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The Contours of Judicial Tenure in State Courts of Last Resort: Accountability vs. Independence

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THE CONTOURS OF JUDICIAL TENURE IN STATE COURTS OF LAST RESORT: ACCOUNTABILITY VS. INDEPENDENCE

by

Todd A. Curry

A Dissertation
Submitted to the
Faculty of The Graduate College
in partial fulfillment of the
requirements for the
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Department of Political Science
Advisor: Mark S. Hurwitz, Ph.D.

Western Michigan University
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The study of state courts of last resort is a field which has, up until recently, been significantly underrepresented in political science (Baum 1987, Dubois 1980). The bulk of work in judicial politics over the last fifty years has focused on the federal system. Furthermore, the study of state courts allows for a true comparative analysis. The methods of selection used for the staffing of state courts of last resort are highly varied. There are five distinctly different methods which are used for judicial selection in the states, and many states have institutional nuances that provide further variation for study. This dissertation will utilize event history analysis to examine if the method of selection in state courts of last resort has a causal effect on the tenure of Supreme Court justices under a variety of different political contexts. Event history analysis is the appropriate method in order to answer this question, as it will allow me to examine first, what the determinants of judicial tenure length are, and second, compare the selection methods to each other.

I will examine three related aspects of methods of selection for state supreme courts. First, I will enter the debate concerning the accountability and independence elicited by the different methods of selection. Second, I will examine the effect of campaign spending by challengers and incumbents on the length of judicial tenure in
states which utilize elections. Third, I will examine to what level judges across all methods of selection behave strategically with regard to retirement. I find that out of each of the methods of selection, partisan elections exhibit the most accountability, with retention elections exhibiting the least. Also, in states which elect their judges, the amount of money spent during the election has no statistical effect on the term length of the justice. Finally, justices in all systems are likely to engage in strategic retirement, however in different ways. Justices who are elected retire when their likelihood of electoral defeat is high while justices who are appointed are likely to retire when an ideologically congruent body can choose their replacement.
ACKNOWLEDGMENTS

This work could not have been completed without the intellectual contribution of my father. Robert W. Curry grew up on a subsistence farm in rural Kentucky, never finishing the 8th grade. At the age of 18, he enlisted in the military, serving during the Korean War. He was a simple man, with a simple vocation: Robert Curry was a mechanic. Much of my father's life I do not know, as he was a quiet man, of advanced age when I was born, having already lived a great majority of his life. We were separated not by just one generation but many.

When I had to build a covered wagon for a school project, my dad was the one who reminded me that the front wheels were smaller than the back wheels, not because he learned it from a book, but because that was how his family took their crops to market. What my father did share with me was a nurturing spirit, and a knowledge of math. I learned how to count, how to add, and basic probability from my father teaching me how to play craps when I was three years old. I may not be able to work on an engine, but he still comes to mind every day, and this dissertation would have been exceedingly unlikely had he not encouraged intellectual growth.

Todd A. Curry
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CHAPTER I

INTRODUCTION

In 2010, Iowa witnessed an occurrence than had not happened in the state’s entire history. In the retention elections for the State Supreme Court, three justices (Chief Justice Marsha K. Ternus, Justice Michael J. Streit, and Justice David L. Baker) were removed from office by the voters. This event was particularly newsworthy as not a single judge in the history of Iowa had failed to be retained, yet on November 2, 2010 every judge standing for retention was removed from office. In response to the Supreme Court case *Varnum v. Brien* (2009), which unanimously overturned a statute that outlawed gay marriage, many out-of-state organizations including the National Organization for Marriage and the American Family Association spent over $3 million to defeat the three justices at the polls. This, according to the Brennan Center for Justice, was more than was spent in the entire previous decade on retention elections in Iowa (Sulzberger 2010). These three sitting justices, and indeed any justice from Iowa, had never faced such a well-funded outside challenge to their legitimacy. Furthermore, these justices who had never had to campaign before were left ill-equipped to fight back.

According to the New York Times the three justices, “did not raise money to campaign and only toward the end of the election did they make public appearances to defend themselves (Sukzberger 2010).”

Groups such as the American Judicature Society (AJS) and the Brennan Center for Justice, which promote the use of merit selection and retention elections as a means to
populate the bench in order to further their goal of selecting the most qualified judges while keeping them publically accountable, ultimately turned their ire on the special interest money which they argued led to the justices’ defeat. Bert Brandenburg, executive director of the Brennan Center for Justice stated, “Judges are facing more demands to be accountable to interest groups and political campaigns instead of the law and the constitution (2010).” While groups such as the AJS promote retention elections as a means to keep judges accountable, in 2010, accountability at the polls shocked them. Rachel Paine Caufield, research fellow for the AJS, stated, “[retention elections] are meant to serve a very similar check as impeachment. It was not originally intended to be used for ideological or partisan purposes” (Duffelmeye 2011).

The normative implications regarding methods of judicial selection have often fueled the debate concerning what type of system a state should use. Couched in the terms of “independence v. accountability,” many groups have actively rallied around one system with the goal of either balancing, or maximizing one of these two competing values. Therefore, states celebrating their right of self-determination under the U.S. federalist constitution have resulted in an extremely heterogeneous mixture concerning the methods of selection used to staff their courts of last resort.

The various states within the U.S. truly are a garden of democracy. The states truly have, “Let a hundred flowers bloom; let a hundred schools of thought contend.” The variation of thoughts, movements, and institutional dynamics among the states of the union are a testament to federalism within the United States. Changes, tweaks, and

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1 This stands as an interesting juxtaposition considering the Brennan Center advocates the use of the Missouri Plan as a way to keep judges accountable at the polls.
nuances can be made, observed, and tested to fit the particular needs and dynamics of that specific state. One such institution that experiences an extremely high level of variation is the judicial system, specifically, the method of selection used to staff the courts of last resort in the states.

While each state’s method of selection has its own nuances and quirks, there are largely five different methods which are used amongst the states to staff their highest courts. These are partisan elections, non-partisan elections, retention elections, gubernatorial appointments, and legislative appointments (Warrick 1993). States have changed methods over time, and indeed, states such as North Carolina (Boniti 2011), Nevada (German 2009), Tennessee (Locker 2009), Michigan (Gilber 2010), and Wisconsin (Rafery 2011) are currently debating changes in their method of judicial selection.

States which utilize partisan elections staff their high courts in a method which is not dissimilar from that of elections for members of Congress. If there are challengers, candidates must run in a partisan primary to win the party’s endorsement, and then must compete in the general election to win the position. The candidates in the general election appear with their partisan identification on the ballot. These elections can be, and often are, highly contested events, with large amounts of money spent in the campaigns (Bonneau and Hall 2009). The partisan electoral system generally provides the public with the most information in terms of candidates, whether before the election in terms of campaigning (Bonneau and Hall 2009) or at the polls with their party identification listed on the ballot (Klein and Baum 2001).
Non-partisan elections are quite similar to their partisan counterparts in structure. Candidates must run in a primary and a general election. The significant modification from partisan elections is that candidates in states which utilize non-partisan elections do not have a party attachment listed on either the primary or general election ballot. While partisan leanings are often easily observable, this leaves voters without a heuristic shortcut in the voting booth. Non-partisan elections are generally viewed as lower-information, lower-cost affairs (Bonneau and Hall 2009) and, the ballot provides little relevant information to the voters (Klein and Baum 2001). These elections still can be contested, and the amount of money being spent in non-partisan elections has increased significantly since the 1980s (Justice at Stake 2011).

The common conception of the Missouri Plan, also commonly known as retention elections, have been described as “a process in which a non-partisan or bipartisan commission nominates a few individuals for a judicial position, for appointment (usually) by the executive based on the commission’s recommended names, with subsequent tenure on the bench dependent upon a retention election at specific intervals” (Hurwitz and Lanier 2001, 86, fn. 11). While the Missouri Plan thus incorporates elements of both appointive and electoral systems, the vast majority of judges subject to retention elections are in fact retained (Hall 2001b), and thus the defining feature of these merit systems is the initial nomination by commission (Hurwitz and Lanier 2001). In the perfect example of a Missouri Plan state, such as Iowa, a non-partisan judicial nominating committee recommends a list of individuals from which the governor chooses a nominee. The justice, depending on the laws of the state, serves for a brief period of time ranging from one to three years. Following this period of time the justice must stand for a retention
election. The retention election is simply an up or down vote from the public saying either they approve, or disapprove of the justice. It is not a contested election, and as such, generally less salient, with more ballot roll-off (Hall and Aspin 1987). Also, less information is available to the public because of the lack of campaigning on the part of the standing justices (Bonneau and Hall 2009). Designers of this system claim it balances both accountability and independence, and while the system does shield the justices from public accountability at the time of selection, it does subject them to public confidence during retention.

The two remaining methods of selection, gubernatorial appointment and legislative appointment, differ from the previous three because there is no chance for public accountability concerning the justices. They do not stand in any election: partisan, non-partisan, or retention. These states still exhibit accountability by the way in which judges within the system are retained, but that accountability is not given a public outlet.

The gubernatorial appointment system is modeled in large part after the system used to select judges in the federal system (Canon 1972), with modification by the use of a judicial selection commission. In gubernatorial appointment systems the governor selects from a list approved by a judicial nominating committee and is responsible for retaining the sitting justices. While the ideology of the governor’s office may change, the governor is still highly likely to retain a previous colleague’s judge, so as to avoid appearing to being playing political games with the judicial branch. In no gubernatorial appointment state is the nominating commission required by law, but it is included in the

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2 The nominating commission is a modern development, marking its inception to the use of the Missouri Plan which as part of its institutional setup introduced the idea of non-partisan/bipartisan nominating commissions.
informal process in every state. In legislative appointment systems, the legislature chooses one judge from a list of judges determined by either the judicial committee or the legislature as a whole. When judges’ terms are up, the legislature takes an approval vote to determine retention, though as with gubernatorial appointment systems, the majority party has generally been unwilling to remove justices for ideological differences.

Legislative appointment occurs in only two states: Virginia and South Carolina.

History of Judicial Selection in the States

The reasons for the current debate over methods of judicial selection and the variation of methods of selection amongst the states have their roots in the historical political movements of the country, as well as regional nuances. As political movements have changed over time, so have methods of judicial selection. Many states have modified the method they have used over time, generally with the motivation of subjecting justices to either more or less accountability.

Following the founding of the nation, the various states, as well as the federal government, followed the lead of Great Britain in appointing their judges and giving them life tenure. The appointing institution varied depending on the state, but all states which entered the union until 1832 appointed their judges to the court of last resort. The reasoning for this occurrence is summarized by Alexander Hamilton in *Federalist 78*. Hamilton argued that the judiciary in its current state was not a powerful institution. It was unable to enforce decisions, and as such, depended on the other two branches of government to lend their strength in order for judgments to be carried out. Furthermore, the assumption at the time was that because the judiciary was weak it would not handle important political decisions. These decisions instead could be handled by the executive
and the legislature. As such, the need for oversight from the public or the other branches in the form of term limits was assumed unnecessary (Streb 2007). The thirteen original states all entered the union appointing their judges for lifetime terms. It was not until Mississippi entered the union in 1832 that a court of last resort used any method except appointment.

When Mississippi entered the union, their constitution required judges at every level be popularly elected. Very quickly states began to adopt elections, primarily partisan elections, as a means of selecting judges. According to Evan Haynes (1944), “In the year 1850 alone, seven states changed to popular election of judges (p. 100).” Following the conclusion of the Civil War, a majority of the states in the union, twenty-four of thirty-four, used elections as the way to staff their judiciary.

This push for the popular election of judges can be linked to numerous contributing factors. First, following the publication of *Marbury v. Madison* (1803) and the establishment of judicial review as the power of the judiciary, a worry emerged that unaccountable judges would begin to overturn law in the states. By making judges responsible to the same constituency as legislators, this concern could be mitigated. Second, following on the heels of the Jacksonian Democrat revolution, it was thought at the time that elections would actually make judges more independent than they were previously. Under the system of appointment, the judges were thought to be beholden to those that selected them, namely the governor or legislature. By removing their means of selection out of the other two branches of government, judges were thought to be more independent from those branches. Third, moving retention into the hands of the
electorate allowed a means by which to remove inept judges from the bench that did not involve impeachment (Streb 2007).

This increase in partisan elections did not eliminate all issues concerning judicial selection in the states. Partisan candidates were largely chosen by the dominant political machines at the time. The move to elections, which was thought to increase independence from the other branches of government, had created a system where the judges were perceived as dependent on the political machines. During the Progressive Era, in an attempt to curtail control by the political machinery of the time, non-partisan elections were floated as a means to maintain public accountability, while insulating judges from the perceived vulgarity of partisan politics and thus diminishing cronyism. Candidates appear on the ballot with no partisan identification. These non-partisan elections removed power from the political machinery at the time, allowing the public to choose directly who would be the judges without the mitigating role of the party.

Beginning in the early 1900s, the AJS began the push for another method to select judges. Initially termed merit selection, the system which is now used in sixteen states is more commonly known as the Missouri Plan. The AJS argued that this method of selection would shield candidates from politics because a list of candidates would arise from a non-partisan/bipartisan commission from which the governor would select a judge. These judges would remain accountable to the public because at the end of their initial term (usually one to three years), they would have to stand for a retention election, in which they would not face a challenger, but instead would be subjected to an up or down vote from the electorate.
The current landscape of judicial selection in the various states exhibits a wide range of variation, but the patterns that remain are, to a degree, holdovers from the various political movements that occurred while states were admitted to the union. Table 1 contains the states and their current method of selection. Only four states utilize a pure form of partisan elections: Alabama, Louisiana, Texas, and West Virginia. Alabama and Louisiana changed their method of selection during the era of Jacksonian influence while Texas and West Virginia were admitted to the union originally as partisan election states. All four of the states have constitutionally mandated that elections be the primary means of selecting judges, which likely explains why they have remained resistant to change, given that constitutional amendment is exceedingly difficult.

Five states can be considered hybrid electoral states, in that they combine mechanisms of the other four types within their method of selection. Illinois, New Mexico, and Pennsylvania hold partisan elections for open seats and seats which are filled by the governor in interim. Justices in these states then stand in an uncontested retention election for successive terms. The states of Michigan and Ohio combine portions of partisan and non-partisan elections in unique ways. In Michigan, candidates are chosen in a private party caucus, yet appear on the general election ballot with no affiliation listed. In Ohio, candidates must win a partisan primary to gain their party’s nomination, but must also appear on the general election ballot with no party identification listed. In combining parts of partisan, non-partisan, and retention elections as well as other unique arrangements these states are institutionally different from others in the union.
<table>
<thead>
<tr>
<th>Partisan Elections</th>
<th>Term Length</th>
<th>Non-Partisan Elections</th>
<th>Term Length</th>
<th>Missouri Plan</th>
<th>Term Length</th>
<th>Appointment</th>
<th>Term Length</th>
<th>Hybrid Elections</th>
<th>Term Length</th>
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<tr>
<td>Alabama</td>
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<td>Connecticut</td>
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<td>Illinois**</td>
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<td>6</td>
<td>Arizona</td>
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<td>Delaware</td>
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<td>Michigan***</td>
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<td>Idaho</td>
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<td>California</td>
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<td>Hawaii</td>
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<td>New Mexico**</td>
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<td>Maine</td>
<td>7</td>
<td>Ohio***</td>
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<td>Life</td>
<td>Pennsylvania**</td>
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<td>Utah</td>
<td>10</td>
<td>Wyoming</td>
<td>8</td>
</tr>
</tbody>
</table>

Source: Data taken from http://www.judicialselection.us/, website administered by the American Judicature Society

* Retention elections held if incumbent is unopposed.

** Justices are initially chosen in partisan elections but in subsequent terms only stand for retention election.

*** During the general elections candidates appear without a party identification on the ballot, but they are initially chosen in a partisan manner (partisan caucus/partisan primary).
Method of Selection in US States

Figure 1. Method of selection in U.S. states.
Election or Appointment in US States

Figure 2. Election or appointment in U.S. states.
The states which still use appointment systems are predominantly in the area of the original thirteen states. In what resembles a path-dependent nature, the choices the states originally made have proved relatively unchanged. Only three states retain life tenure for their justices: Massachusetts, New Jersey, and Rhode Island, while the others have adopted terms, which are themselves renewable.

States which use either non-partisan elections or the Missouri Plan are largely states which changed their method of selection during the Progressive movement or entered the union with these methods originally. While there appears to be no regional trend to states which adopted the Missouri Plan, a large proportion of states which use non-partisan elections come from the south and midwest regions.

Figure 2 breaks down the method of selection by the primary means by which justices are chosen initially either by election or appointment. The states which are grouped into elections include both partisan and non-partisan elections, including the hybrid systems leaving states which use the Missouri Plan, gubernatorial appointment, or legislative appointment to be grouped into the appointment category. Regionally, the northeast and the Atlantic coast predominantly use some form of appointment system. Many of the states in this region are using the same method of selection as they initially did at their incorporation with minor modifications, usually in the form of tenure length. A block of the central United States ranging from the midwest to the mountain west contains a large number of appointment states universally using the Missouri Plan. Minus three states, the South is a stronghold for elections, and the same can be said for the Northwest. Overall, there is substantial regional variation in terms of the methods of selection used to staff state courts of last resort.
Current State of Judicial Selection

The push for states to change their method of judicial selection did not cease following the Progressive Era. Indeed, the Brennan Center for Justice, the American Bar Association, and the American Judicature Society all actively campaign for some form of “merit” selection to be used in the states. Following an active campaign in the state of Nevada, a state which uses non-partisan elections to staff their bench, the Missouri Plan was brought before the voters of the state in 2010. Fifty-eight percent of the voters chose to reject the purposed change in the states method of selection, mirroring defeats of similar proposals in 1972 and 1988 (Skolnik 2007). Nevada is not the only state actively debating changes to their method of selection. North Carolina’s legislative Election Oversight Committee has actively been debating moving to the Missouri Plan as well (Boniti 2011).

