷⁴ See note 15, *infra*. The organization was headquartered at Drake University from 2003 to 2013, when it relocated to Vanderbilt Law School.

Pierce and Miller 1999). A third explanation of geographic effects is that jurisdictions that have similar historical, cultural, physical, or structural features tend to adopt innovative policies within a very short time span (Gray 1973a; Eyestone 1973; Walker 1969). In this context, geographic effects are essentially a proxy for similarities between jurisdictions (Grattet, Jenness, and Curry 1998).

Regional effects are shown to have a strong effect on the adoption of hazard waste programs (Daley and Garland 2005), efforts to combat the filing of liens by disgruntled citizens groups (Chamberlain and Haider-Markel 2005), and the enactment of hate crime laws (Soule and Earl 2001). Contiguous states effects are well-established with respect to lotteries (Pierce and Miller 1999; Berry and Berry 1990; Alm, McKee, and Skidmore 1993), tax incentive programs (Berry and Berry 1992), and Medicare reimbursement programs (Miller 2006). Although geographic effects make intuitive sense in many contexts and the concept is well represented in the innovation and diffusion literature, it remains problematic to differentiate between purely “regional” and purely “contiguous” effects with respect to some policies (Mooney 2001). Merit selection of judges for state courts of last resort is one such policy.

The standard conceptualization of regional effects variables assumes that a region border state is affected more by a non-adjacent regional neighbor than an adjacent state that happens to be in a different region. Similarly, standard contiguous effects variables assume a close neighbor with no common border will have no impact on a state’s learning, the identical impact presumed for a state literally on the other side of the country. The extant literature fails to meaningfully differentiate between these effects. Theoretically, there is no *a priori* reason to expect one particular type of geographic effect over another

with respect to merit selection. However, to the extent that states learn from one another and routinely emulate policies successful in nearby jurisdictions, it is reasonable to expect the presence of merit selection in neighboring states to have a positive effect on adoption by nearby states. Accordingly, the following research hypotheses are tested:

Hypothesis 13: *There is a positive relationship between the percentage of regional states having previously adopted merit selection and merit selection of judges for state courts of last resort.*

Hypothesis 14: *There is a positive relationship between the percentage of contiguous states having previously adopted merit selection and merit selection of judges for state courts of last resort.*

The geography-based hypotheses will be tested through analysis of the REGION and CONTIG independent variables. REGION measures the percentage of states within the U. S. Bureau of the Census region¹⁷⁵ in which a state is located that utilize merit selection to choose judges for their courts of last resort. Similarly, CONTIG is the percentage of states contiguous to a particular state which employ merit selection to choose judges for their courts of last resort. The value of both geographic variables is expected to be *positively* related to the status variable.

A correlation matrix including all fourteen independent variables is shown in Table 4.2. EDUCATION and WEALTH (.9435) show high levels of correlation in the familiar and intuitively obvious relationship between educational attainment and earnings. LAWSTRENGTH and EDUCATION (.8833), LAWSTRENGTH and WEALTH (.8624), REGION

¹⁷⁵ The four Census Bureau regions are the Midwest, Northeast, South and West. The Midwest region is comprised of the following thirteen states: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin. The Northeast region is comprised of the following nine states: Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont. The South region is comprised of the following sixteen states: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. The West region is comprised of the following twelve states: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington (U. S. Bureau of the Census 1998).

and EDUCATION (.8592), REGION and WEALTH (.8404), and LAWSTRENGTH and REGION (.7828) also demonstrate high levels of correlation, although the connection of these variables is less obvious. When the covariates demonstrating collinearity are alternatively omitted, the overall goodness-of-fit and the values of the remaining coefficients produced remain essentially unchanged. The omission of variables generally has no meaningful impact on the significance of any explanatory variables.¹⁷⁶ Since the theoretical value of the explanatory variables outweighs any loss of robustness, all covariates are included in the tested and reported models.

[Insert Table 4.2 about here]

Methods, Models, and Results

Allison (2014) observes that, “In the judgment of many, Cox regression is unequivocally the best all-around method for estimating regression models for event history data.” (Allison 2014, 35). The method is popular because it does not require choosing a particular probability distribution in advance. It is robust and easily incorporates time-varying explanatory variables. Information contained in censored cases is included in the likelihood estimator, instead of being lost as results as occurs in other methods. Although the baseline hazard remains unspecified, Cox models estimate coefficients for multiple covariates and produce non-negative hazard rates (Mills 2011). Cox regression is remarkably flexible and much better equipped to deal with common

¹⁷⁶ Likelihood ratio tests for nested models were conducted to compare the goodness-of-fit for alternative models that included some or all of the correlated variables. Results are presented in Appendices A through E.

issues present in event history analysis than other statistical techniques (Allison 2014; Box-Steffensmeier and Jones 2004; Mills 2011).

The basic Cox proportional-hazards regression equation is:

$$h_i(t) = h_0(t) \exp(\beta'X) \quad (4.1)$$

where $h_i(t)$ is the hazard for case i at time t , $h_0(t)$ is the unspecified baseline hazard, and $\beta'X$ are the model covariates and regression parameters (Box-Steffensmeier and Sokhey 2010). The distinguishing statistical feature of Cox regression is the partial likelihood function. Initially, the likelihood function is divided into two parts. One factor contains information about the impact of time on the coefficients and is discarded. The second factor, which contains only information about the coefficients, is treated as a normal likelihood function and is maximized using standard techniques. This partial likelihood function depends on the order of events rather than the exact timing of events. There are no intercept values in Cox regression, as the intercept is part of the unspecified function that disappears from the partial likelihood (Allison 2014).

Given the exploratory nature of this effort to assess the effects of forces on the likelihood of states adopting merit selection for choosing judges to their courts of last resort, I begin with preliminary bivariate tests of each research hypothesis. Using the basic Cox formula, I estimate the following equations:

$$\beta'X = \beta_1 \text{LASTCHANGE}_i(t) \quad (4.3.1)$$

$$\beta'X = \beta_1 \text{CHANGE EASE}_i(t) \quad (4.3.2)$$

$$\beta'X = \beta_1 \text{IDEOLOGY}_i(t) \quad (4.3.3)$$

$$\beta'X = \beta_1 \text{LEGPRO}_i(t) \quad (4.3.4)$$

$$\beta'X = \beta_1 \text{GOVPOWER}_i(t) \quad (4.3.5)$$

$$\beta'X = \beta_1 \text{POPULATION}_i(t) \quad (4.3.6)$$

$$\beta'X = \beta_1 \text{WEALTH}_i(t) \quad (4.3.7)$$

$$\beta'X = \beta_1 \text{URBAN}_i(t) \quad (4.3.8)$$

$$\beta'X = \beta_1 \text{EDUCATION}_i(t) \quad (4.3.9)$$

$$\beta'X = \beta_1 \text{LAWSTRENGTH}_i(t) \quad (4.3.10)$$

$$\beta'X = \beta_1 \text{PARTYCOMP}_i(t) \quad (4.3.11)$$

$$\beta'X = \beta_{12} \text{AJSCONF}_i(t) \quad (4.3.12)$$

$$\beta'X = \beta_1 \text{REGION}_i(t) \quad (4.3.13)$$

$$\beta'X = \beta_1 \text{CONTIG}_i(t) \quad (4.3.14)$$

The results of each are reported in Table 4.3 as shown.

[Insert Table 4.3 about here]

Each column presents the Cox regression coefficient for an equation with unstandardized errors shown beneath in parentheses. Positive coefficients identify an increased likelihood of a state adopting merit selection. These results present strong preliminary support for seven of the fourteen hypotheses. LASTCHANGE, CHANGE EASE, WEALTH, EDUCATION, LAWSTRENGTH, REGION, and CONTIG yield coefficients consistent with the hypothesized direction and are statistically significant. LEGPRO, GOVPOWER, PARTYCOMP and AJSCONF also yield coefficients in the expected direction, but fail to attain levels of significance sufficient to reject the null hypothesis. LASTCHANGE, EDUCATION, LAWSTRENGTH, REGION, and CONTIG each individually explain sufficient variance in MERIT that those models reach conventional levels of significance (where $p < 0.05$).

The following six equations are designed to test each of the theoretical propositions set out in Chapter 2. They are as follows:

$$\beta'X = \beta_1\text{LASTCHANGE}_i(t) + \beta_2\text{CHANGE EASE}_i(t) \quad (4.4.1)$$

$$\beta'X = \beta_1\text{IDEOLOGY}_i(t) + \beta_2\text{LEGPRO}_i(t) + \beta_3\text{GOVPOWER}_i(t) \quad (4.4.2)$$

$$\beta'X = \beta_1\text{POPULATION}_i(t) + \beta_2\text{WEALTH}_i(t) + \beta_3\text{URBAN}_i(t) + \beta_4\text{EDUCATION}_i(t) + \beta_1\text{LAWSTRENGTH}_i(t) \quad (4.4.3)$$

$$\beta'X = \beta_1\text{LEGPRO}_i(t) + \beta_2\text{GOVPOWER}_i(t) + \beta_3\text{PARTYCOMP}_i(t) \quad (4.4.4)$$

$$\beta'X = \beta_1\text{LAWSTRENGTH}_i(t) + \beta_2\text{AJSCONF}_i(t) \quad (4.4.5)$$

$$\beta'X = \beta_1\text{REGION}_i(t) \quad (4.4.6)$$

$$\beta'X = \beta_1\text{CONTIG}_i(t) \quad (4.4.7)$$

The results of each are reported in Table 4.4 as shown.