A possible reason for the continued push toward states adopting the Missouri Plan are the changes, both real and perceived, that have occurred concerning judicial elections. There is little doubt that in the past ten years profound changes have occurred with respect to funding of judicial elections. According to Justice at Stake, campaign spending has more than doubled in judicial elections from the 1990s to the 2000s, rising from $83.3 million to $206.9 million (Justice at Stake 2010). According to many reports, the tone of judicial elections has changed as well. Judicial elections historically had been low salience affairs, marked with little money spent by the candidates and advertising that was generally demure (Streb 2007). One commentator has famously noted that “new” style judicial elections are, “noisier, nastier, and costlier” (Woodsbury 1988). These claims are generally followed by the additional argument that judicial
independence is being eroded at the cost of public accountability at the polls (O’Connor 2010). These claims often are supported by anecdotal stories, or data for a single state or election. These groups generally support their claims from a theoretical or normative standpoint, rarely scientifically testing their claims.

The reform groups make numerous claims concerning the deleterious effects that increased campaign spending has on the judiciary. Among their claims is that the increased money spent in elections has lowered the legitimacy of the judiciary in the eyes of the public. In the “New Politics of Judicial Elections 2000-2009,” released by the Brennan Center for Justice, the authors claim, “More than seven in ten Americans believe that campaign contributions affect the outcome of courtroom decisions” (4, but see Gibson et al. 2011). One of the most vocal opponents of judicial elections, ex-Supreme Court Justice Sandra Day O’Connor, has argued that the amount of money spent on judicial elections has called into question the judicial independence of judges (O’Connor 2010). She contends that the increased spending by judicial candidates has caused an erosion of public confidence in the courts. Outside of her concerns that the election of judges reduces the consistency and predictability of the law, she claims that as increasingly large amounts of money enter into judicial elections that judges may be expected by their contributors to make decisions in a certain fashion, thereby eroding the independence of the judges to rule solely based in the law. While these reform groups make claims concerning the nature of judicial selection, many of their hypotheses have been challenged by political science researchers.
Political Science of Judicial Selection

This history of political science literature on judicial selection notably follows the same methodological evolution of political science literature more generally. Before the behavioral revolution which occurred in the 1940s and 1950s, much of the work done by political scientists on judicial selection examined the issue theoretically, supporting their suppositions with anecdotes. Harold Laski is perhaps the earliest commentator from the field of political science on judicial selection.

Laski (1926) wrote in opposition of every method of selection barring executive selection (gubernatorial appointment) supplemented by a nominating commission staffed by judges. While he does not address the Missouri Plan, he claims of judicial elections, “Insofar as its underlying assumption is the belief that the people should choose those by whom they are to be governed, it omits to note the vital fact that the qualifications for judicial office are not such as an undifferentiated public can properly assess” (532). Beyond dismissing the voting public as being unable to determine if a candidate for judgeship is qualified for the position, he also argues that by making judges beholden to an electorate, the institution will cause a train of thought concerning retaining their position which should “be absent from the judicial mind (531).”

Laski also argues that legislative election simply makes the judges dependent on the party in power, thereby reducing the judicial independence of judges. He claims that the selection from a partisan body will devolve into a partisan process, and will not be focused simply on the consideration of the various candidates’ qualifications. Much of

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3 Laski goes so far as to argue that removing the U.S. Senate confirmation of federal judges would lead to a more desirable system.
the early work in political science took a form similar to the advocacy of the reform
groups: scant empirical backing and theoretical normative arguments.

Behavioral work on state courts however was a slow moving process. Following
the behavior revolution most of the research done in judicial politics examined the federal
courts, in particular, the U.S. Supreme Court. The nascent empirical work examining
state courts began to arise in the 1960s. The work in this area has been divided into three
distinct, though interrelated topics: judicial behavior, judicial independence, and voting in
judicial elections.

**Judicial Behavior**

Vines (1965) examined state litigation in civil rights cases from 1954-1963 in
southern states, which used judicial elections as a means to staff the bench. Vines found
that judges were extremely unlikely to rule for the rights claimant, and if the lower court
did find in favor of a rights violation, it was overturned on appeal over 90% of the time.
Vine claims that this could be because the judges were dependent on the voting public for
re-election. He continues by saying that judges who were insulated either by life tenure,
or a means of selection which did not involve elections, may have been more likely to
decide in favor of the civil rights claims. While this work is noteworthy for the time
considering the use of empirical data, Vines could not escape the problem of
observational equivalence, meaning he could not rule out other alternative explanations.

Hall (1987) examined if the institutional arrangements of the various methods of
selection might account for the low rate of dissent in state supreme courts. Her
hypothesis was that judges who serve in states where they must stand for re-election
should be less likely to dissent even when they disagree with the reasoning in the
majority opinion, so as not to be perceived as out of step with the views of their constituency. Examining the Louisiana Supreme Court, she found that liberal justices were extremely unlikely to dissent in salient cases, specifically cases involving the death penalty. In interviews, she found that the judges were appealing to their regional constituencies despite their own moral and legal objections to the death penalty. In this case study, Hall found that these judges were accountable to their districts.

Beginning largely in the 1990s, two researchers, Paul Brace and Melinda Gann Hall, begin to drive the study of state courts of last resort with large N, quantitative studies. These studies examining voting behavior mixed three different types of explanations which had been prevalent in previous work; case-characteristic models, preference models, and neo-institutional models.

In a broader study, quantitatively examining 48 states at three time points, Brace and Hall (1990) found that dissent rates on state supreme courts varied predictably based upon the states' institutional arrangements. In contrast to the findings of Hall (1987), Brace and Hall found that judges in states which utilized appointment methods had significantly more consensus than states which use elections. Brace and Hall explained that the findings of the 1987 piece focused on a highly salient “easy” issue, the death penalty. While highly salient issues may have an interactive effect with electoral systems to produce high levels of consensus across all types of cases, appointment systems are institutionally geared toward decreasing the level of dissent.

Hall (1992) examined more directly the effect of electoral systems on individual justice behavior. Looking at four southern state supreme courts, Hall sought to find out if

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4 Louisiana elects their Supreme Court justices based on regional districts.
justices in the political minority, both on the Court and in the voting public, voted strategically in order to increase their likelihood of re-election. In accordance with her hypothesis, she finds that individuals who are institutionally predisposed to be vulnerable during the election will modify their voting patterns to bring them more in equilibrium with the Court and the views of their constituency. She argues that by engaging in this behavior, the judges are acting in a representative fashion consistent with the desire to maximize accountability in electoral systems.

Three articles from Brace and Hall (1993, 1995, 1997) examined the determinants of vote choice on state courts of last resort. Combining personal attributes as well as institutional and contextual variables, Brace and Hall found that the exercise of personal preference in vote choice is conditioned by the institutional and contextual environment in which the choices are made. As an example, Brace and Hall (1997) found that individuals judges who are predisposed to vote liberally will be much more likely to maintain a conservative voting record if they are in an electoral system with short terms. This however can be mitigated if both the composition of the Court and the political climate of the state are decidedly liberal. Ultimately, Brace and Hall found that it is the institution, combined with the political context of the state, which conditions the decisions of the judge.

**Judicial Independence**

Examining the politics of judicial selection in a state which uses the Missouri Plan Watson, Downing, and Spiegel (1967) looked at the composition, and decisions of nomination committees in Missouri. Despite the claims of reform groups that merit selection plans such as those used in Missouri shield judges from politics, Watson et al.
find that the decisions of the nominating commissions are actually partisan in nature. Two rival organizations which populated these commissions served to represent their constituents and clients instead of simply picking the most qualified candidate.

Studies by Glick and Vines (1969), Canon and Jaros (1970), Ungs and Baas (1972), Cannon (1972), and Wold (1974) examined whether the role perceptions of judges in state courts were affected by their method of selection. Mainly utilizing survey analysis, these researchers came to some general conclusions. Judges who were elected to the bench were more likely to claim they were mere interpreters of the law. Judges who were shielded from elections, or had longer terms of office were more likely to claim themselves to be law makers. While these studies were groundbreaking, they suffered from a distinct lack of control variables, making it difficult to determine if the correlations found were likely to be of a causal nature.

**Voting in Judicial Elections**

Beginning in the late 1970s, political scientists turned their gaze primarily from the characteristics of judges to the methods by which they were selected. Dubios (1979) began to look at the electoral institutions in both partisan and non-partisan elections which selected members of state supreme courts. Looking to answer critics of judicial elections, Dubios examined the relevance of voting cues, namely partisan identification listed on the ballot. He found, as some critics had predicted, that, “Without a party cue, voting decisions are relatively unstructured and, as examples show, often produce idiosyncratic results (757).” In partisan judicial elections however, voters behaved very much they would in other partisan elections. The party cues served to help voters make rational decisions, voting consistently down party lines. While Dubios refused to enter
the normative debate of whether it was better to maximize judicial accountability or judicial independence, he conceded that if one wished to have a system which ensured accountability at the polls, that partisan elections are the effective means by which to accomplish this task.

Dubios (1979b) sought again to test another hypothesis of judicial reformers, namely, that judicial elections suffered from low turnout. Examining all non-Southern states which utilized either partisan, non-partisan, or retention elections from 1948 – 1974, Dubios found that low turnout was not a universal truth of all judicial elections, and states which did have low voter turnout had institutions which increased that probability. Dubios found that factors which depressed turnout in non-judicial elections also produced low turnout in judicial elections. Factors including the timing of judicial elections, partisan labels, and contestation all affect the amount of voter turnout and ballot roll-off. Dubios recognizes that some of these selection systems inherently, as part of their institutional construct, have these deficiencies ingrained. Partisan elections, regardless of scheduling, experience low levels of ballot roll-off. Non-partisan elections have significant scheduling effects, with higher ballot roll-off in presidential election years. Non-partisan elections however suffer because candidates appear on the ballot without a partisan identification, significant increasing their average level of ballot roll-off as compared to partisan elections. Retention elections have the most institutional deficiencies. Retention races, by institutional construction, have no party identification on the ballot, and no contestation. These elections suffer from a significant amount of ballot roll-off, ranging from 25 to 50 points lower than states which use partisan elections. Dubios (1979b) concluded, “The level of voting in state judicial elections is
primarily a function of the institutional arrangements under which they are conducted and does not reflect peculiar voter behavior in ballotings for this particular kind of elective office (886).

Two studies in 1983, both examining non-partisan judicial elections, examined the effects of voting cues on voter behavior. Lovrich and Sheldon (1983) found that voters (and would-be voters) in states which use non-partisan elections lack significant cues in order to make informed decisions. In the absence of voter pamphlets and other means to increase voter knowledge, this leads to lower voter turnout, and for those who choose to vote, voter inconsistency. Dubios (1983), examining non-partisan trial court races in California, found similar affects. He warned that, “At this point, the existing research has demonstrated that not all judicial elections are alike and that the accountability function of elections appears to be better served in some electoral circumstances than others (433).”

Examining the decisions of voters can be difficult. Given the nature of state-by-state variation, it is difficult to statistically examine how the voters of one state will behave under a different method of selection. Klein and Baum (2001) countered this problem by imbedding an experiment into a pre- and post-election survey. By modifying the vignette which participants saw, Klein and Baum were able to assess how voters would behave under varying levels of ballot information. Klein and Baum found that the only relevant information that affected not only the decision to vote, but also vote choice, was the knowledge of the candidates’ partisan identification. Giving the participants additional or other types of information including incumbency or city of location had no discernible effect. Klein and Baum concluded that non-partisan elections, with these
institutional deficiencies built into the system, may not be able to serve the accountability function that is expected from elections.

The research done in political science over the last ten years on state courts of last resort can be grouped together largely by one common thread: testing the hypotheses of judicial reformers, those groups and individuals which seek to end the practice of selecting judges via elections. The work done in this vein can be separated into two areas. One area seeks to test the reformers' hypothesis that judicial elections are low salient affairs that do not serve an accountability function. The second area of research probes many of the claims concerning the nature of increasingly expensive judicial campaigns.

Hall (2001a) addressed two interlinked claims put forth by reform groups. First, she tested the assumption that partisan elections are ill-equipped to serve their accountability function. Second, she examined the assumption that non-partisan and retention elections are in some way shielded from politics. On both accounts, she found the claims of the reformers dubious. Substantively, she found that, to varying degrees, the election outcomes in each of the three methods of selection are a function of political variables.

Hall (2001b) examined a different way in which to measure accountability. She theorized that if judges are strategic, they would prefer to choose the way in which they leave the bench. Under conditions where it appears they would likely lose the next election, they should have an increased likelihood of retiring. Examining partisan, non-partisan, and retention elections, Hall concluded that, “In states that select judges using partisan elections or the Missouri Plan, justices’ decisions of whether to face voters or
relinquish their seats are determined, at least in part, by factors in the external political environment indicative of relative risk (1135)." She argued that the findings of this study showed that reformers may be partially right and partially wrong. If partisan elections were not serving their accountability function, then we would not expect to see strategic retirement. Similarly, if retention elections did shield justices from politics, increasing their judicial independence, we would not see them behaving in this strategic fashion. Reformers may be correct, however, about the nature of non-partisan elections, considering justices did not engage in strategic retirement.

Again, addressing the claims of numerous judicial reformers, Hall and Bonneau (2006) took on interrelated concepts. To begin, Hall and Bonneau claimed that challengers will be more likely to enter the race when the institutional and political environment is tilted toward the probability of an incumbent’s defeat. They found that the same variables which predict challengers in congressional elections (previous close election, an in-term appointment, and divided government) predict the likelihood a challenger will enter the race. In the next stage of the model, they examined what affects the incumbent vote share. The best predictors of the percentage of an incumbent’s vote are a quality challenger, if they were a new appointee, and the spending difference between the candidates. Hall and Bonneau concluded that the claims that judicial elections are not serving their accountability function are incorrect, as these elections behave quite similarly to legislative elections in that candidates behave strategically and the voting public can differentiate between weak and strong candidates.

In a related aspect, Hall (2007) founds that ballot roll-off is conditioned by the method of selection and other environmental factors. The criticisms concerning the
ambivalence of voters concerning judicial elections only applies to non-partisan and retention elections, two of the systems which judicial reformers actually prefer. Similar to what Dubios (1979b) found, Hall argued that the institutional deficiencies of retention and non-partisan elections lead to increased ballot roll-off because the institutions fail to provide the voters with useful heuristic cues.

The second aspect that modern political science research examines concerning state courts of last resort is the effect that money has on judicial elections. Following the claims of numerous judicial reform groups like the Brennan Center for Justice concerning the nature of judicial election expenditure (Brennan Center 2011), numerous political scientists have sought to examine the empirical relationship.

Bonneau (2004) asked a simple question: has the amount of money spent in judicial elections actually increased from 1990 to 2000? Bonneau found that campaign expenditure did actually increase, across both partisan and non-partisan elections. He found that in some states, campaign expenditure has always been high, but all states had seen a relative increase in both campaign expenditure and contested elections. Bonneau (2005) found that campaign expenditures in states correlate with an increase in contested and close elections. While Bonneau does not claim that it is a causal relationship, he finds that campaign expenditure occurred with an increased number of contested and close elections. Similarly, Bonneau (2007) found that the predictors of campaign expenditure in state supreme court elections follow the traditional predictors of spending in legislative elections, namely quality challenger, previous close race, and an incumbent who has not previously stood for election. Hall and Bonneau (2008) found that the increased campaign expenditure does not have negative effects on the accountability
function of state supreme court elections. Higher levels of campaign expenditure resulted in decreased ballot roll-off. Hall and Bonneau concluded, "the fact remains that expensive campaigns serve to encourage participation in elections for the state high court bench once those voters already have gone to the polls to cast ballots for other important elections. In short, money means voters in supreme court elections (468)."

In *Republican Party of Minnesota v. White* (2002), a divided 5-4 U.S. Supreme Court struck down the announce clause, which prevented candidates for judicial office from discussing possible issues that may come before them while in office. Groups like the ABA and the American Judicature Society claimed that this would increase many of the problems already associated with judicial elections. The Brennan Center for Justice claimed, "What is therefore threatened is a comprehensive loss of public faith in the capacity of elected judges to decide upon the most important legal issues of the day in a manner faithful to the adjudicative ideas of fairness and impartiality (2002)." With the publication of *Running for Judges: The Rising Political, Financial, and Legal Stakes of Judicial Elections* more scholarly attention turned to the fallout (or perceived fallout) from the U.S. Supreme Court’s decisions in the case *Republican Party of Minnesota v. White* (2002). Many of the chapters focused on the empirical occurrences following the decisions. A general consensus of the book was that something had changed, be it either the tone of the elections (Caufield 2007), interest group participation (Goldberg 2007), or the amount of campaign spending (Bonneau 2007). All of these scholars however were quick to note that only a small amount of time had passed following the White decisions, and that their conclusions should be understood in that context.
For years following the publication of *Running for Judges*, Bonneau, Hall, and Streb (2011) questioned if any substantive, empirical change had occurred in judicial elections following the *White* decision. They state that their “primary assumption is that if *White* has had the transformative effects generally presumed to have occurred, we should see measurable changes in key characteristics of these races (249).” Using ANOVA, the authors examined five areas (contestation, quality challengers, incumbent vote share, campaign spending, and ballot roll-off) to determine if any statistically significant changes had occurred following the *White* decisions. Bonneau et al. found that there were no statistical differences post-*White*. Despite the claims of many reform and advocacy groups, the decision turned out to be the dog that did not bite.