[Insert Table 4.4 about here]

Model 4.4.1 is designed to test whether the adoption of merit selection is path dependent. It includes the covariates LASTCHANGE and CHASEEASE, and considers durational and complexity of change effects. Overall, the model produces impressive goodness-of-fit, as it is significant at the $p < .001$ level. It offers strong evidence that state judicial selection methods are path dependent. LASTCHANGE demonstrates a high degree of significance ($p < .001$ level) within the model and yields a coefficient consistent with research expectations. The impact of CHANGE EASE is also in the direction predicted, but is not statistically significant.

Model 4.4.2 is constructed to test whether adoption of merit selection by a state is an instance of bricolage, a meaningful but less than revolutionary institutional change. The covariates in the model are IDEOLOGY, LEGPRO, and GOVPOWER. It demonstrates very poor goodness-of-fit with an overall significance of $p = 0.8971$ and fails to offer

sustentation of the bricolage proposition. None of the explanatory variables attain standard levels of significance. LEGPRO and GOVPOWER produce coefficients in the appropriate direction while the effect of IDEOLOGY is inconsistent with research expectations. The performance of this model suggests that decisions to adopt merit selection are independent of political liberalism and other institutional adjustments.

Another model that manifests notable goodness-of-fit is Model 4.4.3, which is designed to gauge demand for merit selection. POPULATION, WEALTH, URBAN, EDUCATION, and LAWSTRENGTH are the explanatory variables included in the model. It tests whether larger, wealthier, more densely populated and educated jurisdictions with a strong presence of lawyers are more likely to adopt merit selection for choosing their state supreme court judges. The model is significant at the $p < 0.01$ level. Although it does not reach a conventional level of significance, LAWSTRENGTH ($p < 0.086$) is the strongest indicator of merit selection and its coefficient is in a direction consistent with theoretical expectations. None of the other covariates adds much weight to the model although WEALTH and EDUCATION yields coefficients in the appropriate direction. These results offer notable support for the proposition that demand is a necessary prerequisite to the adoption of merit selection.

The weakest model in this set is Model 4.4.4, which fails to attain overall statistical significance ($p = 0.9745$). It is calculated to reveal support for merit selection by self-interested decision makers. The LEGPRO, GOVPOWER, and PARTYCOMP covariates align with leading institutions that stand to win from the adoption of merit selection. None of the covariates are significant. GOVPOWER and PARTYCOMP have positive, albeit modest,

effects on the likelihood of merit selection while LEGPRO is inconsistent with research expectations. The model fails to yield support for the self-interest proposition.

Model 4.4.5 is devised to explore the role of actors as communicators in the adoption of merit selection. LAWSTRENGTH and AJSCONF describe the strength of lawyers as an interest group and the cumulative number of AJS citizens conferences held in a state, respectively. The model demonstrates only modest goodness-of-fit ($p = 0.0786$). Once again, LAWSTRENGTH ($p < 0.05$) is an indicator of merit selection and yields a coefficient consistent with theoretical expectations. The coefficient for AJSCONF is in the appropriate direction, but the covariate provides little explanatory strength to the overall model. These results offer some support for the proposition that adoption of merit selection is more likely where actors are able to communicate the need for such reform.

Models 4.4.6 and 4.4.7 are identical to Models 4.3.13 and 4.3.14, respectively. They are the bivariate geographical models for REGION and CONTIG and are included in Table 4.4 for ease in illustrating the theoretical propositions discussion in Chapter 5. Each of these model yields statistically significant coefficients consistent with research expectations and exhibits strong goodness-of-fit ($p < .05$ and $p < .01$, respectively). These results lend support to the proposition that adopting jurisdictions look to the success of their neighbors with merit selection when adopting the method for their own use.

A state's decision to adopt merit selection is likely the result of a complex decision process that cannot be adequately measured by a simple, bivariate specification. Accordingly, I estimate four general models as follows:

$$\beta'X = \beta_1\text{LASTCHANGE}_i(t) + \beta_2\text{CHANGE EASE}_i(t) + \beta_3\text{IDEOLOGY}_i(t) + \beta_4\text{LEGPRO}_i(t) + \beta_5\text{GOVPOWER}_i(t) + \beta_6\text{POPULATION}_i(t) + \beta_7\text{WEALTH}_i(t) + \beta_8\text{URBAN}_i(t) + \beta_9\text{EDUCATION}_i(t) + \beta_{10}\text{LAWSTRENGTH}_i(t) + \beta_{11}\text{PARTYCOMP}(t) + \beta_{12}\text{AJSCONF}_i(t) + \beta_{13}\text{REGION}_i(t) \quad (4.5.1)$$

$$\beta'X = \beta_1\text{LASTCHANGE}_i(t) + \beta_2\text{CHANGE EASE}_i(t) + \beta_3\text{IDEOLOGY}_i(t) + \beta_4\text{LEGPRO}_i(t) + \beta_5\text{GOVPOWER}_i(t) + \beta_6\text{POPULATION}_i(t) + \beta_7\text{WEALTH}_i(t) + \beta_8\text{URBAN}_i(t) + \beta_9\text{EDUCATION}_i(t) + \beta_{10}\text{LAWSTRENGTH}_i(t) + \beta_{11}\text{PARTYCOMP}(t) + \beta_{12}\text{AJSCONF}_i(t) + \beta_{13}\text{CONTIG}_i(t) \quad (4.5.2)$$

$$\beta'X = \beta_1\text{LASTCHANGE}_i(t) + \beta_2\text{CHANGE EASE}_i(t) + \beta_3\text{WEALTH}_i(t) + \beta_4\text{EDUCATION}_i(t) + \beta_5\text{LAWSTRENGTH}_i(t) + \beta_6\text{REGION}_i(t) \quad (4.5.3)$$

$$\beta'X = \beta_1\text{LASTCHANGE}_i(t) + \beta_2\text{CHANGE EASE}_i(t) + \beta_3\text{WEALTH}_i(t) + \beta_4\text{EDUCATION}_i(t) + \beta_5\text{LAWSTRENGTH}_i(t) + \beta_6\text{CONTIG}_i(t) \quad (4.5.4)$$

Models 4.5.1 and 4.5.2 are identical and contain all of the other explanatory variables, except for the geographic variables, which are run in separate models to test the alternative geographical operationalizations. REGION is included in the first general model and the second includes CONTIG. Similarly, Models 4.5.3 and 4.5.4 are identical except for the geographic variables. The third model includes REGION and the fourth includes CONTIG. The other covariates in these models include the explanatory variables that are statistically significant in the binary models. The results of all four general models are reported in Table 4.5 as shown.

[Insert Table 4.5 about here]

In all four models, LASTCHANGE yields coefficients in the direction consistent with research expectations and is the only covariate that obtains statistical significance. CHANGE EASE, LEGPRO, WEALTH, EDUCATION, LAWSTRENGTH, AJSCONF, and REGION have minimal impact on the models, but yield positive coefficients consistent with the research hypotheses. IDEOLOGY, GOVPOW, POPULATION, URBAN, and PARTYCOMP also

demonstrate minimal effect and yield coefficients inconsistent with research expectations. An interesting result of comparing the two sets of models is that, although CONTIG demonstrates only minimal impact, it has a differing directional effect between models. It decreases the likelihood of adoption and is inconsistent with research expectations in the full model, but yields coefficients consistent with expectations when tested in the limited models. The overall goodness-of-fit of all four models is high and each is statistically significant at the $p < .001$ level.

Discussion

The contribution of this event history analysis is to quantitatively differentiate between those states that have adopted merit selection to choose judges for their courts of last resort and those that have not. I have conceptualized and operationalized fourteen explanatory variables and each is the subject of a separate research hypothesis. Each hypothesis is rigorously tested in bivariate, partial, and general models. The partial models are specifically designed to explore the theoretical propositions advanced in Chapter 2, while the general models test the strength of each covariate against each other and in the broader context. The statistical relationships between individual covariates and the status variable demonstrate mixed results. The partial and general models exhibit strong goodness-of-fit, confirm a discernable distinction between merit and non-merit selection states, and lend support to many of the research hypotheses developed in this study.

LASTCHANGE is by far the most powerful predictive variable. It uniformly demonstrates a high degree of significance ($p < .001$ level) and yields negative coefficients consistent with research expectations in every model in which it is included. The null

hypothesis regarding LASTCHANGE is easily rejected. LASTCHANGE is so dominate that no other covariate attains a standard level of statistical significance in any equation in which it is included. This outcome strongly suggests that the choice of state judicial selection method, like other institutional arrangements, is path dependent and becomes increasingly difficult to alter over time.

LAWSTRENGTH is another independent variables for which the corresponding null hypothesis may be rejected. It demonstrates conventional statistical significance in the bivariate and actors-as-communicators (Model 4.5.5) models, and is the key covariate in the demand (Model 4.4.3) model. It also yields coefficients consistent with research expectations. Its strength as a predictive covariate is eliminated, however, in the general models. This is not to say that LAWSTRENGTH is not associated with the adoption of merit selection; it merely loses explanatory power, in any model in which includes LASTCHANGE.

The explanatory variables CHANGEASE, WEALTH, EDUCATION, REGION, and CONTIG all demonstrate statistical significance and yield coefficients consistent with research expectations in bivariate models, allowing rejection of the null hypotheses for these covariates. The bivariate models also produce sufficient goodness-of-fit to conclude that the effect of the independent variables is not random. They lose their explanatory power, however, in any model where LASTCHANGE is included.

The remaining covariates fail to produce any statistical results that suggest their impact on state adoption of merit selection is anything other than random. Accordingly, the null hypotheses for IDEOLOGY, LEGPRO, GOVPOWER, POPULATION, URBAN, PARTYCOMP, and AJSCONF cannot be rejected.

Similar to the individual covariates, the partial models produce a mix of results. Models 4.4.1 and 4.4.3 exhibit strong goodness-of-fit ($p < .001$ and $p < .01$, respectively) and yield statistically significant coefficients consistent with expectations. In contrast, models 4.4.2, 4.4.4, and 4.4.5 do not produce particularly strong outcomes. They do demonstrate that LAWSTRENGTH is an important covariate in the absence of LASTCHANGE. This suggests that lawyers play an important role in the adoption of merit selection in circumstances where the opportunity for reform is otherwise available.

The overall strength of the general models is impressive. As detailed in Table 4.5, the goodness-of-fit for each model is statistically significant at the $p < .001$ level. LASTCHANGE is the only covariate that obtains statistical significance in each model and consistently yields coefficients in the direction consistent with research expectations. The impact of the other explanatory variables is negligible, even where a parsimonious model is constructed. These results highlight the stability of existing arrangements for picking state judges to the exclusion of other factors.

Conclusion

The purpose of this chapter was to produce a statistical assessment that, when combined with the theoretical assumptions of institutionalism, the insights of innovation and diffusion research, and the historical record of state judicial selection, will provide a robust analysis of the decision of states to implement merit selection to choose judges to their courts of last resort. The results produced contribute important insights that are not otherwise readily apparent or available, especially the overwhelmingly negative relationship between the length of time the established selection regime has been in place

and actual reform. The findings also suggest that absent the time variable, the strength of lawyers within a state meaningfully increases the likelihood of the adoption of merit selection.

This information alone, however, is insufficient to adequately address the question in its entirety. In order to solve the puzzle of why states adopt merit selection, it is necessary to fit all of the pieces together into a single, comprehensive picture. The final chapter combines the theoretical, historical, and quantitative assessments of state judicial selection into a single discussion. The six theoretical propositions introduced in Chapter 2 are considered in light of the historical record of state judicial selection discussed in Chapter 3 and the quantitative analysis provided in Chapter 4. It is this task that is the objective of Chapter 5.

Following a short, general discussion of the research and results, the major finding is that state judicial selection institutions are highly path dependent and whether a state will adopt merit selection to choose justices for its state supreme court justices is increasingly unlikely the longer an alternative method has been in place. A secondary finding is that where an opportunity for reform is available, lawyers play a critical role in the adoption of merit selection. These findings comport well with the broader understanding of institutions which holds that institutions are path dependent and institutional change is the result of the efforts of interested actors. The chapter concludes with a short discussion of future research possibilities.

Table 4.1: Summary Statistics

	Observations	Mean	Standard Deviation	Minimum	Maximum
LASTCHANGE	620	3.857	1.184	0	5.79
CHANGE Ease	620	2.524	0.804	2	5
IDEOLOGY	620	0.385	0.2	-0.555	0.569
LEGPRO	620	0.157	0.107	0.026	0.626
GOVPOWER	620	3.618	0.719	1.667	5
POPULATION	620	7.85	1.076	4.615	10.526
WEALTH	620	9507.9	4603.2	1270.1	23476
URBAN	620	0.565	0.23	0	1
EDUCATION	620	0.117	0.076	0.201	0.394
LAWSTRENGTH	620	1.729	0.862	0.563	5.348
PARTYCOMP	597	0.764	0.144	0.5	0.999
AJSCONF	620	0.845	1.186	0	5
REGION	620	0.18	0.197	0	0.667
CONTIG	620	0.152	0.214	0	1

Table 4.2: Correlation Matrix

VARIABLES	LASTCHANGE	CHANGEASE	IDEOLOGY	LEGPRO	GOVPOWER	POPULATION	WEALTH	URBAN	EDUCATION	LAWSTRENGTH	PARTYCOMP	AJSCONF	REGION	CONTIG
LASTCHANGE	1													
CHANGEASE	-0.545	1												
IDEOLOGY	0.090	0.056	1											
LEGPRO	-0.054	0.005	-0.188	1										
GOVPOWER	0.098	0.077	-0.033	0.353	1									
POPULATION	0.008	0.053	0.063	0.588	0.539	1								
WEALTH	0.097	0.069	-0.053	0.315	0.944	0.449	1							
URBAN	0.002	0.039	-0.063	0.077	-0.074	0.082	-0.109	1						
EDUCATION	0.049	-0.019	0.072	0.060	0.381	0.290	0.311	-0.027	1					
LAWSTRENGTH	0.046	0.042	0.036	0.595	0.411	0.555	0.351	0.183	0.280	1				
PARTYCOMP	0.033	-0.210	0.023	0.215	0.200	0.280	0.165	0.180	0.221	0.265	1			
AJSCONF	0.079	0.039	-0.070	0.430	0.862	0.542	0.883	-0.015	0.338	0.467	0.261	1		
REGION	0.110	-0.066	-0.136	0.218	0.623	0.252	0.620	-0.094	0.190	0.210	0.169	0.584	1	
CONTIG	0.117	0.011	-0.100	0.268	0.840	0.317	0.859	-0.074	0.324	0.379	0.167	0.783	0.666	1

Table 4.3: Individual Covariates Parameter Estimates with Standard Errors

VARIABLES	4.3.1	4.3.2	4.3.3	4.3.4	4.3.5	4.3.6	4.3.7	4.3.8	4.3.9	4.3.10	4.3.11	4.3.12	4.3.13	4.3.14+
LASTCHANGE	-1.650*** (0.282)													
CHANGE Ease		0.408* (0.192)												
IDEOLOGY			-0.779 (1.085)											
LEGPRO				0.162 (1.925)										
GOVPOWER					0.032 (0.293)									
POPULATION						-0.386 (0.203)								
WEALTH							0.000* (0.000)							
URBAN								-0.293 (0.838)						
EDUCATION									26.639** (8.611)					
LAWSTRENGTH										0.864* (0.364)				
PARTYCOMP											0.665 (1.528)			
AJSCONF												0.154 (0.206)		
REGION													4.273* (1.821)	
CONTIG														2.678** (1.021)
Observations	620	620	620	620	620	620	620	620	620	620	597	620	620	620
ll	-38.17	-85.88	-87.54	-87.79	-87.79	-85.93	-85.21	-87.74	-82.44	-85.33	-83.15	-87.52	-85.05	-84.45
chi2	99.25	3.836	0.507	0.0070	0.0123	3.725	5.167	0.121	10.71	4.930	0.190	0.557	5.496	6.698
prob > chi2	0.0000***	0.0502	0.4763	0.993	0.9117	0.0536	0.0230*	0.7285	0.0011**	0.0264*	0.6632	0.4556	0.0191*	0.0097**
N_fail	24	24	24	24	24	24	24	24	24	24	23	24	24	24

Standard errors in parentheses. *** p<0.001, ** p<0.01, * p<0.5

Table 4.4: Proposition Models

	Model 4.4.1 (Path Dependence)	Model 4.4.2 (Bricolage)	Model 4.4.3 (Demand)
LASTCHANGE	-1.651*** (0.288)		
CHANGE Ease	0.169 (0.233)		
IDEOLOGY		-0.862 (1.121)	
LEGPRO		0.375 (2.065)	
GOVPOWER		0.056 (0.309)	
POPULATION			-0.417 (0.286)
WEALTH			0.000 (0.000)
URBAN			-1.047 (1.202)
EDUCATION			20.824 (12.700)
LAWSTRENGTH			1.080 (0.629)
PARTYCOMP			
AJSCONF			
REGION			
CONTIG			
Number of Observations	620	620	620
Log likelihood	-37.92	-87.50	-78.63
Chi ²	99.75	0.600	18.34
Prob > chi ²	0.0000***	0.8971	0.0025**

Note: Cox regression, Breslow method for ties. *p<0.05, **p<0.01, ***p<0.001, one-tailed tests.

Table 4.4: Proposition Models (continued)

	Model 4.4.4 (Decision Makers)	Model 4.4.5 (Advocates)	Model 4.4.6 (Geography/Region)	Model 4.4.7 (Geography/Contiguous)
LASTCHANGE				
CHANGEEASE				
IDEOLOGY				
LEGPRO	-0.085 (2.037)			
GOVPOWER	0.055 (0.322)			
POPULATION				
WEALTH				
URBAN				
EDUCATION				
LAWSTRENGTH		0.842* (0.370)		
PARTYCOMP	0.608 (1.578)			
AJSCONF		0.081 (0.205)		
REGION			4.273** (1.821)	
CONTIG				2.678*** (1.021)
# of Observations	597	620	620	620
Log likelihood	-83.13	-85.25	-85.05	-84.45
Chi ²	0.219	5.086	5.496	6.698
Prob > chi ²	0.9745	0.0786	0.0191*	0.0097**

Note: Cox regression, Breslow method for ties. *p<0.05, **p<0.01, ***p<0.001, one-tailed tests.