Over the past 50 years, the empirical work done by political scientists has extensively increased our knowledge of state courts of last resort. Much of the research done during this time period was focused on testing hypotheses which were derived from the normative statements concerning judicial selection mechanisms stated by groups interested in ceasing judicial elections. This research has increased our knowledge significantly. We know a significant amount about how incumbents fare in judicial elections, how voters behave in judicial elections, and how judges’ decisions are influenced by their method of selection, though currently, we know precious little about the determinants of judicial careers. The different types of selection and retention systems serve as important intervening institutions, which may have predictable effects on judicial tenure. It is unlikely that on average judges in partisan electoral systems have similar career lengths to those judges serving in Missouri Plan systems. There are sound theoretical reasons to assume these varying institutions of judicial selection should have
observable effects on the individuals who serve as judges. These institutions are created to distribute risks of removal differently. Said more simply, the methods of selection make it easier or harder to remove judges from their office, and as such, we should expect the careers of judges within these different systems to be affected systematically.

**Plan for this Dissertation**

In the course of this dissertation I will examine three specific claims made by judicial reform groups concerning the effects different methods of selection should have on judicial careers. Using quantitative data on 18 states concerning justice tenure from 1980 to 2005, I will employ an event history approach to examine what affects judicial tenure under a variety of institutional and political stimuli. States were chosen randomly from lists which were separated by type of selection system. I decided to end the analysis in 2005 because of the nature of retention cycles in the various states. Some states retain their justices as often as four years, while others wait as long as twelve. By ending the analysis at 2005, I was able to stop at a point where complete records were available.

In Chapter III I will apply the claims of both the reformers and election advocates to a rational choice model, which takes into account the institutional variations that litter the landscape of state courts of last resort. Those who debate the merits of one type of selection system or another all claim that the specific institution, be it partisan election, non-partisan election, retention election, gubernatorial appointment, or legislative election condition judges' environments and thus behavior. In this chapter I will formulate the theoretical motivation behind each of my empirical chapters. These theoretical models will utilize basic rational choice theory, taking into account the varying institutional arrangements, to determine the goal of the institutional designers,
and ultimately, how justices in those systems should behave. I assume that under each of the conditions examined in following chapters, either the institutional designers or the justices themselves have a goal they are attempting to maximize.

The third chapter will examine if the expectations of the institutional designers directly translate into empirical differences between the tenure rates for each selection system. The primary hypothesis for this chapter states that each method of selection distributes varying amounts of risk, which is directly relatable to varying amounts of independence and accountability. Partisan elections, with normally high contestation rates and partisan identification listed on the ballot should distribute the most risk, and thus be the most accountable. Non-partisan elections, which are similar institutions to partisan elections, except candidates do not appear on the ballot with a party identification, should be the second most accountable. According to judicial reform groups, the third most accountable should be the Missouri Plan, because while they do not have contested elections they still subject the candidate to a yes or no vote by the electorate. The least accountable, according to the judicial reformers, should be the gubernatorial appointments and legislative election, as the judges only must be retained by either selection body.

The fourth chapter examines the relationship between campaign spending and judicial tenure in partisan and non-partisan elections. Reform groups claim that there is an unquestionable link between increased campaign spending and a reduction of judicial independence. The hypothesis for the second empirical chapter comes from these claims. As I argue in Chapter III, judicial independence and accountability can be traced on a linear path: when one increases the other must decrease. If the reformers are correct, and
campaign funding decreases independence, then accountability must increase. If increasingly higher levels of money are being spent in judicial campaigns, thus reducing judicial independence, then these reform groups are also claiming that the judges are more accountable than previously. The relationship being espoused is that the more money spent, the shorter the judicial career. The single hypothesis under examination is thus: the higher the total amount spent by the candidates in judicial elections, the shorter judicial tenure rates will be.

The fifth chapter will attempt to determine whether or not state supreme court justices engage in strategic behavior when leaving the bench. In this chapter the methods of selection will be aggregated into two groups. These two groups will be based upon the strategic ways an individual can leave the bench. Group one consists of judges in systems of gubernatorial appointments, legislative elections, or retention elections. Individuals in these selection systems can only retire strategically by leaving office when the body that chooses their successor is ideologically congruent with themselves. While judicial nominating commissions can play an intervening roll in the process, the final decision remains either in the hands of the governor or legislature. Group two consists of judges in partisan and non-partisan elections. These individuals can only retire strategically by leaving office when a likely electoral defeat is approaching. These individuals should be more likely to retire rather than risk electoral defeat. Hall (2001) found that individuals in partisan and non-partisan elections retire strategically, but that those in retention elections did not. She however assumed that judges in merit systems would retire when they previously had a close retention election. That is, despite the media attention surrounding the retention elections in Iowa in 2010, in which several
justices failed to retain their seats on the bench, the reality is that sitting justices run an extremely low risk of electoral defeat in retention elections (Hall 2001b). Judges know this, and will continue to stay office until they wish to retire. Their likelihood of retirement should increase when the governor is of the same party as the judge.

In the final chapter I will place my findings within the context of the claims made by the reform groups. I plan on showing empirically whether or not the claims made by reformist groups are correct. First, I will discuss whether or not retention elections are accountable institutions. Second, I will examine whether high levels of campaign funding in judicial elections restrict judicial independence. Lastly, I will analyze how judges, regardless of method of selection, engage in strategic behavior with respect to their retirement.
CHAPTER II

METHODOLOGY

The nature of the variation in the methods of selection used to populate the state courts of last resort has led both amateur and academic institutional designers alike to make numerous claims concerning the nature that the institutions may have on justices within them. Individuals on either side of the debate concerning which type of selection system is normatively superior generally agree on one thing: institutions condition individual behavior. The theoretical motivation from this dissertation follows from this assumption. The variation of methods of selection and retention used in the American states should have measurable effects on justices serving in state courts of last resort.

The assumption that formal and informal institutions have the ability to shape individual level behavior arises from the assumption that individuals are rational actors. Rational choice theory articulates a claim that individuals have goals and that these individuals have an inherent rank ordering system for these goals. The pursuit of these goals is accomplished via a cost-benefit analysis through which the individual will not act if the intrinsic and economic value of the goal is less than the cost of the attempt to acquire it (Friedman 1996). Perhaps the best-known example of rational choice theory as applied to political science comes in the form of Down’s (1957) *An Economic Theory of Democracy*.

The theory of neoinstitutionalism builds upon rational choice theory by recognizing that institutions are often interveners in strategic calculations.
Neoinstitutionalism claims that, “political outcomes...result from actors’ seeking to realize their goals, choosing within and possibly shaping a given set of institutional arrangements, and so choosing within a given historical context” (Aldrich 1995, 6: citing Rohde and Shepsle 1978). Indeed, an entire sub-field of political science, Institutional Design, was founded on the premise that carefully designed institutions can increase the likelihood of democratic consolidation (Goodin 1996). While not all institutional analysis follows a quantitative methodology, my research falls firmly within the “first camp” of new institutional research as described by Gillman and Clayton (1999) as I seek a rational choice explanation of individual behavior given the constraints of the institution by examining the available data.

My dissertation takes this institutional approach because I claim that the differing outcomes concerning tenure length of justices is caused in part by the systems their crafters chose. This institutional perspective recognizes that judges will engage in a rational choice, attempting to maximize their goals, within an institutional environment that conditions certain types of behavior. Research demonstrates there are no identifiable differences between justices that serve in systems staffed by elections or appointments (Choi, Gullati, and Posner 2009). The nature of the judicial selection and retention methods in the state vary drastically, allowing us to examine how similar justices will behave under vastly different institutions.

Examining the historical evolution of the method of selections used in the states, we recognize that an important consideration of each institutional innovation was the expected effects they would have upon the individuals serving within them. Following the founding of the nation, the states uniformly chose some form of appointment, either
gubernatorial or legislative, because they thought it would keep judges free from "overt political influence" (Streb 8, 2007). Beginning in the 1830s, and expanding during the era of Jacksonian democracy, states increasingly began to move their judiciaries to partisan elections. Bonneau and Hall (2009) argued this move to elections occurred because of three reasons. First, the with increase of state supreme courts invalidating laws via judicial review, institutional designers wanted to increase the relative accountability of the judiciary, making judges more directly accountable for their decision-making. Second, by removing the means of selection from the political establishment, it was though the judges would be more independent from the legislature, instead gaining their legitimacy from voters. Finally, it was viewed as a better way to remove incompetent judges than was impeachment, which was rarely invoked by legislatures because of the high political costs of such action.

The introduction of judicial elections however, "introduced a whole new set of problems" (Streb 9, 2007). Partisan elections of the time were controlled by party machines and thus, dominated by cronyism. Ultimately, while electing judges garnered them independence from both the governor and legislature, it simply shifted their dependence to another political institution, the party machinery of the era. Two reforms emerged from the Progressive Era as possible solutions to the perceived vulgarities of partisan elections. First, the American Bar Association and the progressives argued for the non-partisan elections. By removing the control of the parties, it was believed that judges in these systems would be more independent from the institutions of government and the party machines. The second reform was sponsored in large part by the American Judicature Society (AJS). The Missouri Plan, also known as merit selection, which
combines retention elections, following nomination by a governor, were seen as a way to maintain judicial independence from the party machinery while keeping public accountability via an uncontested election. The history of judicial selections in the states is based on the recognition by institutional designers that different types of selection methods institutions can, to varying degrees, either increase or decrease both judicial independence and judicial accountability.

Indeed, when the reform group the American Judicature Society currently argues that, "[N]ot only does merit selection ensure that only the most qualified candidates become judges, but it also limits the influence of any one political party or public official. In doing so, it frees judges from overt political influence and promotes a fair and impartial judiciary" (AJS 2010), they are describing a situation in which they expect merit selection to shield the judges from the political consequences of elections. They continue, saying "Furthermore, retention elections provide a mechanism whereby those judges who are failing to live up to their responsibilities to the citizens can be removed from the bench. Unlike popular elections or appointment, merit selection seeks to balance judicial independence (by removing – as much as possible – direct political control over judges) with public accountability (by allowing citizens to decide whether the judge is retained in office)" (AJS 2010), ultimately describing an institutional situation by which the method of selection and retention causes a condition to exist that the AJS seeks to promote, a balance of independence and accountability.

I begin from the theoretical assumption, identical to those institutional designers of judicial selection mechanisms, that certain methods of selection do indeed affect individual behavior. All justices, working within these various institutions, seeking to
gain similar goals, will have their effort channeled and conditioned in different ways dependent upon the method of selection and retention. The three following chapters empirically test claims made by judicial reformers concerning the nature of conditioned behavior within each of these institutions.

**Does Accountability Vary?**

Discussions concerning the implications of which method of selection should be used to populate state courts of last resort generally focus on normative ideals. Central to these discussions concerning the variety of institutions used for judicial selection within the United States comes a concern over whether judges should be, to varying degrees, either accountable or independent (see Bonneau and Hall 2009, AJS 2010). Understandably, this rhetoric delves succinctly into expectations regarding the nature of judges and the judicial enterprise.

Thus, arguments on the subject of various means of judicial selection, as well as those regarding judicial behavior more generally, have a long tradition in the United States. To state there is a controversy regarding methods of judicial selection in the states would downplay the current policy landscape, in terms of both numbers of players and the level of rhetoric. A critical reason for the intensity of this debate is that judicial selection systems play directly into the normative issue of whether judges should be independent or accountable. Hamilton and the founders of the Constitution favored judicial independence, a position more recently and strongly articulated by Justice Sandra Day O’Connor (2010). Yet, accountability via political participation is often claimed to be essential to all democratic institutions (Bonneau and Hall 2009; Hall 2001a). Indeed, there is much at stake when it comes to the method of selection and retention each state
chooses for its judiciary. Consequently, the debate from both sides is heated. While the AJS has recently acknowledged the validity of much of the work done by political scientists (Judicature 2010), the normative debate concerning systems either promoting independence or accountability still remains.

Empirically, there are five types of judicial selection systems used within the United States: partisan elections, non-partisan elections, gubernatorial appointment, legislative appointment, and the Missouri Plan. While some states combine certain methods together (e.g., Pennsylvania uses partisan elections for open seats and then retain their justices via retention elections, which are normally found in states that use the Missouri Plan), these five types are easily identifiable and categorized, as they have institutional differences which exist to levy more or less risk of removal upon the justices.

I assume that the institutional designers of each of the selection systems have as one of their goals to set the amount of risk of removal ingrained in each system. To this end, they choose a system based on how much accountability they desire within the judicial branch, understanding that the less accountable an institution is, the more independent it is.

![Figure 3. Accountability vs. independence.](image)

Figure 3 is a representation of a common way in which reform groups claim to conceptualize accountability and judicial independence in modern politics. This is not to
say that judicial independence and accountability are unidimensional concepts. There are conceptions of both independence and accountability which do not easily fall into the conceptualization. As an example, a judge in a system which has lifetime tenure can still take into account public opinion and be simultaneously less independent and more accountable and yet never encounter an election (Mishler and Sheehan 1996). However, the way in which the reform groups have cast the debate, they make the underlying assumption that more of one begets less of the other. A judge on the left-hand side of the figure would be completely accountable, possibly removable after every decision the court handed down. A judge on the right-hand side would be entirely independent with lifetime tenure and no ability to be removed until retirement or death. Clearly these two extremes do not exist within the American context, either at the state or federal level, but they provide a starting point for discussion.

States deciding on a partisan election system for their judges should recognize they will be choosing a system which generally provides the public with the most information about candidates, whether it be before the election in terms of campaigning (Bonneau and Hall 2009) or at the polls with their party identification listed on the ballot (Klein and Baum 2001). This amounts to an increasing amount of risk of removal for the judges, which increases their relative accountability. States that choose a non-partisan electoral system for their judges choose a similar method to partisan elections, being that both are ultimately the direct expressions of public will. Non-partisan elections are believed to have less inherent risk than partisan elections, because they are generally lower-information, lower-cost affairs (Bonneau and Hall 2009), and the ballot provides little relevant information to the voters (Klein and Baum 2001). Theoretically, this
should make non-partisan systems less accountable than partisan elections. Non-partisan electoral systems, however, do subject the judges to competitive elections, which should make them more accountable than either the Missouri Plan or appointment systems.

The Missouri Plan, according to judicial reform groups such as the American Judicature Society, offers a balance between accountability and independence. In the perfect example of a Missouri Plan system, such as Iowa, a non-partisan judicial nominating committee recommends a list of individuals from which the governor chooses one to nominate. The justice, depending on the laws of the state, serves for a brief period of time ranging from one to three years. Following this period of time the justice must stand for a retention election. The retention election is simply an up or down vote from the public saying either they approve, or disapprove of the justice. It is not a contested election, and as such, generally less salient, with more ballot roll-off (Hall and Aspin 1987) and less information available to the public because of the lack of campaigning on the part of the standing justices (Bonneau and Hall 2009). Designers of this system claim it balances both accountability and independence, and while the system does shield the justices from public accountability at the time of selection, it does subject them to public confidence during retention. As such, the designers expect their system to be less accountable than any system that uses contested elections, but more accountable than appointment systems.

There are two different types of appointment systems, both of which protect their justices equally from the pressure of public sentiment. In gubernatorial appointment
systems, the governor selects from a list approved by a judicial nominating committee and is also responsible for retaining the sitting justices. While the ideology of the governor’s office may change, the governor is still highly likely to retain a previous colleague’s judge, so as to avoid appearing to be playing political games with the judicial branch. In legislative election systems, the legislature chooses one judge from a list of judges determined by either the judicial committee or the legislature as a whole. When judges’ terms are up, the legislature takes an approval vote to determine retention, though as with gubernatorial appointment systems, the majority party has generally been unwilling to remove justices for ideological differences. With both of these appointment systems, the designers shielded the justices almost entirely from electoral politics, by removing not only their nomination but also their retention from the hands of public will. As such, the designers intended to maximize judicial independence over accountability.

Figure 4. Designer’s conception of accountability and independence as applied to methods of selection.

Figure 4 displays the choices the institutional designers made based upon their desire to distribute risk differently to their justices. These designers, attempting to balance their goals of either maximizing independence or accountability, chose one of these various systems precisely for the way in which they would affect the justices.

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5 Though not all states which utilize gubernatorial appointments are legally required to use a nominating commission, they are de facto used in all states.
Based upon their choices, each of these methods of selection should have predictable effects on the justices’ term lengths, stemming directly from the goals of the designers.

Indeed, these assumptions are not merely semantics, but they dovetail with the current public debate going on in numerous states concerning potential changes to their judicial selection mechanism. Debates in states such as South Carolina (Boniti 2011), Nevada (German 2009), Tennessee (Locker 2009), Michigan (Gilber 2010), and Wisconsin (Raftery 2011) are invoking similar language and assumptions when trying to determine which method of selection would be most preferred. These debates however, are not fully articulated, missing important causal variables which may augment their hypotheses’ effects.

Any theory that attempts to explain why different systems have more or less accountability needs to incorporate that risk varies not only across systems, but within systems as well. Systems that subject judges to a selection/retention process which involves the public, either through contested elections or retention elections, need to take into account the effect of the salience of a contest on risk. Partisan and non-partisan elections can either be low- or high-salience affairs. When justices go unchallenged, these elections will be at their lowest salience; indeed, even at less risk than justices in appointment systems. Contested elections, at their minimum, have a challenger, and campaigning is likely to occur. Candidates in these elections would be at more risk of losing than individuals who go unchallenged. These elections then should be higher salience, and as such incumbents will be at a higher risk of departing the bench. Retention elections are never contested, and as such will have lower salience, and thus less risk. The amount of money spent during an election however, modifies the level of
salience, and theoretically, should introduce more risk to the individual election (Bonneau 2007). This occurrence explains retention elections in which an individual justice is removed. Looking at Iowa in 2010, many organizations including the National Organization for Marriage and the American Family Association spent over $3 million to defeat three justices at the polls. This, according to the Brennan Center for Justice, was more than was spent in the previous decade concerning retention elections in Iowa (Sulzberger 2010). This increased the salience, and thus the risk, in the individual election. It is important to note, that this occurrence was a rarity, not only in Iowa, but among all states which use retention elections. Partisan and non-partisan election states often have their justices in contested elections, and these elections are often well funded, providing the public with a significant amount of information, raising the salience of the event.