Table 4.5: General Models

	Model 4.5.1 (Region)	Model 4.5.2 (Contiguous)	Model 4.5.3 (Region)	Model 4.5.4 (Contiguous)
LASTCHANGE	-1.661*** (0.381)	-1.704*** (0.380)	-1.626*** (0.324)	-1.624*** (0.305)
CHANGE Ease	0.234 (0.367)	0.192 (0.368)	-0.050 (0.275)	-0.032 (0.267)
IDEOLOGY	-1.936 (1.799)	-1.915 (1.794)		
LEGPRO	4.889 (5.444)	4.534 (5.381)		
GOVPOWER	-0.628 (0.531)	-0.634 (0.527)		
POPLOG	-0.480 (0.777)	-0.535 (0.812)		
WEALTH	0.000 (0.000)	0.000 (0.000)	-0.000 (0.000)	0.000 (0.000)
URBAN	-1.875 (2.275)	-1.806 (2.220)		
EDUCATION	8.752 (23.770)	7.053 (24.115)	21.698 (14.054)	21.107 (14.033)
LAWSTRENGTH	0.836 (0.957)	1.049 (1.365)	0.112 (0.551)	-0.086 (0.665)
PARTYCOMP	-0.109 (3.537)	-0.332 (3.450)		
AJSCONF	0.452 (0.614)	0.424 (0.622)		
REGION	0.701 (3.163)		0.639 (2.573)	
CONTIG		-0.296 (1.876)		0.736 (1.343)
# of Observations	597	597	620	620
Log likelihood	-30.71	-30.73	-35.03	-34.61
Chi ²	105.1	105.0	105.5	105.8
Prob > chi ²	0.000***	0.000***	0.000***	0.000***

Note: Cox regression, Breslow method for ties. *p<0.05, **p<0.01, ***p<0.001, one-tailed tests.

CHAPTER 5: UNLOCKING THE PUZZLE OF STATE JUDICIAL SELECTION

Introduction

The choice of judicial selection method employed by American states is an understudied phenomenon. This study seeks to increase understanding of this important, foundational question of American politics by integrating extant knowledge of institutions and the methodological rigor of innovation and diffusion research with original research. Two substantive additions are proffered. First, a brief narrative tracks judicial selection reform efforts in the American states from Tudor England to the present. This history highlights the intellectual underpinnings of preferred reforms as well as the efforts of those seeking change. In particular, it emphasizes the role of lawyers as key, transformative actors. Second, event history analysis is employed to quantitatively assess the decision of American states to adopt merit selection for choosing judges to their courts of last resort. Fourteen explanatory variables are developed and a hypothesis is generated regarding the impact each is expected to have on the adoption of merit selection. Similarly, quantitative models are developed to test six theoretical propositions concerning the adoption of merit selection that can also be utilized as a means for understanding institutional change in a broader context.

This final chapter begins with brief reviews of the theoretical, historical, and quantitative chapters. Each of the six theoretical propositions that comprise the theory of merit selection adoption in the American states proffered in Chapter 2 are then considered and tested against the qualitative and quantitative evidence derived from Chapters 3 and 4. Consideration of the key findings and their implications for understanding institutional

change follows. The chapter concludes with a short discussion of remaining questions about state judicial selection and potential future research. By combining new information with extant knowledge, this research helps to unlock the puzzle that is state judicial selection.

Theoretical Foundations

The existing body of literature on state judicial selection reveals a research topic that is ripe for theory construction and quantitative investigation. Although it does contain a number of helpful observations, the literature fails to yield either a sound theoretical foundation or a set of identifiable features to distinguish states from each other. This study looks to pool the strengths of two well-established research traditions, new institutionalism and policy innovation and diffusion research, to the study of state judicial selection.

Extant knowledge of institutional change provides the starting point of inquiry. The mechanisms of path dependence, actors, and diffusion are key causal concepts that have received much attention from institutional scholars, and each plays a key role in explaining why states choose their particular judicial selection method. Path dependence is the concept that existing institutions create feedback that rewards consistent behavior and increases the cost of reform over time. It suggests a basic pattern of smooth and gradual change from existing institutions that are not meaningfully different from current forms.

To the extent that path dependency constrains innovation, it is human actors that make it happen. They seek and resist change for various reasons, ranging from self-interest to a logic of appropriateness. Actors seeking to change path dependent institutions are often limited to variations of existing schemes that offer substantive and symbolic benefits

superior to the status quo. This incremental process of bricolage requires a demand for change as well as actors who are capable of bringing it about. Change agents are often found at the intersection of existing social and political institutions and are seldom able to act alone. They have to think creatively to transform existing institutions and often look beyond their own boundaries for successfully implemented innovations.

Diffusion is the spread of principles and practices across jurisdictions. It is a process that permits decision makers to accept an innovation as a solution that creates outcomes they prefer. States suffering problems may look to jurisdictions in search of institutional alternatives. The adoption of a reform by a neighboring state adds legitimacy and offers the opportunity to prospectively confirm whether the innovation will serve the interests of would-be reformers. Studies of diffusion within the corpus of institutionalism research are mostly limited to nation-states and tend to stand in isolation. They also lack large-N, time-series analyses that permit more robust quantitative assessment of a phenomenon of interest.

Innovation and diffusion research in public policy is used to study a wide range of substantive questions and utilizes a variety of analytical tools. The primary unit of analysis is the American states. Initial inquiries focused on the relationship between innovative states and those that lagged behind. Models were developed to distinguish the leaders from the laggards. Subsequent research has come to focus on the political, economic, and social characteristics of states, which served as the bases for theoretical and statistical explanations of innovation. The results of studies are often at odds with one another, but researchers tend to offer their results in isolation or respond to conflicting outcomes with non-specific calls for further research.

A separate but related question is why a particular innovation moves from one state to the next. The diffusion of policies from one jurisdiction to another presumes that states interact, communicate, compete with, and learn from one another. In effect, geography matters. Regional and contiguous models have been used to explain the adoption of various policies, although little effort has been devoted to explaining the practical differences between the two types of models. Vertical models that look at the movement of policy preferences between central governments and their political subdivisions also have been explored.

Event history analysis was developed to address the limitations of other innovation and diffusion research techniques. It has become the gold standard in this area of research. The technique allows combining the theoretical insights of earlier models with large-N, time series analysis that is not attainable with other approaches. By including a case for each relevant jurisdiction (e.g., the 50 American states) over a period of multiple years, researchers can utilize the power of large-N statistics even where the number of jurisdictions is relatively small. This permits a more robust assessment of the theoretical premises related to a phenomenon of interest. It also allows a more effective combination of seemingly disparate areas of research.

As detailed in Chapter 2, the existing understanding of institutional changes suggests a theory of merit selection adoption comprised of six propositions: 1) state judicial institutions are path dependent; 2) demand is a necessary, but not sufficient, condition for the adoption of merit selection; 3) adoption of merit selection by a state is an instance of substantive and symbolic bricolage; 4) decision makers are more likely to adopt (or reject) merit selection if they perceive it will increase (or decrease) their power and/or resources;

5) merit selection is more likely to be adopted where there are relevant actors on hand who can frame and communicate its benefits in clear and essential terms; and, 6) merit selection is more likely to be adopted where relevant actors are able to present evidence to decision makers that it has worked effectively elsewhere and is likely to work for the decision makers and their constituents. These propositions are tested later in this final chapter using the historical evidence of Chapter 3 and the event history analysis of Chapter 4.

Historical Record

The history of judicial selection in the American states is the story of the on-going quest for the proper balance between judicial independence and judicial accountability. The saga easily divides into four overlapping periods that equate with the preferred method espoused by the reformers of the day as the best combination of the two competing ideals. This approach is generally accepted by scholars that study state judicial selection. Significantly, the standard story places too much emphasis upon change and fails to acknowledge the high degree of continuity that epitomizes state judicial selection.

The founding period through the 1840s witnessed the appointment of judges by governors and legislatures, which was viewed as the appropriate response to the historic abuses of the English monarchy. The original constitutions of each of the first twenty-eight states provided for appointment of all appellate judges. Only in Indiana and Michigan were some trial judges chosen directly by the people. Reliance on popular elections as a means to establish more democratic controls began to take hold in the second quarter of the eighteenth century and soon became the most commonly employed method for selecting state jurists. At the brink of the Civil War, 60% of the states elected judges to their courts

of last resort, and two out of every three states elected their trial judges. The last quarter of the nineteenth century saw further entrenchment of popular election of state court judges, especially in the post-Reconstruction South. Despite these reforms, a consequential number of states, especially those that comprised the original thirteen, retained appointment as their method of judicial selection.