Appointment systems such as legislative election and gubernatorial appointment systems also fit within this saliency theory. It has become common rhetoric for researchers of judicial selection to state that these systems are less accountable than merit selection (which includes a public statement of will); this does not take into account the individuals who are taking part in the selection or retention. The individuals in charge of the appointment and retention process are political elites, and will be more attuned to the behavior of the Supreme Court as opposed to the regular voting public. This increases accountability, as the individuals who are charged with judicial oversight are those in charge of judicial retention. Indeed, Langer (2002) argued that in appointment systems

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6 Partisan elections generally experience higher amounts of campaign funding than non-partisan elections (Bonneau and Hall 2009).
the body charged with reappointment (governor or legislature) is quite aware of how the justices has ruled on their legislation and policy actions. This makes the selection or retention of a judge always a salient event. However, the elites in these systems generally approve retention, as justices in these systems rarely operate outside of what Langer terms the “safety zone.”\textsuperscript{7} This means most justices in appointment systems will not engage in judicial review or check the legislative output of the current government. Thus, while mitigating their likelihood to remove a judge, the institutional arrangement should be more accountable on average, because the individuals who are empowered with choice are knowledgeable about the judge.

Unlike the theory espoused by reformers, my theory claims that merit systems should be less accountable institutions on average when compared to appointment systems. To be removed from the bench in states which use the merit system, a judge will have to have a highly salient election. Considering the nature of the election, which lacks contestation, this is an extremely unlikely event. Salient retention elections only occur rarely when the public is energized via spending. Selections in appointment systems are always salient, though mitigated by political implications. I hypothesize, as seen in Figure 5, that the selection system of the Missouri Plan will exhibit the least accountability, different from the claims of the judicial reformers. Judicial reform groups such as the AJS and the Institute for the Advancement of the American Legal System (IAALS) maintain that “merit selection” is the best way to select judges. To the IAALS,

\textsuperscript{7} While in recent years, some governors have rattled their swords, only one, Gov. Chris Christie (NJ) has acted upon his threats. In 2010 Christie chose to not retain Justice Roberto Rivera-Soto.
merit selection includes all systems that promote “quality” on the bench, including gubernatorial or legislative appointment, and the Missouri Plan (IAALS 2006).

Figure 5. Theoretical conception of accountability and independence as applied to methods of selection.

Both the AJS and IAALS argue that the Missouri Plan is the most accountable of the three, as it contains a retention election which puts incumbent judges before the populace. This differs significantly from my claim, as I recognize that retention elections are rarely salient events. Retention elections thus, normally feature a non-energized, uninformed populace, who often engage in significant amounts of ballot roll-off, shirking their accountability function (Klein and Baum 2001).

Does Campaign Expenditure Affect Judicial Tenure?

While it is difficult to exactly determine what has changed with regard to judicial elections in the states, it is clear to all observers that judicial elections have transformed in some way. The most frequently cited changes regarding judicial elections in the past twenty years regard the amount of money being spent and the tone. According to Justice at Stake (2010), spending in judicial campaigns more than doubled from the 1990s to the 2000s, topping out at over $205 million. In one notable electoral contest in Wisconsin in 2008, almost $6 million dollars were raised by the incumbent and challenger combined (Kourlis 2009). Most commentators claim that the change in tone coincides with the
change in increased campaign spending. The Defense Research Institute (2001) goes so far as to draw a direct causal link: “The tone, tenor and manner of judicial campaigns have materially changed as special interest money and advertising have flowed into judicial campaigns” (16).

The decreasing amount of judicial independence in state courts of last resort which are selected and retained by judicial elections is one of the clarion calls of judicial reform groups. The Committee for Economic Development (2011), advocates of the Missouri Plan claim,

Where judges hold or retain office by election, the independence of the judiciary is at risk. Elections encourage judges to raise campaign contributions and appeal to voters. They provide special interests with substantial opportunities to politicize judicial decisions and influence judicial behavior. Elected judges find it hard to avoid becoming entangled in the political thicket. Selection by election does not befit the role of a judge in our legal process. (1)

One of the reasons for this perceived reduction in judicial independence is the claim that increased spending can influence an uninformed electorate. These groups argue that with increased money being spent in judicial elections, judicial accountability is being maximized at the cost of judicial independence. The Defense Research Institute (2011) states,

Increased spending and fundraising activities targeting state judicial elections have been working in tandem with heightened voter apathy and a lack of information about judicial candidates. The confluence of these trends means that states that elect their judges are especially vulnerable to the unique ability of political action committees and
ideological groups to influence voters who lack the information necessary to properly evaluate the influx of messages about judges running for election or retention. (15)

Contested elections by their nature put justices within these systems at more risk of not being retained than other methods of judicial selection (Curry and Hurwitz 2010), though it is not mere contestation, which reform groups are claiming is causing a reduction in judicial independence. The argument they are making is that as increasing amounts of money are being spent in judicial campaigns these campaigns are getting closer, and the incumbent judges have an increasing likelihood to be removed from office. Implicitly, these groups are claiming that as campaign spending increases, judges experience a reduction in judicial independence at the cost of judicial accountability at the polls. Figure 6 is the graphical representation of the reformers causal argument.

![Figure 6](image)

_Figure 6._ Reformers’ claims concerning campaign expenditure.

Theoretically, as campaigns get more expensive, according to reform groups, we should notice a marked decrease in the length of judicial careers. Stated differently, more expensive judicial campaigns should cause more overturn in the judicial office. Indeed, according to another advocate for the Missouri Plan, “The increase in money and organized interest, particularly business interest, has paved the way for more contentious judicial elections” (Caufield 2007). The Center for Economic Development echoes this
sentiment, stating, "... transformation has taken place in judicial elections, resulting in
costlier, more competitive, and more controversial campaigns."

It could be that as money flows into these electoral races it increases the inherent
risk of removal that already exists within these methods of selection. Certainly there is
evidence that spending differences between the incumbent and challenger have an effect
on electoral success (Bonneau and Hall 2009). Bonneau and Hall (2009) found that the
differences between incumbent and challenger spending translated directly into
differences in vote shares. However, while Bonneau and Hall’s research focused on
electoral success, my research question looks at judicial careers. By examining the
question of whether campaign spending affects judicial careers over time, I will be able
to address whether higher levels of campaign spending are affecting judicial
independence as argued by the reformers. As such, in Chapter IV I subject these claims
of the reformers to empirical scrutiny to determine if indeed, increasing amounts of
campaign spending have reduced judicial tenure in states with popularly elected justices.

**Strategic Retirements of Elected and Appointed Justices**

The decision to retire from any job usually involves considering numerous factors
for the average individual. Retirement plans, age, and working conditions are all possible
parts of the calculation individuals make when deciding whether to retire. While state
supreme court justices are generally far from the average citizen, it would seem plausible
that they would also consider numerous factors when making their decision to retire.
These decisions to retire, however, are not devoid of institutional context. Given the
nature and variation of the institutions of judicial selection and retention amongst the
states, justices could theoretically be retiring for different reasons and with different motivations.

The various types of methods of selection and retention used in state courts of last resort were created in part to (AJS 2011), and have been shown to (Bonneau and Hall 2008) condition individual behavior, especially with regard to decisions on the merits of cases. I hypothesize that these institutions of selection and retention also condition other types of behavior, including that of retirement.

It seems ubiquitous to say that in political science there is a consensus that judges, especially those in courts of last resort, decide cases at least in part based on their personal preferences (Segal and Spaeth 2002). Justices, however, cannot remain in office forever. The decision to terminate their tenure should likely take into account wishing to see their ideological proclivities remain on the bench after their departure. In the federal judicial system, the method of selection allows for the forward-looking justice or judge to make a calculation concerning the probability of an ideologically congruent successor. The federal method of selection, which consists formally of nomination by the president and confirmation by the Senate, allows those judges seeking to retire the ability to estimate the likelihood that the president in power will choose someone who will decide cases like they had. To state more simply, the ideologically conservative judges know that the likelihood of a conservative replacement significantly decreases when the office of the presidency is occupied by a democrat (Hagle 1993).

While most justices in state courts of last resort do not have effective life tenure, many are selected (and retained) in a way which increases their probability of being able to predict the ideological tendencies of their successor. Justices who serve in systems
which are populated by either gubernatorial appointment or legislative appointment know the ideological composition of the individual or body who will select their replacement. These justices, however, have an intervening step within the process, that of retention. Justices in these states serve for set terms, and must be retained by the same institution that initially selected them.

I argue that retention within these systems does not act as a significant motivator for retirement behavior. Langer (2002) described a situation in which most justices will behave in a manner consistent with what she termed the “safety zone.” While justices are operating within this zone, they have a low (approaching zero) probability of retaliation when seeking retention. Examining the possibility of judicial review, Langer argued that justices in appointment systems have a much smaller safety zone than justices in electoral systems because these justices must take into account that another institution of government, not the electorate, is responsible for their retention. She found evidence that justices in systems that have an appointment mechanism for judicial retention will be less willing to engage in judicial review. Indeed, Langer (2002, 37) claimed, “justices are concerned about retaliation and that each branch of government pays attention to the policy preferences of the other.” Thus, she described an institutional situation where judicial behavior will be affected because of the nature of retention. However, simultaneously, she showed that justices will fear reprisal enough to behave in a fashion that will increase their likelihood of being retained. As such, justices should decide cases in a fashion that is consistent with the wishes of the party in power of the institution responsible for their retention, which will make retention a nominal consideration when deciding when to retire. An incumbent Supreme Court justice, who is a Democrat, would
be much less likely to vote to overturn legislation passed by a Republican state legislature.

Nominating commissions may have an intervening role to play in the selection process in appointment states. Fitzpatrick (2009), expanding on the work of Watson, Downing, and Spiegel (1967) demonstrated that the nominating commissions in Missouri Plan states, were not representative of the population of that state, but instead the bar association of that state. This leads to an ideological majority in these commissions, which as Fitzpatrick demonstrated, has the tendency to nominate individuals who are more ideological (often in a liberal direction) than the electorate. Considering the function of nominating commissions, it is unlikely this will affect the strategic calculations of justices wishing to retire. These commissions in most states submit a list to the governor ranging from three to five individuals from which the governor must choose. The nature of the list allows the governor to choose the individual who is closest to their preference. The choice of the governor will not likely be at their ideal point, as the institution conditions their choices, but if we assume an ideological motivation to the section of judges, the governor will likely choose the most similar. A justice retiring, having knowledge of the selection system intimately will recognize that their chances of being replaced by an individual of close ideological proximity should increase dramatically under an ideologically congruent governor. The same argument can be made for the occurrence of divided government.

The calculations for judges in electoral systems are markedly different from either judges in the federal system or judges in states that use an appointment method. These judges are not responsible for their decisions to another branch of government, but
instead must answer to the public in elections. This institutional difference should modify the strategic decision of when to retire from the bench, as the situation makes it difficult to predict with any certainty the ideological nature of their replacement. The outcomes of judicial elections are dependent on a number of factors, entirely out of the control of the retiring incumbent (Bonneau 2007). Therefore, since the institution of retention in electoral systems removes the possibility of predicting the ideological nature of their replacement, a different strategic calculation must takes its place.

Following the lead of Hall (2001), I hypothesize that since these justices most-preferred preference, which is seeing someone ideologically similar replace them, is prevented by the method of selection and retention, they will attempt to maximize a second preference. Hall (2001) argued that justices in electoral states will have an increasing probability of retirement when they fear a likely electoral defeat. Brace (1985) hypothesized that the cost of running in a political campaign where defeat is probable is less desirable than simply retiring. Losing an election carries a stigma, which further would increase the cost of losing an election. Therefore, justices who fear likely defeat in the next election should be more likely to retire than risk the stigmatization and cost that comes with defeat at the polls.

Electoral systems almost universally however allow governors to fill seats vacated by mid-term retirements. The justices chosen in this way have to stand for election during the next cycle. This means that at most, a retiring justice can guarantee securing a partisan replacement for ten months, though longer if they win election. Given the

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8 There may be a similarity between retiring because of a perceived close election, and thus risking being replaced by a member the opposite party, and retirement in appointment systems where there is a risk the governor will nominate someone of the opposite party. However, the probability of a same party governor nominating a member of the other party is extremely small.
ideological nature of judicial elections, even in non-partisan elections (see Bonneau and Hall 2009), the appointed justice may not be safe. Two states in my sample, Michigan and Oregon, do grant an additional advantage to mid-term appointees. In both Michigan and Ohio, mid-term appointments have some designation listing them on the ballot as the incumbent. Possible incumbency effects will be controlled for within the statistical model.

This two-part theory accounts for justices in both pure appointment systems (gubernatorial and legislative) and electoral systems (partisan, non-partisan, and hybrid). One method of selection remains yet to be placed within this theory, the Missouri Plan. While the governor does initially select the justices, albeit following the work of a nominating commission, the justices must stand for in uncontested retention elections at regular intervals. With aspects of both appointment and electoral systems, the Missouri Plan is markedly different than the other methods of selection and retention9.

Uncontested elections, like those used in the Missouri Plan, generally experience a significant amount of ballot roll-off (Klien and Baum 2001). This is because the nature of non-contested retention elections provides little information to the average voter. Campaigning for these positions occur only extremely rarely and the ballot provides no information to the voter in terms of partisan affiliation. Indeed, the vast majority of justices in Missouri Plan states are comfortably retained. This is to say, the occurrence in Iowa 2010 which saw three justices removed is an anomaly. To put it in perspective, in the entire history of retention elections in Iowa dating back to 1962, not a single justice

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9 Justices can also leave state supreme courts by being appointed to the federal bench. In my data, each selection system saw between 4-5% of their justices appointed to the federal bench. There was no statistically significant difference across selection systems, so departing in this fashion is considered right censored.
had previously failed to be retained. I argue, because of these factors, Missouri Plan justices likely do not find retention elections to be a motivating factor concerning retirement. That is, since it is unlikely a justice will fail to be retained by the electorate, they will make their strategic retirement calculation in an identical fashion to those justices in pure appointment systems. Justices in states which use the Missouri Plan, unmoved by retention elections, will seek to retire strategically when the governor is ideologically compatible with them\textsuperscript{10}.

Therefore, depending on the method of selection and retention, there are two different ways in which justices could retire from the bench strategically. Appointment systems allow justices to predict the likelihood of an ideological successor since they know the partisan proclivities of the body which will nominate the candidate. Strategic retirement in electoral systems should be different. Justices do not have the ability to predict the ideology of their successor with any certainty. Justices in states that use contested elections to staff their high court should be more likely to retire when there is a higher probability of defeat in the next election. I hypothesize that justices regardless of the system of selection and retention have avenues available to them to retire strategically, and it is the institution which will channel this behavior.

**Why Event History?**

Each of the hypotheses under examination in the following chapters asks a question concerning judicial careers. Careers of any type are not time invariant events. To properly consider the nature and determinants of careers, one must take into account

\textsuperscript{10} While a nomination commission is at work in states which use the Missouri Plan, the final choice lies with the governor.
the duration of the occurrence. For example, the decision to retire does not occur at the point someone leaves his or her employment. The decision to retire is continuous, with various inputs that occur over time, leading to an event. Careers are a process, not a culmination of a series of discrete points in time, and the choice of modeling strategy should take this into account.

Event history modeling, also known as duration modeling or survival analysis, is concerned with analyzing the time until an event occurs and what causes variation in that timeline (Box-Steffensmeier and Jones 2004). Much of the origin of this type of statistical model arises from the medical field, where researchers wished to know how long did patients survive on different types of stimuli, usually various drugs (Collett 2003). My explicit interest in each of three empirical chapters which follow concerns the amount of time until an event occurs and the statistical causes of said event. In this way, my research is akin to these medical studies, whereas my patients take the form of state supreme court justices, and my drugs are represented by different control variables. The dependent variable in each of these chapters is the time until the event of interest, be it leaving the bench for any reason (Chapters III and IV) or specifically retirement or losing an election (Chapter V).

In Chapter III I ask whether each of the methods of selection used to populate state courts of last resort distribute a different amount of risk to their justices. This question implicitly evokes an event history framework, given that the very nature of the event history approach assumes that the individuals or cases under observation are at some risk of an event occurring. In Chapter IV, I test the claims of judicial reformers that increasing amounts of campaign spending leads to higher levels of accountability and
thus, shorter judicial careers. My variable of interest, total campaign spending, is equivalent to varying the dosage of a drug given to a set of patients to determine if it has any effect on their lifespan. In Chapter V, I examine whether justices in both appointment and electoral systems strategically retire from the bench. While my variables of interest are different depending on the model being estimated, I am attempting to examine whether justices are more likely to retire under a condition which would be most favorable strategically. The questions I am asking in each of these chapters concern the nature of duration, risk, and removal, and are best answered using a modeling strategy that can incorporate all three. The event history environment is the appropriate context for my analyses.
CHAPTER III

DOES ACCOUNTABILITY VARY? INSTITUTIONAL EFFECTS ON THE CAREERS OF STATE SUPREME COURT JUSTICES

“Judges have considerable discretion and should be held accountable for their choices, at least at the state level where we would expect a close connection between public preferences and public policy” (Bonneau and Hall 2009 p. 2).

“An independent judiciary as provided by the Constitution has assured that the governed as well as the government are bound by the Rule of Law.” (Sandra Day O’Connor 2003)

Introduction

The 2010 Supreme Court retention elections in Iowa were a very clear demonstration of judicial accountability. For the first time since the installation of the Missouri Plan in Iowa in 1962 a justice failed to be retained at the polls. Indeed, three justices; Chief Justice Marsha K. Ternus, Justice Michael J. Streit, and Justice David L. Baker, were removed from office by the voters. An expensive campaign, in large part funded by the National Organization for Marriage and the American Family Association, painted all the justices on the Iowa Supreme Court as liberal extremists out of touch with the citizens of Iowa. Arguing that the justices’ decision in Varnum v. Brien (2009), which overturned a statute banning gay marriage, did not represent the values of Iowa, the campaign urged voters to remove the three justices standing for retention. And the voters listened.
The Missouri Plan, however, as envisioned by its most vocal proponents, the American Judicature Society, is supposed to use retention elections for a reason much like impeachment, not for ideological voting. They claim the Missouri Plan, which incorporates elements of judicial selection taken from both gubernatorial appointment systems and elections, is meant to increase judicial independence while still keeping accountable through regular uncontested retention elections. The Missouri Plan is the most recent development in terms of judicial selection in the states.

While some states in the Eighteenth and Nineteenth centuries followed the federal system of judicial appointment and retention, many others did not. In fact, in the early history of the United States appointment by state legislatures as well as various forms of judicial elections proved to be popular in the states. Then, the early Twentieth century brought with it an increase in the use of judicial elections. Subsequently, judicial reform groups advocated for what they term merit selection as a way to remove politics from the courts. Many states have since agreed, choosing to utilize some form of this selection system to for their judges. The result is great variety in the states today regarding judicial selection.

Thus, there is a long tradition in the U.S. of arguments on the subject of the various means of judicial selection, as well as those concerning the desired nature of judicial behavior more generally. Indeed, to assert there is a controversy regarding methods of judicial selection in the states would downplay the current policy landscape,

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11 While reformers and advocates refer to this as the merit system, it often is also called the Missouri Plan, as that state is credited with being the first to implement this system in 1940. At a minimum this selection mechanism incorporates nomination by commission but usually also includes retention elections. We use the terms merit selection and the Missouri Plan interchangeably.
in terms of both numbers of players and the level of rhetoric. A critical reason for the intensity of this debate is that judicial selection systems play directly into the normative issue of whether judges should be independent or accountable. Yet, accountability via political participation is essential to all democratic institutions, including the judiciary (Bonneau and Hall 2009; Hall 2001a). There is much at stake when it comes to the selection system each state chooses for its judiciary. Consequently, the terms of the debate tend to plunge into a level of hyperbole, often (but not always) with claims made based on a lack of empirical research by either side to support their assertions.

Accountability is one of the key claims made by those in favor of electoral systems. That is, because judges must stand for election, there is a greater likelihood that they will be held answerable for their actions and judgments on the bench. If a judge is making decisions that are out of tune with the prevailing political mainstream within the state, the electoral mechanism provides the public with a means of removal and replacement, thus enhancing judicial accountability (Bonneau and Hall 2009).

On the other hand, proponents of merit-based selection seek to maximize the goal of judicial independence, in order to shield judges from external influences deemed inappropriate when it comes to interpreting the law. These advocates, including Justice O’Connor and the American Judicature Society, among others, favor this selection system, believing that choosing and retaining judges in this manner enables them to make decisions regarding the law that are free from political or electoral constraints, thus augmenting judicial independence.

In addition to electoral and merit systems of selection, governors and legislatures have the power to appoint judges in a number of states. Judicial appointment by these
political elites is often considered similar to merit selection in terms of the purposes behind these selection systems. That is, it is thought that appointive systems tend to promote judicial independence.

As this debate has been constructed, then, conventional wisdom holds that elections promote accountability while appointive and merit systems instead advance independence. However, this notion that differing selection systems produce various levels of accountability has never been directly or systematically tested. The question thus becomes whether the various selection systems in fact have different effects on accountability.

Accountability and independence are multi-faceted concepts. Selection systems that promote accountability can still have individuals remain in office for over twenty years, while selection systems that promote independence can have individuals leave office after a single year. The purpose in this paper is to examine empirically if the various systems of judicial selection have systematic affects on the length of state supreme court justices’ careers. Accordingly, I enter this debate not to take any particular side, but instead to test this particular issue within this controversy: whether different mechanisms of judicial selection produce varying lengths of tenures on state supreme courts. While the analysis does not examine directly the levels of accountability in each of the systems, accountability is clearly impugned. Although accountability is a complex concept, institutional designers (and I) see a direct connection between the amount of risk of removal and accountability. I will examine the likelihood of removal, and by proxy, accountability.
Methods of selection of supreme court justices vary by each state, such that nearly each state’s selection system is unique. Nevertheless, the literature considers five broad, institutional selection mechanisms in the states: partisan elections, non-partisan elections, merit selection, gubernatorial appointment, and legislative appointment (Warrick 1993).

Partisan and non-partisan elections are similar vehicles for selecting judges, in that candidates usually must make it first through a primary election and then win a general election to attain a seat on the bench. The principal difference between these two types of electoral systems concerns the manner the individuals are listed on the ballot, either with or without a partisan label.

The common conception of Missouri Plan has been described as “a process in which a non-partisan or bipartisan commission nominates a few individuals for a judicial position, for appointment (usually) by the executive based on the commission’s recommended names, with subsequent tenure on the bench dependent upon a retention election at specific intervals” (Hurwitz and Lanier 2001, 86, fn. 11). While merit selection thus incorporates elements of both appointive and electoral systems, the vast majority of judges subject to retention elections are in fact retained (Hall 2001b), and thus the defining feature of merit systems is the initial nomination by commission (Hurwitz and Lanier 2001). Nevertheless, advocates of this selection mechanism contend that retention elections are a critical feature as well, in that they allow citizens to determine whether judges continue in office.

In gubernatorial appointment states, judges are chosen by the governor, usually with confirmation by the state senate. This system is thus analogous to judicial selection
in the federal courts (Canon 1972). Finally, legislative appointment occurs in but two states, Virginia and South Carolina, where their respective state legislatures have the authority to choose and retain justices on their supreme court.

These are the five broad categories of selection systems used in the states. In this chapter I am interested in how these several systems of judicial selection distribute risk and thus affect the tenures of state supreme court justices. As Hall (2001a, 1136) asserted in her study on how electoral pressures influence state judges to retire: “This study is only the first that seeks to unravel the fascinating and complicated nexus between democratic processes and career decisions in the states’ highest courts. Countless questions remain [and] further inquiry will be fruitful, especially for examining and perhaps dispelling myths surrounding the politics of institutional design.” In this paper I carry on this line of research by examining the interplay between accountability and judicial selection systems in state courts of last resort. In particular, I explore whether different judicial selection systems produce varying lengths of judicial careers, which theoretically, should vary with different levels of accountability.

Theory

For the purpose of this study, I define accountability as the length of tenure for a justice on a state court of last resort. This definition recognizes that increased risk produces increased accountability (Hall 2001a). That is, a greater risk of losing one’s seat on the bench coincides with an increasing level of accountability. Each type of selection method has as one of its foundations the goal of subjecting justices to varying levels of accountability, which is directly associated with the amount of risk of removal that the individual justice faces. I acknowledge that this is only a proxy measure for
accountability, as there are numerous other facets to accountability in office. However, I am confident in arguing that since subjecting justices to more or less risk was a goal of those of who instituted these different methods of selection within the various states, and since more risk produces more likelihood for accountability, that the concept is measured efficiently. While individuals may vary in terms of their relative accountability within systems, when aggregated, these trends should appear. If we believe that accountability has an effect how tenure length is affected in the aggregate, when these states are analyzed together as systems differences should be apparent.

With this definition of accountability in mind, the theoretical expectations are based in part on an institutional perspective (Aldrich 1995; Brace and Hall 1990; North 1990) and in part on conventional wisdom, both of which interestingly coincide here. Both formal and informal institutions shape behavior in an endogenous setting. From an institutional perspective, the various judicial selection systems should produce variable levels of risk in predictable ways, based on the unique institutional arrangements of each selection system. These various institutions, therefore, should have predictable affects on the tenure length of justices in these different systems.

As well, conventional wisdom plays a role in the rhetoric regarding judicial selection. Thus, there is much discussion, scholarly and otherwise, regarding the perceived benefits of different selection systems based notions of accountability and independence. For instance, both advocates and opponents of judicial elections generally agree that judges who stand for some form of election are more likely to be held accountable than judges in appointive systems. Stated otherwise, because of the
institutional features of elections, judges exposed to elections should be at greater risk of being forced off the bench than their colleagues in appointive systems.

While all the types of judicial elections potentially raise accountability to some degree, the occurrence of risk – and thus the greatest potential for accountability – should be highest in partisan elections. As Hall argued (2007, 1151), “voters vote when they have interest, readily available information, and choice.” Such increased interest and information are likely to be highest in partisan elections, because 1) partisan elections produce the most expensive campaigns, which in turn increases the electorate’s access to information (Bonneau and Hall 2009), and 2) partisan elections have the potential to field high quality challengers, which in turn increases both information and choice (Hall and Bonneau 2006). Furthermore, even if voters do not absorb a sufficient amount of information about the judicial candidates from the campaign, candidates for these offices are listed with their partisan affiliation present on the ballot, a key source of information for many voters (Downs 1957).

Structurally, non-partisan elections are near mimics of their partisan counterparts, save for the fact that the candidates’ partisan affiliation is not listed on the ballot in non-partisan elections. Because there is no partisan cue, and because non-partisan campaigns are less expensive than their partisan counterparts, voters consequently have comparatively less information and interest in non-partisan elections (Bonneau and Hall 2009). Accordingly, due to the nature of competitive elections I hypothesize that non-partisan electoral systems should produce high levels of accountability and thus, shorter

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12 For these reasons, successful challengers in non-partisan elections usually spend quite a bit of money, certainly more than the norm, in order to overcome the information deficit that ordinarily accompanies non-partisan campaigns (Bonneau and Hall 2009).
tenure lengths for these justices comparatively. However, since partisan elections hold relatively more risk, accountability should be somewhat lower in non-partisan elections.

While retention elections are not associated with analogous levels of risk as competitive elections, advocates of the Missouri Plan make clear that retention elections provide voters with the ability to hold judges accountable. Notwithstanding, retention elections are generally low-salience affairs where candidates do not face any challengers and where there is strong evidence of ballot roll-off (Bonneau and Hall 2009). The expectation is that retention elections do produce lower levels of accountability than partisan or non-partisan elections. The reformers claim that this non-contested retention election is the accountability function which both gubernatorial appointments and legislative selection systems lack. Therefore, they see the Missouri Plan as having less accountability than competitive elections, but more than the other appointment selections systems. Retention elections remain, at their core, elections. Consistent with advocates’ claims, retention elections should produce higher levels of risk than appointive systems, which are generally thought to produce judges who are independent, as occurs in the federal system (Hamilton, Federalist. 78). That is, while gubernatorial and legislative appointment systems subject judges to some accountability when their terms come to an end (which distinguishes them somewhat from the federal system), the institutional mechanism of judicial appointment puts judges under less risk than electoral systems, as judges are only accountable to the executives and legislators responsible for

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13 For instance, the American Judicature Society recently countered criticism that voters had no say in the merit system for the Kansas Supreme Court by asserting that the state’s electorate is able to vote in retention elections every six years (Koranda 2010).
their retention. If judges make decisions in line with their fellow political elites in these other branches, rarely should they be at risk of losing their positions.

In sum, the methods of selection and retention used in state supreme courts should affect the tenure of justices in predictable ways, as different institutional arrangements subject the justices to varying levels of risk that should be directly related to accountability. To reiterate the theoretical expectations, partisan elections should produce maximum levels of accountability, as the risk justices assume here is likely to be highest relative to the other selection mechanisms. Justices in partisan electoral systems should, on average, have the shortest tenures in comparison to the other methods of selection. Non-partisan judicial elections should similarly generate high levels of accountability, though perhaps not as much as that found in more salient partisan elections. Justices in these non-partisan elections should experience tenure lengths longer than partisan elections and shorter than retention elections. While I expect retention elections, which by definition are non-competitive, to provide less risk and accordingly less accountability than the competitive electoral systems, I follow the claims of reform groups which state that justices facing retention elections have greater levels of accountability than those confronting gubernatorial or legislative appointment. Stated otherwise, justices in appointive systems will have the most independence, the lowest levels of accountability and, thus, the longest tenure, since they are theoretically prone to less risk than any of the elective systems.

An alternative hypothesis, departing from the claims of the reforms groups can however be constructed. Following the work of Langer (2002), I hypothesize that justices in both gubernatorial and legislative selection systems will exhibit higher levels
of risk than those in Missouri plan systems. Justices within these appointment systems have their retention tied to the partisan interests of one of the two other branches of government. This creates an environment that may indeed be hostile to the interests of the incumbent judge. While Langer acknowledges that justices often behave in a fashion so as to not garner retribution from the appointing institution, these political elites are active observers of the judicial branch, and thus, while they might not be removing justices, their pressure can force justices to retire. For this reason, I specify an alternative hypothesis which claims that I expect to find higher levels of accountability in gubernatorial appointment and legislative selection systems than is found in Missouri Plan systems.

Data and Methods

I collected data on the length of tenure for every individual state supreme court justice who served in one of sixteen states from 1980 to 2005. I categorized each state as employing one of the following selection and retention systems: 1) partisan election, 2) non-partisan election, 3) retention election, or 4) appointment. These sixteen states are selected because they incorporate classic features of the respective selection systems without significant modification. Further, I chose four states from each selection system so that all of the categories would be equally represented. This sample was chosen randomly from a list of each of the states within the category that had pure, unmodified archetypes. While some categories (legislative election and partisan election) had a limited number to choose from the others—gubernatorial, the Missouri Plan, and non-
partisan elections—were randomly sampled. Table 2 provides the states analyzed herein and their respective methods of selection.\(^{14}\)

Table 2

*Descriptive Statistics*

<table>
<thead>
<tr>
<th>States</th>
<th>Method of Selection</th>
<th>Number of Justices</th>
<th>Number of Departures(^{15})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Partisan Election</td>
<td>31</td>
<td>22</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Partisan Election</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>Texas</td>
<td>Partisan Election</td>
<td>44</td>
<td>34</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Partisan Election</td>
<td>19</td>
<td>14</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Non-partisan Election</td>
<td>21</td>
<td>13</td>
</tr>
<tr>
<td>Oregon</td>
<td>Non-partisan Election</td>
<td>24</td>
<td>17</td>
</tr>
<tr>
<td>Washington</td>
<td>Non-partisan Election</td>
<td>29</td>
<td>19</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Non-partisan Election</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>Iowa</td>
<td>Retention election</td>
<td>20</td>
<td>13</td>
</tr>
<tr>
<td>Kansas</td>
<td>Retention Election</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Retention election</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Retention Election</td>
<td>20</td>
<td>13</td>
</tr>
<tr>
<td>Maine</td>
<td>Gubernatorial Appointment</td>
<td>22</td>
<td>16</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Gubernatorial Appointment</td>
<td>19</td>
<td>12</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Legislative Election</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>Virginia</td>
<td>Legislative Election</td>
<td>19</td>
<td>12</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td></td>
<td><strong>351</strong></td>
<td><strong>232</strong></td>
</tr>
</tbody>
</table>

\(^{14}\) According to my coding rules, the Missouri Plan is thus represented by retention elections. I aggregated gubernatorial and legislative appointment into a single "appointment" category, in part because only two states utilize legislative appointment and only a few more employ gubernatorial appointment. Since both gubernatorial and legislative selection methods are appointive in nature, and since I include all selection systems in our study, it made theoretical sense to combine them.

\(^{15}\) A departure occurs when a justice leaves the bench for any reason during the period of analysis from 1980-2005, including retirement, resignation, losing an election, or death.
Table 2 also displays the number of justices and departures for each state in my study from 1980 to 2005. A departure occurs when a justice leaves the bench during the period of analysis for any reason, which might include retirement, resignation, losing an election, or death. I am keenly interested in the departures in this study, since I anticipate that the time a justice leaves the bench is conditioned on her selection system.

Individuals may leave the bench for reasons which are unrelated to the risks levied upon them because of the institution system in which they serve. However, there is no theoretical reason to assume that these departures are not evenly distributed across all the methods of selection. To say more frankly, there is no assumption that a justice in a partisan electoral system will be more likely to experience a death than were she in an appointment system. Examining judge quality, a predictor of nomination to the federal bench, Glick and Emmert (1987) show that there are no statistically significant differences across the selection systems. Looking specifically at my data, 7% of justices in partisan systems are nominated to the federal bench, which is not statistically different (when taking into account sample size) from the 9% in non-partisan, the 8% in appointment systems, and the 4% in Missouri Plan states. There are reasons though to assume that retirements and resignations can be related to the method of selection. Hall (2001) argued that decisions to leave the bench can be motivated by future electoral fortunes and that these may not be distributed evenly across the methods of selection. Indeed, my theory concerning the distribution of risk within each system incorporates such departures into my hypotheses.

Accordingly, the dependent variable is operationalized as the length of time a justice served on the state supreme court, which takes into account when a justice’s
tenure ended. In order to assess the effect of methods of selection upon the duration of the justice’s tenure, I incorporate variables to represent non-partisan elections, retention elections, and appointive systems. In the full model this means that partisan elections serve as the statistical baseline, allowing for direct comparison of the tenure rate for each method of selection. Three dichotomous control variables were included in the full model; gender, minority status (White or non-White), and whether the state imposes a retirement age. The literature is unclear on the effect of gender or minority status on judicial tenure, though we do know that a state’s method of selection has no effect on the likelihood of a woman or minority reaching the high court (Hurwitz and Lanier 2003, 2008). I hypothesize that an individual’s gender or minority status will have no effect on their judicial tenure; though include these variables since the empirical question should be examined. States which impose a retirement age should have shorter judicial tenures than those which do not.