The rise of party machines in the second-half of the nineteenth century raised the ire of Progressives who pushed for the nonpartisan election of judges as part of a general reform agenda as a means to take politics out of judicial selection. Nineteen states, mostly in the Midwest and West where Progressive influence was strongest, adopted nonpartisan elections for selection of their judges between 1908 and 1941. The reform faced significant opposition from established interests and retrenchment to partisan elections occurred in a number of states. The appointment of judges was retained in New England and partisan elections remained prominent in the South. Thus, by the entry of the United States into the Second World War, the landscape of judicial selection methods employed in the American states was fairly well divided on a regional basis.

In 1937, the ABA formally endorsed merit selection as its ideal method for selecting judges as a means to combine the positive aspects of appointment and judicial elections while avoiding the pitfalls of each. Missouri became the first state to adopt merit selection for choosing its judges in 1940. Thirty-seven other states have since adopted merit selection to choose some or all of their jurists. Along the way, some states have retained their existing methods for selecting judges while others have adopted alternative reforms such as replacing partisan elections with nonpartisan elections. The resulting configuration of judicial selection today is nearly as varied as the fifty states.

The historical record also provides insight and meaning into other aspects of this research. For example, members of the bench and bar are shown to be important actors deeply involved in each period of reform from the establishment of state judiciaries in the founding period to the adoption of merit selection in the late-20th century. Similarly, key features of the development and implementation of merit selection are revealed. The Progressive Era was a reaction to a larger, wealthier, more educated, and increasingly urbanized American society and evidence suggests that the AJS-sponsored citizens conferences played a conspicuous role in the development and implementation of merit selection within particular states. These historical findings help to provide the basis for the operationalization of some of the variables included in the event history analysis.

Event History Analysis

Event history analysis is the primary investigative tool of policy innovation and diffusion research and is well equipped to study institutional change. It employs longitudinal time-series data that permit large-N analysis even where the number of relevant jurisdictions is few, as in the situation of the American states. A discrete case is created for each jurisdiction during a particular time period. Event history models assess a risk set comprised of theoretically relevant independent variables and their impact on a bivariate dependent variable. Once a jurisdiction adopts a nonrecurring event, it is removed from the risk set for subsequent periods. Coefficient estimates reflect a hazard rate – the likelihood a jurisdiction will adopt a change – that is constant over time. This permits useful comparison of relevant cases over time, such as contrasting Indiana in 1945 to Massachusetts in 1970.

The risk set employed in this study is 620 cases comprised of fourteen independent variables. The unit of analysis is an individual state during a given year and the applicable time period is 1935 to 2010, in five-year intervals. Explanatory variables are drawn from the extant literature and the historical record, and a hypothesis is formulated for each regarding its expected impact on whether a state will adopt merit selection for choosing judges to its court of last resort.

Each hypothesis is tested separately using Cox proportional hazard regression. The independent variables are also arranged in partial Cox models to test the theoretical propositions advanced in Chapter 2, as well as in general Cox models that assess the overall impact of particular covariates.

The results present support for seven of the hypotheses, yielding statistically significant coefficients consistent with the expected direction of impact on merit selection adoption. Similar findings are present for only some of the partial models, where results confirm the importance of path dependence, demand, and geographic factors on the likelihood of states adopting merit selection. Although they fail to afford strong overall goodness-of-fit, the partial models investigating the role of actors endorse the contention that lawyers play an important role in the success of judicial selection reform. The general models provide compelling evidence that the amount of time since the last change of judicial selection method is the key explanatory variable considered; each demonstrates a strong goodness-of-fit, and the timing covariate is the only explanatory variable to attain statistical significance. This suggests that the stability of existing arrangements for picking state court judges outweighs all other factors.

Testing the Theory of Merit Section Adoption

The purpose of this research is to advance understanding of state judicial selection methods, an important yet understudied social science phenomena. Theoretical, historical, and quantitative appraisals have been developed in an effort to advance received wisdom through new research. The final step in the process is to link these disparate parts into a single, coherent assessment of the greater research question. New knowledge is gained by testing the theory of merit selection adoption advanced in Chapter 2 against the historical and quantitative findings of Chapters 3 and 4. This section considers each proposition separately, and the following section provides an overall appraisal of the theory.

Proposition 1: *State judicial institutions are path dependent.*

The concept of path dependence suggests that institutions will not only remain intact over time, but they will become more difficult to alter as the cost of change to relevant actors increases over time. Evidence supporting this proposition is found where a jurisdiction resists changing its existing judicial selection method even in the presence of a meaningful reform movement. Similarly, a negative relationship between time since the last change of judicial selection method and a state's adoption of merit selection for choosing judges to its court of last resort is expected.

The history of state judicial selection tells as much of a story of continuity as it does one of change. The tumult of the revolutionary period resulted in the adoption of many new institutions, but the new state judiciaries still relied on the monarchial method of appointing judges. The rise of popular elections of judges in the 19th century tends to obscure that many states, including a majority of the original 13, retained appointment as their preferred method of judicial selection. Similarly, although nonpartisan election of judges became the

single-most popular selection method by the mid-20th century, a majority of states retained either their existing partisan election or appointment schemes. It is unsurprising, then, that only 24 states have chosen merit selection to choose members of their courts of last resort even though it is the most popular state judicial selection reform of all.

The quantitative assessment also confirms that state judicial selection methods are path dependent. As demonstrated by the results in Models 4.3.1 and 4.3.2, respectively, the LASTCHANGE and CHANGE EASE covariates are statistically significant and yield coefficients consistent with the hypothesized impact on adopting merit selection. Model 4.4.1, designed to specifically test whether the adoption of merit selection is path dependent, demonstrates impressive goodness-of-fit and LASTCHANGE yields a high degree of significance. Notably, the impact of CHANGE EASE is nominal, which suggests the formal requirements for adoption are secondary to the time since last change.

Thus, strong support for the proposition that state judicial institutions are path dependent is found in both the historical record and the event history analysis.

Proposition 2: *Adoption of merit selection by a state is an instance of substantive and symbolic bricolage.*

Merit selection of judges is a hybrid form of two common means of picking officials. It combines facets of appointment with aspects of popular election. Therefore, the substantive aspect of merit selection is well within the existing parameters of governance in the American states. Proponents of merit selection argue that it is the best method available for securing the independence of state court jurists. Since judicial independence is a key feature of the principal of checks and balances as it is expected to function at the state level, adoption of merit selection also advances symbolic norms. The existence of other progressive institutional improvements, such as increased legislative professionalism

and stronger state executive power, would tend to evidence merit selection as symbolic bricolage. Such changes should also be accompanied by higher levels of political liberalism within a state, since liberals have carried the mantle of progressive reforms during the study period.

The Progressive era of the late-nineteenth and early-twentieth century ostensibly was a reaction to the problems of increasing populations and urbanization. A hallmark of the period was a deliberate effort by pro-establishment intellectuals and business to modernize and improve existing institutions, including state judiciaries. Although widespread adoption did not begin to occur until after World War II, merit selection is a Progressive reform that traces its genesis to the early 20th century. Since the New Deal, reforms targeting efficiency and improved government are commonly associated with political liberalism.

The event history analysis provides no meaningful support for the proposition that the adoption of merit selection by a state to choose judges to its state court of last resort is an instance of bricolage. As demonstrated by the results in Models 4.3.4 and 4.3.5, respectively, the LEGPRO and GOVPOW covariates yield coefficients consistent with the hypothesized impact on adopting merit selection, but neither is statistically significant at conventional levels. Model 4.3.3 reveals IDEOLOGY is neither significant nor signed consistent with expectations. Model 4.5.2 is constructed to test whether adoption of merit selection is an instance of bricolage, and produces poor goodness-of-fit with no significant explanatory variables.

Thus, the historical record tends to support the proposition that adoption of merit selection is an instance of bricolage, but the event history analysis does not.

Proposition 3: *Demand is a necessary, but not sufficient, condition for the adoption of merit selection.*

Demand for institutional change occurs when factors arise that give relevant actors the perception that the distribution of power or other resources is changing, or needs to be changed, in order to pursue their goals. Modernity, in the context of growing populations, increased urbanization, greater wealth, and rising educational attainment, tends to strain existing resources and create a demand for better and more efficient institutions. Positive relationships between demographic variables representing these factors and whether states adopt merit selection for choosing judges to their court of last resort provide evidence of demand. Similarly, the relative strength of benefitted parties, such as lawyers, spurs demand and should produce a positive quantitative association.

The population of states, their levels of urbanization, average wealth, and educational attainment by adults have been on an unchecked upward trajectory since the nation's founding. The post-World War II period witnessed significant growth of these demographic factors that continues today. The states with the largest populations also tend to have higher levels of urbanization, average wealth, and educational attainment by adults. However, only two of the thirteen largest states utilize merit selection to select judges to their courts of last resort while seven of the nine smallest do employ the approach. History also suggests that lawyers have been instrumental in state judicial selection reform, but their strength varies from state to state.

Mixed results are obtained regarding the relationship of relevant demographic variables to adoption of merit selection for choosing state supreme court judges. The WEALTH, EDUCATION, and LAWSTRENGTH covariates have positive coefficients as hypothesized and are statistically significant, as shown by the results in Models 4.3.7, 4.3.9,

and 4.3.10. Conversely, POPULATION and URBAN are negatively signed and lack significance, as revealed in Models 4.3.6 and 4.3.8. Model 4.5.3 is designed to test whether demand is a prerequisite to the adoption of merit selection. It produces an impressive goodness-of-fit, but none of the individual covariates attain a standard level of significance. LAWSTRENGTH presents as the model's key explanatory variable, as its impact is consistent with research expectations and it approaches conventional levels of significance. These results lend support to the hypothesis that lawyers play a key role in the adoption of merit selection by states.