One time-varying covariate (TVC) included in the model, which is the absolute value of the difference between the justices PAJID score and the state’s respective Barry et al. score.\textsuperscript{16} PAJID scores, which measure justice ideology, and the Barry et al. scores, which measure government or electorate ideology, are on a common metric and thus facilitate this variable. While some studies have examined dynamic effects of party or diversity in state courts, it remains to be seen whether these serve as potential influences on judges’ tenures (Brace and Hall 1990; Hurwitz and Lanier 2003). I hypothesize that

\textsuperscript{16} For states which the electorate plays an active role in selecting justices (Partisan, Non-Partisan, Retention), I utilized the citizen ideology scores; in appointive states I used the government ideology scores.
as the distance between the justice’s ideology and the institution responsible for their retention increases, the will be more likely to leave the bench.

Intuitively, this study is akin to a medical experiment where a selection of patients has been given one of four different drugs, and our interest would be in learning how long patients generally survive on each of these drugs and what their risk of death is. In this circumstance, the four different drugs are represented by the various methods of judicial selection analyzed, while the patients’ lives and deaths are depicted by the justices’ tenure lengths. Of course, I am not concerned with the patients’ death; instead, the interest lies in how long the justices served at the time of their exit from the bench based on their particular selection system.

The appropriate statistical method to analyze data of this sort is an event history model, also known as hazard models (Collett 2003). There are a number of hazard models from which to choose, based on the assumptions of the model and the data utilized. The type I opted to employ is a Cox proportional hazard model. I utilized this semi-parametric technique because I have no hypothesis concerning the shape of the duration dependency. Parametric models assume specific distributions when modeling the hazard function. My only assumption is that the hazard rate will be different in predictable ways across the various methods of selection, not that the hazard rate will have a specific distributional form. Thus, the Cox proportional hazard model is most appropriate method for this research (Box-Steffensmeier and Jones 2004; Cox 1972).

Employing event history models to examine temporally-ordered data has a rich history in political science (see Box-Steffensmeier and Jones 2004). In particular, Cox proportional hazard models (hereafter, “hazard models” or “Cox models”) have been
applied in research on judicial politics. For instance, Shipan and Shannon (2003) used a hazard model to examine the duration of Supreme Court nominations and confirmation, while Langer et al. (2003) applied this model to analyze how associate justices on state supreme courts selected their chief justices. From a methodological perspective this research is analogous to these studies, as I examine the duration of tenure of state supreme court justices.17

When dealing with duration models with data of this sort, issues of left truncation and right censoring become apparent. Left truncation occurs when an individual in the dataset joined the risk pool prior to the first observation. In our study, this means a justice was selected for a judicial position at some point before 1980, when I begin the analysis. These individuals do not enter at t=0, because it is known from the data we collected when their tenure first began as a Supreme Court justice. Thus, a justice may have been unobserved by this study for 8 years, but when she enters our risk pool I code the data as if she began her tenure at t=9. On the other hand, right censoring occurs when a justice continues to serve after the end of observation period in 2005. In event history analysis employing Cox models, neither of these circumstances is problematic, because we are interested in the occurrence and non-occurrence of an event, in this case departures, during the period of analysis. That is, individuals who are coded as left truncated in the data contribute information to the model at the point they become observed, while right censored data contribute information to the model until they are no longer observed (Box-Steffensmeier and Jones 2004).

17 Other examples of studies in judicial politics using event history models that are not Cox proportional hazard models include Patton (2007) and Savchak et al. (2006).
In order to identify a Cox hazard model, the analyst must first assess the proportionality of hazard rates across different values of the independent variables. “The Cox Model assumes that the hazard function of any two individuals with different values on one or more covariates differ only by a factor or proportionality” (Box-Steffensmeier and Zorn 2001, 974). If this assumption does not hold true, the estimates of all the covariates in the model could be biased, not just the offending variables. Following the lead of Box-Steffensmeier and Zorn, I examined the assumption of proportionality by testing the scaled Schoenfeld residuals, and found no evidence of non-proportionality. Furthermore, because of the nature of the analysis, it is appropriate to cluster the standard errors from the model to get more accurate estimates of the empirical reality. In this chapter, the variation within each state may systematically affect the duration, as such; the standard errors are clustered on the state. I now examine the Cox models in order to analyze accountability across selection systems.

Results

Figure 7 illustrates mean judicial tenures as a function of selection system. This figure shows that accountability across the methods of selection varies. In particular, justices in partisan electoral systems have the shortest tenures on average, while justices in merit-based systems (via retention elections) serve for the longest period of time. This lends initial support for the hypotheses, as partisan elections followed by non-partisan elections apparently provide for the most accountability among selection systems as evidenced by departure rates. This figure also suggests that retention elections, and not appointments, descriptively produce the least amount of accountability. In fact, a justice
within a partisan election system can expect her tenure on the court to be about 25% shorter than a justice serving in a state that uses retention elections.

The first step in testing these hypotheses is to examine whether the survivor functions of the four methods of selection are equal. Collett (2003) demonstrated that the log-rank test provides for such a test by pitting the hypotheses against the null hypothesis that there is no difference between the survivor functions of the four selection systems.

**Mean Tenure by Selection Method**

<table>
<thead>
<tr>
<th>Selection Method</th>
<th>Mean Tenure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partisan</td>
<td>8.3436</td>
</tr>
<tr>
<td>Non-Partisan</td>
<td>8.65085</td>
</tr>
<tr>
<td>Appointment</td>
<td>9.31933</td>
</tr>
<tr>
<td>Retention</td>
<td>11.2782</td>
</tr>
</tbody>
</table>

*Figure 7. Mean judicial tenure as a condition of selection system.*

The log-rank test in Table 3 shows that the survivor functions of the four methods of selections are clearly discrete. The Kaplan-Meier survivor function is a similar test that can be assessed graphically (Box-Steffensmeier and Jones 2004), as shown in Figure 8. While the survivor functions overlap briefly, they demonstrate that the four methods
of selection are largely distinct. Moreover, once again I find that retention elections have
the smallest amount of risk, as evidenced by the Kaplan-Meier Survivor function that
decreases the slowest (signifying the longest tenure) for this selection system. Therefore,
I can reject the null hypothesis of equal accountability across the selection systems;
survivor functions for each selection method are different. Thus, it is appropriate to
move on to the next step in the analysis.

Table 3

*Log-Rank Test for Equality in the Survivor Function*

<table>
<thead>
<tr>
<th>Selection method</th>
<th>Departures Observed</th>
<th>Departures Expected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partisan</td>
<td>81</td>
<td>54.31</td>
</tr>
<tr>
<td>Non-Partisan</td>
<td>60</td>
<td>58.29</td>
</tr>
<tr>
<td>Appointment</td>
<td>46</td>
<td>51.19</td>
</tr>
<tr>
<td>Retention</td>
<td>45</td>
<td>68.20</td>
</tr>
</tbody>
</table>

Null hypothesis: equal failures expected.
Chi2(3) = 23.77
Pr>Chi2 = 0.00

While the log-rank test and Kaplan-Meier function provides some information on
the duration of the data, neither allows for direct comparisons of change in the hazard rate
across the methods of selection. I accordingly use the Cox model, which specifically
provides for direct comparisons in rates of change across time within the model. In
particular, the hazard model allows us to “determine if a variable increases duration by
looking at its effect on the baseline hazard rate” (Shipan and Shannon 2003, 662). A
variable with a negative coefficient signifies that it decreases the hazard rate, while a
positive coefficient connotes that the variable increases the hazard rate. Stated somewhat
differently, a negative coefficient indicates there is a decreasing likelihood of a justice
leaving the bench when compared to the baseline hazard, while a positive coefficient means that there is an increasing likelihood the justice will leave the bench compared to the baseline hazard rate. With the TVC, ideological distance, a positive coefficient means as the size of the distance increases, the likelihood of the justice leaving the bench increases.

![Kaplan-Meier Survival Estimates](image)

**Figure 8.** Kaplan-Meier Test of Survivor Function estimates.

Table 4 displays the results of the Cox model. Two of the substantive variables, appointment systems and retention elections, obtain statistical significance within the model and are negatively signed. Two of the control variables, ideological distance and minority status, are statistically significant and positively signed. This means that both of these variables serve to increase the hazard rate.
Substantively, this signifies that when compared to the baseline hazard rate of partisan elections, appointive systems and retention elections experience longer careers; that is, both systems elicit a decrease in the hazard rate, which corresponds directly to a decrease in the level of distributed risks. The model shows that while partisan and non-partisan elections are not statistically different in terms of their level of accountability, both appointment systems and retention elections distribute a significantly lower amount of risk to their justices.

Table 4

*Cox Proportional Hazard Model of the Duration of Judicial Tenure, by Selection System*

<table>
<thead>
<tr>
<th>Variable</th>
<th>Estimate (s.e)</th>
<th>Change in Hazard Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Partisan Election</td>
<td>-.326 (.251)</td>
<td>-28%</td>
</tr>
<tr>
<td>Appointment</td>
<td>-.614 (.311)*</td>
<td>-46%</td>
</tr>
<tr>
<td>Retention Election</td>
<td>-.985 (.268)*</td>
<td>-63%</td>
</tr>
<tr>
<td>Retirement Age</td>
<td>-.120 (.171)</td>
<td>-11%</td>
</tr>
<tr>
<td>Gender</td>
<td>-.296 (.182)</td>
<td>-26%</td>
</tr>
<tr>
<td>Minority</td>
<td>.612 (.165)*</td>
<td>84%</td>
</tr>
<tr>
<td>Ideological Distance</td>
<td>.001 (.000)*</td>
<td>1.1%</td>
</tr>
</tbody>
</table>

Log Likelihood = -1106.136
LR Chi2 = 31.71
Prob>Chi2 = 0.00
N=3213
Scaled Schonfeld residual global test p>chi2 = 0.12

The hazard models provide additional information, as I can use the statistics from the model to rank the order of the different selection mechanisms in terms of the amount of risk, and thus accountability, they produce. In particular, the last column of Table 4

18 This statistic was calculated with the ideological distance variable at its mean, and with a one standard deviation change.
depicts the relative change in the baseline hazard rate for each variable. The interpretation of this statistic is intuitive, in that a positive percentage signifies that, when compared to justices who stand for partisan elections, justices in states with that specific selection method are more likely to leave the bench, while a negative outcome indicates they are less likely to leave the bench relative to partisan elections. Accordingly, I find that justices in non-partisan election systems are 28% less likely to leave the bench than justices in partisan systems, while justices in appointive systems are 46% less likely to depart than partisan election justices. Finally, justices subject to retention elections are 63% less likely to exit the bench than justices subject to partisan elections. Apparently, retention elections do not behave like their more competitive counterparts, as justices in retention election systems are less than half as likely to relinquish the bench for any reason compared to partisan justices.

Finally, Figure 9 plots the hazard rates for all of the methods of selection against each other, as this figure provides graphical comparison of the length of careers produced by these selection systems. To reiterate, the higher the hazard rate the more at risk justices are of leaving the bench, as that selection system thus produces greater levels of risk; conversely, the lower the hazard rate the more insulated from risk are justices from that system. The selection system with the highest hazard rate, and thus the shortest judicial tenure, is partisan elections, and no other selection system has a hazard rate that is relatively close. This provides additional evidence that judges subject to partisan elections are most at risk of exiting the bench, as this is likely the most accountable selection system.
The second highest hazard rate belongs to non-partisan elections, followed relatively closely by that for appointive systems. Since the hazard rates for non-partisan and appointive systems are relatively close, these selection systems behave similarly, though justices in non-partisan elections have somewhat shorter careers than justices in appointive systems. Lastly, the selection system with the lowest hazard rate by far, and thus the system with the least amount of risk, is retention elections. In fact, partisan election justices have a higher risk of leaving the bench in their fifth year in office than retention election justices have in their 25th year on the bench. Clearly, the risk of departing the bench is far lower for justices in retention elections than for justices in any of the other selection systems.

\[ \text{Baseline Hazard Rate for Judicial Selection Methods} \]

\[ \begin{align*}
\text{Smoothed hazard function} & \quad 0 \quad 0.05 \quad 0.1 \quad 0.15 \\
\text{Years} & \quad 0 \quad 10 \quad 20 \quad 30 \quad 40
\end{align*} \]

\[ \begin{align*}
\text{Partisan} & \quad \text{Non-Partisan} \\
\text{Appointment} & \quad \text{Retention}
\end{align*} \]

*Figure 9.* Cox Proportional Hazard rates of the duration of judicial tenure, by selection system.
Conclusion

The findings from the hazard models largely support my theoretical expectations on varying levels of risk. Similarly, the results are chiefly, but not entirely, consistent with conventional wisdom in this regard. It is expected that partisan and non-partisan elections should be the two methods of selection that distributed the most risk to their justices, with partisan elections at the top, and that is precisely what I found. Justices in partisan elections have the shortest tenures and the greatest departure rates – that is, they leave the bench more often and earlier than justices from states with different selection methods. Clearly, this research shows the selection method that holds the greatest amount of accountability is partisan elections.

While non-partisan elections produce significantly more risk than either retention elections or appointment, they are not quite as effective in this regard as partisan elections. Nevertheless, the results demonstrate that competitive elections, whether partisan or non-partisan, are the most accountable institutions when it comes to judicial selection in state supreme courts.

My theory, which relied in part on conventional wisdom, also claimed that retention elections should produce less risk than their electoral counterparts, since retention elections are non-competitive by design. Here again the results comport with expectations. However, following the reform groups, it was expected that retention elections would be more accountable institutions than appointment systems. After all, retention elections are still elections; as well, there is anecdotal reasoning that appointments are designed to produce independent but not necessarily accountable judges (see, e.g., Federalist 78). On this point my alternative hypothesis, not that of the
reformers, is supported. Justices in appointment systems turned out to have shorter judicial careers than those judges in merit systems. Thus, my hypothesized rank order of selection systems by risk is correct.

In the states examined that employ retention elections, only one justice was removed by the voters in 122 retention elections over 25 years of our analysis (1980-2005); and, the average tenure rate was significantly longer with retention elections than with other methods of selection. The American Judicature Society (2010) claims the institution of retention election “provides an opportunity to remove from office those who do not fulfill their judicial responsibilities.” Opportunity, however, is not necessarily the equivalent of action. These findings evince that retention elections produce very little risk to the justices who are subject to run in them. Thus, if judicial accountability is the primary goal with respect to state courts of last resort, our findings suggest that merit systems with retention elections are not a wise choice. However, if judicial independence is the overriding objective, then retention elections provide the best mechanism for maximizing this goal. While these findings and conclusions are somewhat consistent with those of other scholars, particularly Bonneau and Hall (2009) and Hall (2001a), this research adds nuance to the literature on judicial selection in the states in that no other study has incorporated a research design such as this. Indeed, hazard models proved well-suited to analyzing the varying levels of accountability among state courts.19

19 In a recent paper, Reddick and Caufield (2010) of the American Judicature Society claimed that merit selection systems produce higher-quality judges than judicial elections. In support they showed how judges in merit systems are disciplined for ethical violations less often than elected judges, and that when judges are disciplined the sanctions—including removal from the bench—are more severe in merit systems. Our study does not specifically address the issues they raised. However, our findings do show that judges in states with partisan and non-partisan elections are much more likely to depart the bench for any reason than judges subject to the Missouri Plan.
The purpose in this paper was not to take sides in the current debate on what is the best or most appropriate judicial selection system. Instead, my aim was to assess assumptions on both sides of the debate regarding risk and accountability by subjecting those assumptions to rigorous empirical testing. In that endeavor, I feel I have been successful. Perhaps the most interesting finding of this study is that retention elections produce far less accountability than previously had been assumed. The belief that retention elections produce levels of accountability similar to other electoral systems is simply not borne out by the data and empirical tests. In fact, I do not think I am overstating the case by saying that the belief that retention elections provide even a modicum of accountability is simply a stylized fiction. The occurrence in Iowa thus should be recognized for what it is: a notable outlier.

The title of this chapter asks, “does accountability vary?” The findings support an answer to this question in the affirmative. While it has been assumed that that methods of selection could be rank-ordered by level of accountability, this hazard models proved very capable in doing so empirically by examining the tenure of judicial careers. Thus, in this paper I have followed Hall’s (2001a) plea for further research by examining the nexus of democratic processes and institutional design regarding selection in state courts of last resort. There remains much to study with respect to this heated debate, and I hope that scholars continue rigorous empirical testing of the effects of the various judicial selection methods in the states.
REFERENCES


CHAPTER IV

MONEY AND ELECTIONS: DOES CAMPAIGN EXPENDITURE AFFECT JUDICIAL TENURE?

Introduction

There is little doubt that in the past ten years profound changes have occurred regarding the funding of judicial elections. According to Justice at Stake, campaign spending has more than doubled in judicial elections from the 1990s to the 2000s, rising from $83.3 million to $206.9 million (Justiceatstake.org 2010). According to many reports, the tone of judicial elections has changed as well. Judicial elections historically had been low salience affairs, marked with little money spent by the candidates and advertising that was generally demure (Streb 2007). One commentator has famously noted that “new” style judicial elections are, “noisier, nastier, and costlier” (Schotland 1985, 76). These claims are generally followed by the additional argument that judicial independence is being eroded at the cost of public accountability at the polls (see O’Connor 2010).

Judicial elections have been the ongoing target of advocacy groups who seek to end this method of selecting judges. Groups such as the American Judicature Society, the Brennan Center for Justice, Justice at Stake, and the American Bar Association have come out actively as opponents to judicial elections. These groups make numerous claims concerning the deleterious effects that increased campaign spending has on the judiciary. Amongst their claims, they argue that the increased money spent in elections
has lowered the legitimacy of the judiciary in the eyes of the public. In the “New Politics of Judicial Elections 2000-2009,” released by the Brennan Center for Justice, the authors claim that “More than seven in ten Americans believe that campaign contributions affect the outcome of courtroom decisions” (4, but see Gibson et al. 2011). One of the most vocal opponents of judicial elections, ex-Supreme Court Justice Sandra Day O’Connor, has argued that the amount of money spent on judicial elections has called into question the judicial independence of judges (O’Connor 2010). She contended that the increased spending by judicial candidates has caused an erosion of public confidence in the courts. Outside of her concerns that the election of judges reduces the consistency and predictability of the law, she claims that as increasingly large amounts of money enter into judicial elections the judges may be expected by their contributors to make decisions in a certain fashion, thereby eroding the independence of the judges to rule solely based in the law.

While the opponents of judicial elections are concerned with the effects of campaign funding on public confidence and judicial independence, they seem little concerned with how this increased money might affect the careers of their justices. Political scientists know much about the effect of campaign spending in congressional elections (Jacobson 2006), but we still know precious little about its effect on the dynamics and length of judicial careers. Recognizing there are significant differences between judicial elections (both partisan and non-partisan) and U.S. House elections, there are some findings from the congressional literature which may be relevant to this enterprise, because at their root both electoral institutions are still expressions of the democratic will of the people. Just as a representative’s constituency can remove him
when failing to meet expectations, so can judges be removed when their decisions fall outside of regional public sentiment and local moral convictions (Hall 2009).

First, Abramowitz’s (1991) finding that as costs of campaigning rise, incumbents are better positioned to raise more money than challengers, is likely. Second, it is probable that spending by challengers has a larger effect on the outcome of an election than spending by incumbents (Jacobson 1990). Finally, the ability to raise a significant amount of money as an incumbent could lead to less quality (if any) challengers (Epstein and Zemsky 1995).

Bonneau and Hall (2009), in one of the few pieces than examine the effect of campaign spending on judicial elections (though not judicial tenure), found that money plays a significant role in determining the outcome of election, but that this arises from the monetary difference between spending of incumbents and challengers. They claim incumbents raise and spend more money than challengers, and thus, are better able to educate the public. However, their analysis looks at elections as one-shot games without taking into account the individuals’ judicial careers over the long term.

In order to completely assess the effect of campaign spending on judicial tenure, judicial elections cannot be examined as simply one-shot games; instead, they should be analyzed as a series of repeated events. These repeating events, the elections, are markers we can use to examine the span and determinants of a judge’s judicial career. By taking into account the temporal aspect of judicial careers, we will be able to assess more accurately if campaign spending has an effect on judicial tenure, and if so, what effect it has.
Judicial Elections and Judicial Tenure

Historically, there has not been much work done on the contours of judicial tenure at the state level. Curry and Hurwitz (2010) compared the relative tenure rates of Supreme Court justices in sixteen different states from 1980-2005. They found that when compared to states that use gubernatorial appointment, legislative election, or retention elections, contested elections, whether they are partisan or non-partisan, have on average significantly shorter tenure rates for their judges. Curry and Hurwitz attributed this finding to the fact that the other methods of selection insulate the members of their judiciaries from contested elections by providing other means for their retention or removal20.

It is likely that candidates in partisan and non-partisan elections are under different pressures and have different internal determinants of judicial tenure than do those justices who are chosen by other less competitive means. These judges must face challengers, appeal to their constituents, and raise money with which to campaign. These are unique circumstances that judges in other selection systems do not face. Judges in gubernatorial nomination and legislative elections states do not need to raise funds for their re-election, nor do they actively need to face challengers. These competitive elections are different from retention elections where judges are subjected to an up-or-down vote from the electorate. These contests are usually low salience, low knowledge affairs, in part because candidates for retention very rarely spend money for their “re-election.” It is only within partisan and non-partisan elections where we find contestation

20 While retention elections are a form of election, they are not contested elections and thus the individuals who serve in these systems are at less risk of removal.
and significant sums of money being spent. It is these two conditions that greatly increase the risk of removal for these judges and place them on different institutional footing than their counterparts chosen by other methods of selection. Just as North (1990) claimed that institutions can channel individuals’ actions, so do these institutions of judicial selection influence judges’ behavior by distributing greater risk.

Taking a closer examination at the life cycle of justices in partisan and non-partisan electoral systems will allow us not only to better assess the determinants of judicial tenure, but will allow us to more completely understand the effect of increased money being spent in judicial elections. While many outlets have examined the increasing amount of money spent in judicial elections (Bonneau 2007, Justiceatstake.org 2010), no research has examined systematically and empirically whether the rise in campaign spending has influenced the average judicial tenure.

Much of the reporting and scholarship that examines the increasing amount of money being spent in judicial contests across the country have focused either on the amount, the relative increase, the effect on public perception of the judiciary, and the sources from which this money is coming. While all of these topics present timely and important questions, it seems that researchers should also be examining other effects on the individuals making decisions within these systems. While some research has examined whether campaign donations affect a lawyer’s likelihood of winning before a court (Cann 2002; 2007), no scholar has examined if campaign spending affects a judge’s likelihood of leaving the court.

Scientifically, we know much about just one side of the coin without having flipped it over. To understand the effect money may have on the judicial system we need
to know not only its influence on the dispositional outcome of the cases, but also how it affects the judge’s careers.

**Theory**

Judicial accountability and judicial independence are unquestionably linked not only theoretically, but also in the minds of individuals on both sides of the judicial selection debate. Alexander Hamilton (*Federalist 78*, 398-399) argued that in order to avoid “arbitrary discretion in the courts” there must be “permanency of the judicial offices.” Hamilton continued in *Federalist 78*: “temporary duration in office . . . would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity” (at 399). During the Jacksonian Era, the push for popular elections for state supreme court judges took hold in a time where public concern with cronyism was at its highest. It was thought that by putting judges under popular control, that the judges would actually be more independent because they would not be beholden to the party machines for their positions. It was also thought that by increasing the accountability of judges through elections they would have less ability to make decisions out of the current popular dynamic of public sentiment (Streb 2009).

When reformers speak of ceasing the use of elections to choose justices, they claim they want to increase judicial independence. When former Supreme Court Justice Sandra Day O’Connor argued, “In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the Constitution” (Justiceatstake.org, 4), she was describing the potential for judicial independence eroding as a result of political accountability at the polls. Theoretically, the reformers are claiming that judicial independence and political
accountability can be traced on a linear path. As such, the more accountable an institution, the individuals in it are less likely to make independent decisions. Indeed, Hall argued that, “accountability can be seen as an electoral competition, produced by the willingness of challengers to enter the electoral arena and the propensity of the electorate not to give their full support to incumbents (Hall 2009, 166).”

Figure 10 is a representation of one of the popular ways in which to conceptualize accountability and judicial independence in modern politics. This is not to say that judicial independence and accountability are unidimensional concepts. There are conceptions of both independence and accountability which fit easily into the conceptualization. As an example, a judge in a system which has lifetime tenure can still take into account public opinion and be simultaneously less independent and more accountable and yet never encounter an election (see Mishler and Sheehan 1996).

However, the way in which the reform groups have cast the debate, they make the underlying assumption that more of one begets less of the other. A judge on the left hand side of the figure would be completely accountable, possibly removable after every decision the court handed down. A judge on the right hand side would be entirely independent with lifetime tenure and no ability to be removed until retirement or death. Clearly these two extremes do not exist within the American context, either at the state or federal level, but they provide a starting point for discussion.

It seems an undisputed claim that among the methods of selection used by the states that partisan and non-partisan elections are the most accountable because each of the judges must stand for elections which can be contested.
Indeed, Curry and Hurwitz (2010) show that judges who serve in states with either partisan or non-partisan elections have significantly shorter judicial tenure when compared to the other methods of selection.

Dating back to the early 1960s, it has been an empirical reality that incumbents in Congress are better known and have higher name recognition with voters (Stokes and Miller 1962). This incumbency advantage in Congress has been attributed to numerous institutional advantages, but also the ease by which incumbents can raise money as compared to their challengers (Abramowitz 1991). This allows incumbents to better educate the public to their stances, but also increase their already-high name recognition. When the total campaign expenditure begins to increase, it is generally on the basis of more money being spent by the challenger which must then be responded to by the incumbent. Challenger spending is considered to be more effective than incumbent spending, as challengers are raising their name recognition and policy positions from a low bar while incumbents trying to increase their name recognition from a much higher starting point (Jacobson 1990). As such, when total spending in a campaign increases, there is generally increased challenger spending. This theoretically, could put incumbents in a more vulnerable position.

Reformers claim that with the increasing amount of money spent on judicial elections in recent years, the judges in these systems are less independent than they once...
were. This does not acknowledge the fact that judicial elections have always been costly, but it does acknowledge that more judicial races are becoming expensive, more competitive, and more salient. DRI, an association of defense attorneys, stated in publication:

Increased spending and fundraising activities targeting state judicial elections have been working in tandem with heightened voter apathy and a lack of information about judicial candidates. The confluence of these trends means that states that elect their judges are especially vulnerable to the unique ability of political action committees and ideological groups to influence voters who lack the information necessary to properly evaluate and filter the influx of messages about judges running for election or retention. (DRI 2011, 15)

Reform groups, like DRI, are making the argument that it is not merely the contestation in judicial elections which is eroding judicial independence, but the unique occurrence of voting apathy coupled with significant amounts of campaign spending, which increases the likelihood of individuals being removed from office. The claim simply, is that campaign spending has a direct effect on individuals remaining in the judicial office.

When discussing the perceived independence of judges in these systems we encounter one of two possible responses: hyperbole or descriptive statistics. While descriptive statistics have value, they cannot show a causal relationship between an occurrence and an outcome. Referencing Figure 11, it would seem that the reformers are saying that these judges, by the corollary, are also more accountable than they were previously, or at the very least, at a higher risk of removal.
If increasingly higher levels of money are being spent in judicial campaigns, and thereby reducing judicial independence, then reform groups are claiming, simultaneously, that judges are becoming more accountable. The relationship being espoused is that the more money is spent, the shorter the judicial career. The single hypothesis under examination is thus: The higher the total amount spent by the candidates in judicial elections, the shorter judicial tenure rates will be.

**Data and Methods**

The data for this analysis contains information on the length of tenure for every individual state supreme court justice who served in one of eight states from 1990-2005. They are categorized as either having served in systems with partisan or non-partisan elections. These eight states were chosen randomly from a list of states that have pure forms of these electoral types. Four from each system were selected so that each method would be equally represented in the sample. Table 5 lists the states and their methods of selection.

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21 While retention elections are at their core elections, they are not included because the question under examination in the paper concerns the effect of money on judicial tenure. Retention elections, generally being low salience affairs, experience very little, if any, campaign spending in the time period examined.

22 States which have modified systems were not included (e.g., Michigan has parties nominate individuals but have candidates appear without a party ID on the ballot in the general election).
Table 5

Descriptive Statistics

<table>
<thead>
<tr>
<th>States</th>
<th>Method of Selection</th>
<th>Number of Justices</th>
<th>Number of Departures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Partisan Election</td>
<td>23</td>
<td>14</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Partisan Election</td>
<td>12</td>
<td>6</td>
</tr>
<tr>
<td>Texas</td>
<td>Partisan Election</td>
<td>25</td>
<td>17</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Partisan Election</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Non-partisan Election</td>
<td>11</td>
<td>5</td>
</tr>
<tr>
<td>Oregon</td>
<td>Non-partisan Election</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>Washington</td>
<td>Non-partisan Election</td>
<td>16</td>
<td>8</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Non-partisan Election</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td></td>
<td><strong>126</strong></td>
<td><strong>66</strong></td>
</tr>
</tbody>
</table>

Table 5 also displays the number of justices and departures during the period of the analysis for each of the states. A departure occurs when a justice leaves the bench during the period of analysis for any reason, which might include retirement, resignation, losing an election, or death. I am distinctly interested in departures in this study, no matter the type, as I believe that when a justice leaves the bench is influenced by the amount of campaign spending that occurs during her tenure. I acknowledge that an individual leaving the bench due to death is likely unrelated to the level of spending; however, there is no theoretical reason to assume that these departures are not randomly distributed. To state more simply, I do not believe that individual judges who experienced highly expensive campaigns are more likely to die than those who did not.
However, there are reasons to assume that retirement could be related to the amount of money spent during the elections. Individuals who experience highly expensive campaigns and are burdened with the need to raise large sums of money may decide to end their careers earlier than individuals in less competitive elections.

Accordingly, the dependent variable is operationalized as the amount of time a justice served on the bench. In order to assess the effect of campaign spending upon the duration of the justices’ tenure, the main independent variable, a time-varying covariate (TVC), is operationalized as the log of the total amount of money spent by all candidates in the race during the election year\(^2\)\(^3\). This TVC will be carried over until the individual’s next election cycle where it will change to the current year’s spending total. Judges who run unopposed universally spent no money during their election years and are such listed as having spent zero\(^2\)\(^4\). Individuals who are also first nominated to the bench are listed as spending zero before they face their first election. In order to identify the model, this variable is interacted with the time counter for each judge (Collett 2003).

I include five dichotomous control variables in the full model; gender, minority status (White or non-White), whether the judge was in a partisan or non-partisan election state, whether the state imposes a retirement age, and whether the judge was Republican or Democrat\(^2\)\(^5\). While some studies have examined dynamic effects of party (Brace and Hall 1990) or diversity (Hurwitz and Lanier 2003) in state courts, it remains to be seen

\(^{2\text{3}}\) Thanks to Chris W. Bonneau for assistance with this data.

\(^{2\text{4}}\) This is in opposition to much of the congressional literature which argues that candidates spend money to dissuade challengers.

\(^{2\text{5}}\) Ideally we would include a variable which measures the absolute value of the difference between a judges PAJID score and the state’s Barry score. This is also a TVC and puts too strenuous a demand on the model when calculating degrees of freedom. The model was run with it included, however, and no statistically significant differences occurred.
whether these serve as potential influences on judges’ tenure and are therefore included for specification purposes. States experience partisan ebbs and flows, and the variable which measures partisan is included to capture this natural variance. I hypothesize that individuals in partisan elections states and/or states with a mandatory retirement age will on average have lower tenure. One other explanatory TVC, whether the incumbent was opposed in the election, is also included. I assume that individuals who are unopposed will be more likely to stay in office longer than those who do not.

The appropriate method by which to analyze this type of data is an event history model, also known as a hazard model (Collett 2003). Using event history models has a rich history in political science (see Box-Steffensmeier and Jones 2004). There are many types of event history models one can choose based upon assumptions about the patterning of the data and the assumption concerning the duration dependency. I opt to use a Cox proportional hazards model. I employ this semi-parametric technique because I have no assumption concerning the form of the duration dependency. Parametric models assume specific distributions when modeling the hazard function. My only assumption is that the hazard rate will be different in predictable ways across the various levels of campaign spending, not that the hazard rate will have a specific distributional form. Thus, the Cox proportional hazard model is most appropriate for this research (Box-Steffensmeier and Jones 2004; Cox 1972; Curry and Hurwitz 2010).

Event history analysis can be likened to a prescription drug trial, where some patients receive a treatment, and some receive a placebo. My interest however is not time until death or time until cure, but instead, time until leaving the bench. The treatment takes the form of differing levels of the same drug, in this case, campaign spending. I
expect that individuals will leave the bench at varying times based upon their level of exposure to campaign spending. It is anticipated that individuals who experience expensive campaigns will have shorter time on the bench as compared to those who have less expensive campaigns or those justices who run unopposed.

When examining temporally ordered data, one must take into account issues of left truncation and right censoring. Left truncation occurs when the individual under observation enters the risk polling before the time the study begins. In this study left truncation occurs when a judge is sitting on the bench currently at 1990 when our data begins. If the judge has been on the court since 1984, instead of entering the analysis at $t=0$, they will enter at $t=6$ and contribute information to the hazard function from the time they are observed. This method of coding is followed for all individuals who enter the bench before 1990, updating their time counters accordingly. Right censoring occurs when the time period of observation ends and there are individuals who still have not left the risk pool. In this study it means a judge under observation continues serving after 2005. This occurrence is unproblematic for the Cox model, as the individual will contribute information to the hazard function until the study ends. Even though the individual’s departure is unobservable, he still contributes information to the study (Box-Steffensmeier and Jones 2004).

Since the Cox model is a proportional hazards model it is important to examine if the hazards are distributed proportionally. If the hazards are not distributed proportionally, the estimates of all the covariates in the model could be biased, not simply the offending variable. I follow the lead of Box-Steffensmeier and Zorn (2001) and examine the proportionality assumption by testing the scaled Schoenfeld residuals. There
was no evidence of non-proportionality within the model. Furthermore, since two TVCs were included in the model, it is advisable to estimate the model using robust standard errors. We utilize robust standard errors, clustering the estimates by state as there are theoretical reasons to assume that the standard errors among a state will be related while those across states will not (Buckley and Westerland 2004).

Any analysis of this kind has similar problems as Jacobson (1990, 2007) documented with campaign spending in congressional elections; namely, that the main causal variable is potentially endogenous. Campaign spending is hypothesized to have an effect on judicial tenure, but judicial tenure likely causes some variation in campaign spending. This effect should not be consistently linear. Individuals who have a long judicial tenure likely have an easier time raising money than do individuals facing their first election; however, judges with longer tenure may also be less likely to be opposed. Following the advice of Box-Steffensmeier and Jones (2004), we simply acknowledge that endogeneity could exist. They argue that omitting a possible causal variable can bias the model more significantly than leaving in a possible endogenous variable.

**Results**

Figure 12 illustrates the mean judicial tenure of judges in both of the two selection systems: partisan and non-partisan elections. The average justice in a partisan election state will serve around two years less than their non-partisan elected counterpart. Consistent with what is known of partisan elections in general, it could be that voters vote on the basis of party identification, and when it is present, incumbents are at more of a risk than in non-partisan elections.
The estimation of the Cox model provides for direct comparisons in rates of change across time within the model. In particular, our hazard model allows us to “determine if a variable increases duration by looking at its effect on the baseline hazard rate” (Shipan and Shannon 2003, 662). A variable with a negative coefficient signifies that it decreases the hazard rate, while a positive coefficient connotes that the variable increases the hazard rate. Stated somewhat differently, a negative coefficient indicates there is a decreasing likelihood of a justice leaving the bench when compared to the baseline hazard, while a positive coefficient means that there is an increasing likelihood the justice will leave the bench compared to the baseline hazard rate. With time varying covariates the interpretation is also intuitive. The dichotomous variable, which measures previous electoral opposition, can be interpreted like the other dichotomous variables within the model. A positive coefficient on the log of total spending would mean that as spending increased so did the likelihood a justice would leave the bench.