Thus, the proposition that demand is a necessary, but not sufficient, condition for the adoption of merit selection is well supported, although the evidence is less than uniform.

Proposition 4: *Decision makers are more likely to pursue (or resist) merit selection if they perceive it will increase (or decrease) their power and/or resources.*

Decision makers will respond to calls for reform by evaluating the threat to or the enhancement of their power and resources. Similarly, those who perceive a shift in the status quo as a threat are likely to resist and oppose change. In most state merit selection schemes, governors are given appointment authority from an abbreviated list of candidates. Many state legislatures pick at least some members of their judicial nominating commissions. Higher levels of intrastate party competition evidence less risk to the power of political parties and their members in adopting proposed reforms. Positive relationships between legislative professionalism, the executive power of governors, and party competition are expected.

The historical record is largely silent on the impact of legislative professionalism, gubernatorial power, and party competition on state judicial selection practices. Although formal authority to appoint state court judges was held by most state legislatures during the founding period, the democracy movement of the 18th century ended the practice everywhere but South Carolina and Virginia. A number of states that formally grant their governors the power to appoint state court judges have adopted merit selection pursuant to executive order. To the extent that a seated governor controls membership of the nominating commission, of course, they effectively retain their domination of state judicial selection.

The quantitative assessment fails to provide meaningful support for this proposition. The LEGPRO, GOVPOW and PARTYCOMP covariates have positive coefficients but fail to attain statistical significance as shown in Models 4.3.4, 4.3.5, and 4.3.11. Model 4.5.4 is designed to test the impact of decision makers in merit selection adoption. It produces a very poor goodness-of-fit statistic and none of the explanatory variables are significant.

Thus, neither the historical record or the event history analysis demonstrate support for the proposition that decision makers are more likely to pursue (or resist) merit selection if they perceive it will increase (or decrease) their power and /or resources.

Proposition 5: *Merit selection is more likely to be adopted where there are advocates who can effectively frame and communicate its needs and benefits*

Institutional change requires advocates able to effectively frame situations as problems and identify a need to take action. They must also communicate their preferred solution in an effective manner that decision makers and constituents alike can understand.

Reform activities by Progressives, lawyers, and certain interest groups to develop merit selection and actively advocate its adoption is consistent with this proposition. Positive relationships between the strength of lawyers and the level of interest group activity supporting merit selection within a state would be further evidence to support this contention.

Lawyers have historically played a prominent role in state judicial selection reform. The ABA and other bar groups have long supported the adoption of merit-based methods for judicial selection. AJS, a non-profit dominated by lawyers and who helped develop the approach, took an active role in pushing adoption of merit selection by individual states through a series of citizens conferences. These conferences were often co-sponsored by state or local bar associations.

The quantitative assessment lends support to the contention that effective advocacy leads to the adoption of merit selection in states. Models 4.3.10 and 4.3.12 show LAWSTRENGTH and AJSCONF are positively related to merit selection adoption, which is consistent with hypothesized expectations. LAWSTRENGTH demonstrates a statistically significant impact. Similar effects are shown by Model 4.5.5, which is designed to test the advocacy proposition. Both covariates are positively related to MERIT with LAWSTRENGTH attaining statistical significance. Although the model demonstrates a goodness-of-fit that falls just short of conventional levels of significance, it explains much variance and adds additional support to the importance of effective advocacy.

Thus, meaningful support for the proposition that effective advocacy increases the likelihood of adoption of merit selection for choosing state supreme court justices is found in the historical record and the event history analysis.

Proposition 6: *Merit selection is more likely to be adopted where relevant actors are able to present evidence to decision makers that it has worked effectively elsewhere and is likely to work for the decision makers and their constituents.*

The ability of advocates to endorse a proposed reform and confidently pronounce that it will bring desired results often requires pointing to other jurisdictions that have solved similar dilemmas with the new approach. In the context of the American states, this often means looking at the experiences of contiguous and regional neighbors who share history, political culture, and economic interests. This proposition finds support in situations where merit selection is generally adopted or not adopted within historically bounded geographic areas. Positive relationships between geographic independent variables and adoption of merit selection by a state would be further evidence to support this proposition.

The history of state judicial selection reform presents geographic distinctions based primarily on when a state joined the Union and what the preferred judicial selection method was at that time. The original states all adopted appointment of judges, while every state that joined the United States in the second half of the nineteenth century initially used popular election. Merit selection is most prevalent in Midwest and Western states, which were latecomers to the Union and where progressive reforms were more readily accepted. For example Nebraska, a merit selection state that became a state in 1867, is completely surrounded by other merit selection states.

The quantitative assessment further confirms the geography proposition. Models 4.3.13 and 4.3.14 show REGION and CONTIG, respectively, are statistically significant and signed consistent with hypothesized expectations. Both models also demonstrate goodness-of-fit that satisfied conventional levels of significance.

Thus, the proposition that a state is more likely to adopt merit selection where advocates can point to other states where the reform has worked effectively finds support in both the historical record and the event history analysis.

Major Findings

The single-most important result to be drawn from this research is that the institutions of state judicial selection are path dependent. The history of state judicial selection in the American states tells a compelling story of continuity, even though the story is usually framed in the context of reform. In every reform period, many states chose to retain their judicial selection institutions despite calls for change. The result of this stasis in the face of innovation is the patchwork of judicial selection methods that we see today; while many states have opted for merit selection, some still employ appointive methods, a few retain partisan election, and others have settled on nonpartisan elections.

The event history analysis reinforces the historical record. LASTCHANGE is the key explanatory variable in all of the models in which it is included, is statistically significant, and demonstrates an impact consistent with research expectations. Whenever this covariate is included in a model, it renders the impact of other independent variables negligible. The explanatory power of LASTCHANGE is so acute that it essentially suggests state judicial selection reform is a two-step process. First, judicial selection institutions are so engrained in a state that change is usually not possible. Second, where reform is possible, other influences can then work to accomplish change.

The research findings proffer the agency of lawyers and diffusion as key aspects in the second step of the reform process. From the founding period to the adoption of merit

selection, the historical record is replete with lawyers taking an active role in state judicial selection reform. Lawyers took an active and leading role in each reform epoch, and were critical to the development and advancement of merit selection. This denouement is confirmed by the event history analysis. LAWSTRENGTH is positively related to a state's adoption of merit selection and the key explanatory variable in the demand model. Also, it is positively related to MERIT and is significant in the advocacy model. The agency of lawyers thus appears crucial when an opportunity for state judicial selection reform transpires.

Geographical factors are also an issue in state judicial selection reform. The historical development of the United States, including the preferred method *de jure* of choosing state court judges, has a geographic quality. The various states in New England, the South, the Midwest and the West have institutions that collectively reflect the prevailing attitudes at their times of founding or, as in the case of the South, subsequent to Reconstruction. A willingness to accept progressive reforms is evident in the Midwest and the West. The importance of regionalism is confirmed by the positive and statistically significant impact of REGION on merit selection adoption. Similarly, CONTIG is positively and significantly related to MERIT. These indicia are consistent with the diffusion of state judicial selection reforms where neighbors are willing to adopt a new approach that has proven useful to other, similarly situated jurisdictions.

These findings suggest that a state likely to adopt merit selection to choose judges to its court of last resort is one that is not long invested in its current selection method, has a strong presence of lawyers, and has neighbors that have implemented the reform. Conversely, states that have a lengthy experience with their current method of judicial

selection, lack a strong bar, and are isolated from other merit selection states are not likely to adopt merit selection to choose judges to their courts of last resort.

Future Research

The major findings of this study, that state judicial selection institutions are path dependent, that reform requires the agency of relevant actors, and that change occurs through a process of diffusion, are consistent with received understanding of institutional change. The evidence revealed in the qualitative historical record and the quantitative event history analysis are consistent and urge similar conclusions. This consistency offers reliability and supports the contention that innovation and diffusion methods and theory are appropriate for use in the study of institutional change. Still, this research leaves many unanswered questions and offers many avenues of future inquiry. Two facets seem particularly relevant.

First, since state judicial institutions are path dependent, what are the *immediate* factors that lead to an opportunity for reform? In other words, is there some identifiable phenomenon or set of phenomena that occur regularly before change occurs? For example, the Jacksonian democratic movement of the 18th century that led to the popular election of judges is usually thought to be a reaction to the excesses of state legislative power. In their seminal study of the Missouri Plan, Watson and Downing (1969) note a number of factors that seem to have contributed to the success of the effort to implement merit selection in the Show-Me State. While it is possible that the causal mechanisms that overcome the path dependence of judicial selection institutions in particular states are idiosyncratic and do not

lend themselves to systematic explanation, the question is an important one and warrants further exploration.

A second channel of research should be aimed at better explaining the role and behavior of decision makers in the face of judicial selection reform. The instant study intimates that some power elites may actually act contrary to their self-interest in adopting merit selection. This runs contrary to conventional understanding of institutional change. The answer may lie in the judicial nominating process. For example, governors who possess constitutional authority to appoint judges but choose to rely upon nominating commissions to sift through would-be contenders retain near-exclusive authority to select commission members. Commissioners would reasonably be expected to advance judicial candidates that share legal conventions and predispositions with the governor who appointed them. Similarly, legislators may be more willing to accept merit selection in their state if they have a decisive role in deciding who acts as gatekeepers for future jurists.

Conclusion

This research seeks to increase understanding of American state courts through the formulation and testing of a theory of state judicial selection, exploration of a condensed history of state judicial selection reform, and an event history analysis of the adoption by states of merit selection judicial selection for choosing judges to their courts of last resort. The major finding is that, similar to other institutional arrangements, state judicial selection methods are highly path dependent. An important secondary finding is that lawyers play an important role in bringing about change when and where the possibility of change arises. Geography also seems to be an influential factor in judicial selection reform.

As would be expected from a foundational study of any topic, this research invites criticism of the approaches and methods used to reach its conclusions. Also, many of the obtained outcomes are at odds with theorized expectations and a number of important questions on the topic of state judicial selection remain unanswered. Hopefully, these shortcomings will not be deemed fatal. Rather, it is desired that they be considered an invitation to future investigation of this important social and political phenomenon. The crucible of science demands nothing less.

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APPENDIX A

Model 4.4.3

VARIABLES	Full	(1)	(2)	(3)	(4)	(5)	(6)	(7)
POPULATION	-0.358 (0.289)	-0.462** (0.227)	-0.354 (0.278)	-0.463* (0.270)	-0.185 (0.261)	-0.591** (0.236)	-0.241 (0.245)	-0.204 (0.261)
WEALTH	-0.000 (0.000)			0.000 (0.000)	0.000 (0.000)		0.000*** (0.000)	
URBAN	-1.112 (1.223)	0.790 (0.916)	-1.134 (1.116)	-1.034 (1.207)	-1.242 (1.219)	-0.390 (1.000)	-1.123 (1.198)	-0.971 (1.125)
EDUCATION	24.814* (12.868)		24.551** (11.498)		28.361** (12.213)			32.262*** (10.137)
LAWSTRENGTH	0.937 (0.625)		0.925 (0.570)	1.225** (0.601)		1.575*** (0.490)		
Observations	597	597	597	597	597	597	597	597
ll	-74.08	-81.23	-74.08	-75.97	-75.19	-76.45	-78.05	-75.36
chi2	18.33	4.035	18.32	14.54	16.10	13.58	10.38	15.77
df_m	5	2	4	4	4	3	3	3
N_fail	23	23	23	23	23	23	23	23
chi2(LLRatio)		14.29	0	3.79	2.22	4.74	7.94	2.56
P>chi2		0.003	0.964	0.052	0.136	0.093	0.019	0.278

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

APPENDIX B

Model 4.5.1

VARIABLES	Full	(1)	(2)	(3)	(4)	(5)	(6)	(7)
LASTCHANGE	-1.661***	-1.770***	-1.660***	-1.717***	-1.582***	-1.691***	-1.725***	-1.698***
	-0.381	-0.353	-0.378	-0.369	-0.337	-0.366	-0.366	-0.359
CHANGE EASE	0.234	0.341	0.262	0.235	0.286	0.21	0.274	0.312
	-0.367	-0.335	-0.356	-0.368	-0.366	-0.35	-0.352	-0.371
IDEOLOGY	-1.936	-1.026	-1.696	-2.009	-1.538	-1.944	-1.741	-1.401
	-1.799	-1.448	-1.614	-1.795	-1.674	-1.798	-1.606	-1.627
LEGPRO	4.889	8.027**	5.726	5.458	5.152	4.656	6.547	6.77
	-5.444	-3.962	-4.871	-5.243	-5.304	-5.33	-4.467	-5.126
GOVPOWER	-0.628	-0.689	-0.612	-0.676	-0.564	-0.639	-0.669	-0.64
	-0.531	-0.505	-0.531	-0.518	-0.522	-0.529	-0.516	-0.514
POPLOG	-0.48	-0.886**	-0.586	-0.678	-0.22	-0.494	-0.838**	-0.643
	-0.777	-0.413	-0.729	-0.574	-0.693	-0.773	-0.425	-0.584
WEALTH	0.000			0.000	0.000	0.000		0.000
	0.000			0.000	0.000	0.000		0.000
URBAN	-1.875	0.082	-1.499	-1.49	-1.96	-1.819	-0.994	-0.755
	-2.275	-1.266	-1.974	-2.018	-2.203	-2.233	-1.555	-1.848
EDUCATION	8.752		9.94		20.287	8.066		
	-23.77		-23.707		-19.773	-23.374		
LAWSTRENGTH	0.836		0.832	1.031		0.892	1.064	
	-0.957		-0.961	-0.802		-0.924	-0.792	
PARTYCOMP	-0.109	2.439	0.04	0.051	0.971	-0.305	0.266	2.286
	-3.537	-2.935	-3.503	-3.549	-3.217	-3.43	-3.507	-3.088
AJSCONF	0.452	0.79	0.522	0.518	0.463	0.441	0.615	0.64
	-0.614	-0.52	-0.589	-0.589	-0.607	-0.612	-0.544	-0.598
REGION	0.701		0.684	0.551	1.409		0.535	1.381
	-3.163		-3.166	-3.076	-2.98		-3.072	-2.75
Observations	597	597	597	597	597	597	597	597
ll	-30.71	-31.96	-30.77	-30.78	-31.1	-30.74	-30.86	-31.65
chi2	105.1	102.6	104.9	104.9	104.3	105	104.8	103.2
df_m	13	9	12	12	12	12	11	11
N_fail	23	23	23	23	23	23	23	23
chi2(LLRatio)		2.49	0.12	0.14	0.78	0.05	0.29	1.87
P>chi2		0.647	0.733	0.712	0.377	0.825	0.863	0.392

Standard errors in parentheses. *** p<0.01, ** p<0.05, * p<0.1

Model 4.5.1 (continued)

VARIABLES	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
LASTCHANGE	-1.739***	-1.584***	-1.689***	-1.621***	-1.723***	-1.747***	-1.739***	-1.623***
	-0.354	-0.335	-0.361	-0.336	-0.353	-0.349	-0.36	-0.334
CHANGE Ease	0.216	0.307	0.241	0.241	0.375	0.257	0.265	0.266
	-0.351	-0.36	-0.34	-0.352	-0.351	-0.336	-0.358	-0.345
IDEOLOGY	-2.018	-1.342	-1.712	-1.472	-1.044	-1.759	-1.367	-1.294
	-1.791	-1.54	-1.618	-1.658	-1.45	-1.606	-1.611	-1.539
LEGPRO	5.237	5.918	5.494	4.646	8.505**	6.334	6.193	5.407
	-5.084	-4.76	-4.73	-5.148	-4.159	-4.269	-4.969	-4.56
GovPOWER	-0.682	-0.551	-0.625	-0.577	-0.652	-0.678	-0.658	-0.57
	-0.516	-0.524	-0.528	-0.519	-0.514	-0.513	-0.51	-0.521
POPLOG	-0.678	-0.314	-0.596	-0.208	-0.891**	-0.836**	-0.629	-0.295
	-0.572	-0.642	-0.727	-0.684	-0.419	-0.424	-0.576	-0.637
WEALTH	0.000			0.000			0.000	
	0.000			0.000			0.000	
URBAN	-1.474	-1.636	-1.459	-1.839	-0.015	-0.989	-0.665	-1.546
	-1.998	-1.95	-1.948	-2.133	-1.29	-1.55	-1.793	-1.91
EDUCATION		21.695	9.319	20.193				21.665
		-19.332	-23.268	-19.439				-18.894
LAWSTRENGTH	1.066		0.887			1.098		
	-0.78		-0.928			-0.769		
PARTYCOMP	-0.117	1.064	-0.165	0.705	2.744	0.088	2.017	0.777
	-3.424	-3.22	-3.379	-3.148	-3.006	-3.361	-3.022	-3.138
AJSCONF	0.506	0.528	0.51	0.43	0.814	0.603	0.606	0.492
	-0.584	-0.582	-0.587	-0.603	-0.526	-0.538	-0.595	-0.577
REGION		1.39			1.443			
		-2.981			-2.712			
Observations	597	597	597	597	597	597	597	597
ll	-30.8	-31.16	-30.8	-31.22	-31.82	-30.88	-31.78	-31.27
chi2	104.9	104.2	104.9	104.1	102.9	104.7	102.9	104
df_m	11	11	11	11	10	10	10	10
N_fail	23	23	23	23	23	23	23	23
chi2(LLRatio)	0.17	0.89	0.16	1.01	2.20	0.32	2.13	1.10
P>chi2	0.919	0.642	0.922	0.605	0.531	0.955	0.547	0.776

APPENDIX C

Model 4.5.2

VARIABLES	Full	(1)	(2)	(3)	(4)	(5)	(6)	(7)
LASTCHANGE	-1.704*** (0.380)	-1.750*** (0.353)	-1.711*** (0.378)	-1.752*** (0.359)	-1.626*** (0.341)	-1.765*** (0.355)	-1.724*** (0.360)	-1.626*** (0.336)
CHANGE EASE	0.192 (0.368)	0.369 (0.342)	0.209 (0.363)	0.189 (0.369)	0.267 (0.354)	0.210 (0.362)	0.295 (0.359)	0.296 (0.350)
IDEOLOGY	-1.915 (1.794)	-1.319 (1.552)	-1.718 (1.610)	-1.962 (1.783)	-1.765 (1.790)	-1.755 (1.596)	-1.788 (1.793)	-1.464 (1.599)
LEGPRO	4.534 (5.381)	8.493** (4.066)	5.146 (4.940)	4.940 (5.229)	4.896 (5.242)	5.642 (4.728)	6.482 (5.019)	5.886 (4.719)
GOVPOWER	-0.634 (0.527)	-0.705 (0.518)	-0.622 (0.525)	-0.667 (0.515)	-0.612 (0.530)	-0.662 (0.510)	-0.699 (0.526)	-0.591 (0.528)
POPULATION	-0.535 (0.812)	-0.891** (0.427)	-0.635 (0.739)	-0.704 (0.577)	-0.221 (0.699)	-0.829** (0.419)	-0.595 (0.593)	-0.344 (0.653)
WEALTH	0.000 (0.000)			0.000 (0.000)	0.000 (0.000)		0.000 (0.000)	
URBAN	-1.806 (2.220)	0.019 (1.326)	-1.519 (1.957)	-1.518 (1.980)	-1.889 (2.198)	-1.183 (1.639)	-0.885 (1.924)	-1.458 (1.937)
EDUCATION	7.053 (24.115)		7.614 (24.057)		17.996 (19.777)			20.034 (19.280)
LAWSTRENGTH	1.049 (1.365)		1.122 (1.356)	1.263 (1.153)		1.365 (1.121)		
PARTCOMP	-0.332 (3.450)	1.840 (3.040)	-0.253 (3.433)	-0.189 (3.453)	0.260 (3.264)	-0.096 (3.442)	1.226 (3.207)	0.473 (3.201)
AJSCONF	0.424 (0.622)	0.832 (0.534)	0.470 (0.610)	0.470 (0.603)	0.471 (0.609)	0.526 (0.581)	0.637 (0.597)	0.549 (0.592)
CONTIG	-0.296 (1.876)	0.901 (1.251)	-0.439 (1.819)	-0.438 (1.820)	0.745 (1.262)	-0.603 (1.757)	0.986 (1.268)	0.638 (1.229)
Observations	597	597	597	597	597	597	597	597
ll	-30.73	-31.69	-30.77	-30.77	-31.04	-30.82	-31.47	-31.13
chi2	105.0	103.1	105.0	104.9	104.4	104.9	103.6	104.2
df_m	13	10	12	12	12	11	11	11
N_fail	23	23	23	23	23	23	23	23
chi2(LLRatio)		1.94	0.08	0.09	0.63	0.18	1.48	0.81
P>chi2		0.586	0.777	0.769	0.429	0.913	0.477	0.668

Standard errors in parentheses. *** <0.01, ** p<0.05, * p<0.1.

APPENDIX D

Model 4.5.3

VARIABLES	Full	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
LASTCHANGE	-1.626*** (0.324)	-1.651*** (0.288)	-1.640*** (0.319)	-1.626*** (0.325)	-1.620*** (0.321)	-1.659*** (0.305)	-1.620*** (0.307)	-1.631*** (0.317)	-1.691*** (0.312)	-1.621*** (0.322)	-1.660*** (0.306)	-1.653*** (0.303)	-1.585*** (0.293)	-1.680*** (0.300)	-1.684*** (0.311)	-1.655*** (0.304)
CHANGE EASE	-0.050 (0.275)	0.169 (0.233)	0.003 (0.279)	-0.056 (0.274)	-0.040 (0.270)	-0.068 (0.264)	0.079 (0.264)	0.025 (0.272)	-0.030 (0.268)	-0.046 (0.266)	-0.075 (0.262)	-0.058 (0.260)	0.201 (0.243)	0.050 (0.254)	-0.009 (0.261)	-0.065 (0.254)
WEALTH	-0.000 (0.000)		0.000 (0.000)		-0.000 (0.000)	-0.000 (0.000)		0.000* (0.000)	0.000 (0.000)			-0.000 (0.000)			0.000* (0.000)	
EDUCATION	21.698 (14.054)			20.139* (10.624)	22.054 (13.920)	21.956 (13.867)				20.900** (9.434)	20.256* (10.454)	22.331 (13.730)				21.043** (9.302)
LAWSTRENGTH	0.112 (0.551)		0.220 (0.509)	0.083 (0.521)		0.119 (0.545)	0.549 (0.404)		0.230 (0.501)		0.087 (0.516)			0.560 (0.399)		
REGION	0.639 (2.573)		1.076 (2.309)	0.667 (2.560)	0.664 (2.559)		1.208 (2.213)	1.123 (2.298)		0.680 (2.552)			1.356 (2.124)			
Observations	620	620	620	620	620	620	620	620	620	620	620	620	620	620	620	620
ll	-35.03	-37.92	-36.23	-35.05	-35.05	-35.06	-36.85	-36.32	-36.34	-35.06	-35.08	-35.09	-37.72	-37.00	-36.44	-35.09
chi2	105.5	99.75	103.1	105.5	105.5	105.5	101.9	103.0	102.9	105.5	105.4	105.4	100.2	101.6	102.7	105.4
df_m	6	2	5	5	5	5	4	4	4	4	4	4	3	3	3	3
N_fail	24	24	24	24	24	24	24	24	24	24	24	24	24	24	24	24
chi2(LLRatio)		5.78	2.39	0.03	0.04	0.06	3.63	2.58	2.61	0.05	0.1	0.11	5.37	3.93	2.82	0.12
P>chi2		0.216	0.122	0.865	0.840	0.804	0.163	0.276	0.270	0.974	0.953	0.947	0.147	0.270	0.421	0.989

Standard errors in parentheses. *** p<0.01, ** p<0.05, * p<0.1

APPENDIX E

Model 4.5.4

VARIABLES	Full	(1)	(2)	(3)	(4)	(5)	(6)	(7)
LASTCHANGE	-1.624*** (0.305)	-1.651*** (0.288)	-1.650*** (0.309)	-1.625*** (0.304)	-1.631*** (0.302)	-1.659*** (0.305)	-1.652*** (0.302)	-1.650*** (0.307)
CHANGEEASE	-0.032 (0.267)	0.169 (0.233)	0.009 (0.268)	-0.031 (0.266)	-0.041 (0.259)	-0.068 (0.264)	0.080 (0.262)	0.009 (0.261)
WEALTH	0.000 (0.000)		0.000 (0.000)		-0.000 (0.000)	-0.000 (0.000)		0.000* (0.000)
EDUCATION	21.107 (14.033)			21.527* (11.044)	20.990 (14.021)	21.956 (13.867)		
LAWSTRENGTH	-0.086 (0.665)		-0.006 (0.597)	-0.072 (0.594)		0.119 (0.545)	0.479 (0.449)	
CONTIG	0.736 (1.343)		0.964 (1.288)	0.710 (1.231)	0.639 (1.118)		0.487 (1.236)	0.958 (1.103)
Observations	620	620	620	620	620	620	620	620
ll	-34.91	-37.92	-36.05	-34.91	-34.92	-35.06	-36.92	-36.05
chi2	105.8	99.75	103.5	105.8	105.8	105.5	101.8	103.5
df_m	6	2	5	5	5	5	4	4
N_fail	24	24	24	24	24	24	24	24
chi2(LLRatio)		6.02	2.28	0.00	0.02	0.31	4.02	2.28
P>chi2		0.198	0.131	0.961	0.896	0.580	0.134	0.319

Standard errors in parentheses. *** p<0.01, ** p<0.05, * p<0.1

Model 4.5.4 (continued)

VARIABLES	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
LASTCHANGE	-1.691*** (0.312)	-1.631*** (0.302)	-1.660*** (0.306)	-1.653*** (0.303)	-1.601*** (0.284)	-1.680*** (0.300)	-1.684*** (0.311)	-1.655*** (0.304)
CHANGEASE	-0.030 (0.268)	-0.042 (0.253)	-0.075 (0.262)	-0.058 (0.260)	0.195 (0.231)	0.050 (0.254)	-0.009 (0.261)	-0.065 (0.254)
WEALTH	0.000 (0.000)			-0.000 (0.000)			0.000* (0.000)	
EDUCATION		20.867** (9.607)	20.256* (10.454)	22.331 (13.730)				21.043** (9.302)
LAWSTRENGTH	0.230 (0.501)		0.087 (0.516)			0.560 (0.399)		
CONTIG		0.642 (1.097)			1.072 (1.126)			
Observations	620	620	620	620	620	620	620	620
ll	-36.34	-34.92	-35.08	-35.09	-37.46	-37.00	-36.44	-35.09
chi2	102.9	105.8	105.4	105.4	100.7	101.6	102.7	105.4
df_m	4	4	4	4	3	3	3	3
N_fail	24	24	24	24	24	24	24	24
chi2(LLRatio)	2.86	0.02	0.34	0.35	5.1	4.17	3.06	0.37
P>chi2	0.240	0.992	0.843	0.838	0.164	0.243	0.382	0.9464