![Average Tenure Length by Method of Selection](image)

*Figure 12. Average tenure length by method of selection.*
Table 6 displays the results of the estimated model along with the change in the relative hazard rates for each variable. The relative change in the hazard rate is calculated via the equation: \[ \% \Delta h(t) = \left( \frac{e^{B(x_1=x_1)} - e^{B(x_1=x_2)}}{e^{B(x_1=x_2)}} \right) \times 100, \] where \( X_1 \) takes on one value of the independent variable and \( X_2 \) takes on another value of the independent variable.

When calculating with dichotomous variables this means the quantity changes from 1 to 0. When calculating the change in the relative hazard rate for the total spending variable we choose to use the mean and one standard deviation below.

The results of the model are not what would be anticipated following the reasoning of the judicial reformers. Most importantly, contrary to their claims, spending in campaigns has no statistically significant effect on the hazard rate of judges. This means that judges who run uncontested, and thus spend no money and judges who are in races where a substantially large amount of money is spent have statistically similar hazard rates.

More simply, the amount spent in campaigns has no effect on how long an individual serves on the bench. Figure 13 shows the effect of campaign spending on the incumbent's probability of leaving the bench. Three plots, plotted at the minimum, mean, and maximum show that there is no statistically significant difference across the levels of spending. Indeed, in this sample, the direction is actually reversed. As the overall campaign spending increases, incumbents appear to be less likely to leave the bench.

The other time varying covariate in the model, whether or not an individual was opposed in the previous election, also fails to meet statistical significance. At first this
seems counterintuitive; obviously, individuals who are contested in an election should be more likely to leave the bench than an individual who runs unopposed. This analysis however does not examine such events as a cross-section, but instead analyzes the time period in which a judge serves on the bench. This finding states that individuals who ran unopposed and individuals who ran in a contested election have statistically similar hazard rates.

Table 6

*Cox Proportional Hazard Model of the Duration of Judicial Tenure*

<table>
<thead>
<tr>
<th>Variable</th>
<th>Estimate (s.e)</th>
<th>Change in Hazard Rate$^{26}$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Log of Total Spending (TVC)</td>
<td>-.006(.009)</td>
<td>-3.5%</td>
</tr>
<tr>
<td>Opposed in Prev. Election (TVC)</td>
<td>.120(.133)</td>
<td>12%</td>
</tr>
<tr>
<td>Partisan Election</td>
<td>.587(.291)*</td>
<td>80%</td>
</tr>
<tr>
<td>Retirement Age</td>
<td>-.221(.274)</td>
<td>-20%</td>
</tr>
<tr>
<td>Gender</td>
<td>-.197(.267)</td>
<td>-18%</td>
</tr>
<tr>
<td>Minority</td>
<td>1.05(.274)*</td>
<td>186%</td>
</tr>
<tr>
<td>Justice Party</td>
<td>-.485(.259)</td>
<td>-38%</td>
</tr>
</tbody>
</table>

Log Likelihood = -243.5514  
LR Chi2 = 69.37  
Prob>Chi1 = 0.00  
N=914  
Scaled Schonfeld residual global test p>chi2 = 0.33

$^{26}$ The continuous variables were calculated by a change in one standard deviation.
Figure 13. Cox Proportional Hazard Model of the duration of judicial tenure.

While the main explanatory variables do not reach statistical significance within the model, two of the control variables have a substantial impact on the hazard rate of judges in state courts of last resort. First, the variable for partisan elections is statistically significant and positively signed. Substantively, the effect of this variable signifies that judges in partisan election systems as opposed to their counterparts in non-partisan election systems have a higher hazard rate at any point during their career until they leave the bench. During partisan judges’ careers, they are 80% more likely to leave the bench than a non-partisan judge. This lends credence to the claim that partisan systems distribute more risk to their judges than do non-partisan systems. As can be seen in
Figure 14, a judge in a partisan election system in her fifth year is as likely to leave the bench as a judge in a non-partisan system during his sixteenth.

Figure 14. Hazard function by method of selection.

Figure 15. Hazard function by minority status.
The second interesting finding concerns the variable which measures minority status. Minorities in both types of electoral systems have a much greater hazard rate than non-minorities. Minority judges are 186% more likely to leave the bench in the same year as non-minority judges. Hurwitz and Lanier (2003) argued that the method of selection of judges does not affect the number of minorities which reach the bench. It seems that perhaps while the method of selection may have no effect on how often minorities reach the bench, it could be a distinct likelihood that it has an effect on how quickly they leave.

Figure 15 displays the hazard function for both minorities and non-minorities. Amazingly, minority judges at year five are at more of a risk to leave the bench that a non-minority judge at any point in their tenure. Examining the data closer, a possible explanation arises. While some individuals did serve over ten years, most individuals in the sample joined the bench, often by interim nomination, and were either defeated in the following election, or forced to retire because of the mandatory retirement age.

**Conclusion**

Judicial reformers have made many claims regarding judicial elections in the past years. Some have sound empirical basis. Judicial elections have, in fact, become more expensive (justiceatstake.org 2010) and retention elections are more independent institutions than contested elections (Curry and Hurwitz 2010). However, many of their claims are not supported by the analysis of this study.

Notably, claims that, “State judicial elections have transformed during the past decade” (justiceatstake.org 2010), disregard the significant sums of money that were spent in the 1990s and before in judicial contests. In the 1990 election for chief justice in Texas, a combined total of $2,571,532 was spent. Again, in a different race in 1994, a
total of $2,947,743 was spent by candidates in Texas. Expensive campaigns for judicial elections are not a new phenomenon. Judicial elections have been high-cost affairs for some time in certain states. When groups look only at aggregate numbers, they miss important trends.

Furthermore, when the reform groups claim increased spending in judicial campaigns is eroding away the legitimacy and independence of judges, the corollary must be acknowledged: justices must also be becoming more accountable. However, when the data is examined, we find that money has no discernible effect on judicial tenure.

Contrary to the theoretical underpinnings of the reform groups, it appears as though increased campaign spending does not make judges more accountable. Judges who run unopposed and judges who run in expensive contested elections have statistically similar hazard rates. They are at near equal risk of leaving the bench at the same time.

This finding ultimately though has no bearing on the claim that in a one-shot examination of judicial elections money may predict electoral defeat. It is probable that when significant sums of money are spent in an individual election, the incumbent judge will be more likely to lose. This research, however, is not designed as a cross-sectional examination. By examining judicial careers empirically, taking into account the time a judge serves on a court I am declaring that during an individual’s judicial tenure campaign spending does not affect his time served when compared to others. In a cross-sectional examination, the effect of money may be more pronounced.

Similarly, I find that whether or not a judge has been opposed in a previous election has no bearing on judicial tenure when compared to others who were unopposed.
As with campaign spending, this is not to say that in a one-shot game judges who are opposed in an election are equally likely to leave the bench as someone who is unopposed. Indeed, that situation is extremely unlikely. The claim made in this analysis is that over the course of a judge’s tenure on a state court of last resort, her being previously opposed or unopposed has no bearing on the length of her comparative judicial tenure.

There are two variables that do reach statistical significance and as such, affect judicial tenure on a court. First, consistent with previous analyses (Curry and Hurwitz 2010), judges in partisan elections are more likely to leave the bench at any time than those in other selection systems. Considering that the only real institutional difference between these two types of systems is the fact that judges appear on ballots either with or without their party identification, it can be reasoned that this signal alone increases the risk to partisan judges. It would seem that serving as a judge in a system which places either an “R” or “D” next to your name on the ballot increases your relative risk of leaving the bench by 80%.

Second, individuals who are minorities in both selection systems are at a much greater risk of leaving the bench. Judges who are non-White are over 180% more at risk of leaving the bench than their White counterparts. While it seems that the type of selection method does not affect whether minorities will reach the bench (Hurwitz and Lanier 2003), it is clear that these judges, once they reach the bench in contested electoral systems, depart more quickly than non-minority judges.

While total spending does not have an effect on judicial tenure, the analysis of judicial tenure and judicial careers is in its infancy. As more scholars begin to examine
the determinants of judicial careers, we will learn in great detail the true contours of judicial tenure, not only in states with judicial elections, but all among judiciaries in the states. All should follow the lead of Melinda Gann Hall (2001a) when she stated,

This study is only the first that seeks to unravel the fascinating and complicated nexus between democratic processes and career decisions in the states’ highest courts. Countless questions remain [and] further inquiry will be fruitful, especially for examining and perhaps dispelling myths surrounding the politics of institutional design. (1136)
REFERENCES


CHAPTER V

STRATEGIC RETIREMENTS OF ELECTED AND APPOINTED JUSTICES IN STATE SUPREME COURTS: A HAZARD MODEL APPROACH

Introduction

When examining the landscape of state courts of last resort, certainly one of the most impressive factors concerns the amount of variation by which they select their judges. In the states, judges are chosen for their high courts by methods that include partisan elections, non-partisan elections, gubernatorial appointment, legislative elections, and the Missouri Plan, often referred to by its advocates as the merit system. While it is clear that each of these methods of selection places different pressures on the justices when seeking the bench, these systems also vary with how judges retain their seats on the court. While judges in some states must stand for re-election, other judges need only receive the confidence of either a governor or legislature in order to serve an additional term. Though different justices may have careers of various lengths, all their careers are ultimately finite. The decision whether to end a career is often coupled with the decision of how to end it.

The question of why and how state supreme court justices end their careers can have a plethora of answers. Depending on the method of selection and retention, judges departing the bench can lose a primary or general election, lose a retention election, be impeached, fail to be retained by either the governor or the legislature, be nominated to the federal bench, be forced to retire because of age limits, retire voluntarily, or die. Only
one of the possibilities listed above occurs because of an active choice by the justice in question: voluntarily retiring\textsuperscript{27}. It seems highly unlikely a judge would choose to lose an election, be forced off the bench because he met retirement age, or pass away. These options for leaving the bench require positive action on behalf of another party or are simply not controlled directly by the justices. The choice to retire is the only logical action that can be carried out unilaterally by the individual justice. However, the reason behind a judge’s choice to leave the bench voluntarily does not take place in a vacuum. The decision to leave the bench could be influenced in part by the institutional arrangements that coincide with the method of selection. If justices wish to retire strategically, the rules of the institutions that surround them should influence the reason(s) why they leave the bench.

When a justice leaves the bench, for any reason, it creates a situation in which the very nature of how law is interpreted may ultimately change. When a new justice joins the bench, her ideology and written opinions supplant that which would have existed had the previous justice not left. To study retirements from the bench is to examine how law changes over time. In the case of strategic retirement, this requires the justice to be forward-looking, and acknowledge her role in the interpretation of the law. Finding evidence of strategic retirement would mean that justices, even in state courts, care not only about their legacies, but also are concerned with who replaces them.

Strategic retirement at the federal judiciary is a topic that has been examined thoroughly (see, e.g., Barrow and Zuk 1990; Danelski 1965; Hagle 1993; Spriggs and

\textsuperscript{27} If a judge were to turn down a federal promotion, it would be a voluntary action. However, because of the rarity of said occurrences, they are not considered in this chapter.
Wahlbeck 1995; Squire 1988; Vining, Zorn, and Smelcer 2006).\textsuperscript{28} It is generally hypothesized that, all things being equal, Article III judges with effective lifetime tenure will retire when an ideologically congruent president can nominate their replacement. The theory behind this behavior is quite obvious, and follows eloquently from the expectations of rational choice theory. Judges prefer to retire under conditions by which their own ideology will remain represented on the bench after they have left. By retiring when an ideologically similar president is in office, the judge has her best opportunity to achieve that goal.

Among the states, the institutional mechanisms of judicial selection and replacement are significantly more varied than at the federal level. States that select their judges by a method of appointment have much in common with the federal court system. These states generally have the initial selection and retention left to either the governor or, in rare instances, the legislature. States that employ the Missouri Plan allow their governors to select the justices (albeit after the work of a nominating commission), while providing the public the opportunity to retain them at the polls. Due to the important role of the governor in the Missouri Plan, this method of selection still allows the option for a justice to retire in such a manner as to ensure her replacement will have the highest likelihood of being ideologically consistent.

However, states that employ popular elections to select their judges bear little resemblance to the federal judiciary or those states that use an appointment method for their initial selection. Strategic retirement can occur under a variety of methods of

\textsuperscript{28}There also is much research on career decisions in the U.S. Congress, from which much of the literature on retirements in the judiciary relies (see, e.g., Brace 1985; Frantzich 1978; Groseclose and Krehbiel 1994; Hall and van Houweling 1995; Hibbing 1982; Schlesinger 1966).
selection, though the motivation may not always be similar. While it appears that federal justices retire strategically from the bench, the question in this chapter is, do justices at the state level behave similarly, and considering the variation in the methods of selection, is their reasoning the same? In this chapter I engage in an examination of whether judicial selection systems influence state supreme court justices to employ strategic behavior when retiring.

**Theoretical Expectations**

The assumption that federal judges engage in strategic behavior was not always a dominant theory in political science. When Murphy (1964) first published his work explaining the possible ways in which members of the United States Supreme Court could behave strategically, it did not become a dominant paradigm within the field. Indeed, while Rohde and Spaeth (1976) published their initial formulation of the attitudinal model that was based in part on strategic behavior, this motivation was dropped in later iterations (see, e.g., Segal and Spaeth 1993, 2002).

Largely emerging in the 1990s, accounts of strategic behavior began to move back into the lexicon of judicial politics scholars. Using data and statistical procedures not readily available prior to this time, many scholars harkened back to the work of Murphy (1964) to examine and explain how strategic interaction was a theoretically motivating factor in judicial behavior. Indeed, we would come to learn that U.S. Supreme Court justices engage in strategic behavior in many aspects of their jobs, including opinion assignment, coalition formation, and opinion drafting (Maltzman, Spriggs, and Wahlbeck 2000), as well as the decision on the merits (Epstein and Knight 1998; but see
Segal and Spaeth 2002). Other scholars made similar findings with respect to behavior on the Courts of Appeals (Hettinger, Lindquist, and Martinek 2006; Van Winkle 1997).

Notable works have also been published on strategic interaction among state supreme court judges. For instance, Langer (2002) used a separation of powers model to examine the conditions under which state supreme court justices would be willing to engage in judicial review and overturn the acts of state legislatures. She found that justices act accordingly as they consider not only the likelihood of reprisal in terms of their retention, but also the likelihood their decisions will be overturned by the legislature in question. Hall (1987, 1992) analogously found that justices in the ideological minority in states that use popular elections modify their votes on salient issues so as to increase their chances for re-election.

If state supreme court justices are forward-looking rational actors as these studies imply, then their strategic calculations should not necessarily be limited to decisions concerning the dispensation of cases. Indeed, it seems likely that the justices also might behave strategically when making decisions based on their careers as well. The decision concerning when and under what conditions to leave the bench should provide another opportunity for strategic behavior.

The theory underlying the research on strategic retirement in the U.S. Supreme Court claims that a justice will be more likely to retire when the president and to a lesser degree the Senate are of the same political party as the justice (Hagle 1993). That is, since the justices wish to maximize their policy preferences in the disposition of cases (Segal and Spaeth 1992, 2002), they similarly desire to be replaced by an ideologically analogous justice. Studies of the retirement of justices in the federal courts have mixed
results with regard to their hypothesized strategic nature. Hagle (1993) used an event count model to find that there are possible political (strategic) motivations for justice retirement. Spriggs and Wahlbeck (1995) found that appeals court judges retire when conditions favorably allow for a replacement with a similar ideological perspective. However, employing a competing risks duration model, Zorn and Van Winkle (2000) found no evidence that strategic motivation influences retirements on the Supreme Court.

While the evidence at the federal level is mixed, the idea behind strategic judicial retirements has theoretic appeal, even as applied to state courts. In particular, states that utilize gubernatorial appointment or legislative selection are comparable to the federal system, in that the existence of these institutions allow for justices to anticipate the likelihood that an ideologically similar replacement would be selected. Therefore, the mechanisms exist in both gubernatorial appointment and legislative election systems for state justices to make strategic calculations and retire in a particular way.

While legislative electoral and gubernatorial appointment systems are analogous to the federal system, they both have an institutional feature which is significantly different. Most appointment systems in the states do not feature lifetime tenure and therefore, justices must face retention following the length of their term. Their retention may depend upon an institution which is ideologically incongruent with the justice’s jurisprudence. Langer (2002) argued that while this situation can be contentious, most justices facing this situation will behave in a fashion so as not to call attention or retribution from either the governor or legislator. They will do this by operating in what she termed the “safety zone,” where the justices will be less likely to engage in judicial
review or negatively treat legislation passed during their term. In this case, their retention will be much less likely to factor into their strategic calculation of retirement.

Of course, only a few states employ selection systems analogous to the federal system. Yet, states employing non-appointive methods of selection enable a different form of strategic retirement calculation. States that use popular elections to a large degree preclude the retiring justice from knowing the likelihood an ideological similar judge will replace them. For example, open seat elections for state supreme courts are a function of the candidates themselves, the electoral context, the value of the seat, and the institutional arrangements (Bonneau 2006). This provides the sitting justice with far more uncertainty than a federal justice considering retirement. Furthermore, Hall (2001a) claimed that judges in popular election states can retire strategically, although the motivation is different than that for individuals on the federal bench. Borrowing theory from research on U.S. House Elections (Brace 1984, 1985), Hall claimed that justices in states that use elections can retire strategically only by leaving the bench when they are facing a probable electoral defeat. In her study Hall found evidence of strategic retirement in partisan and retention elections, but not in non-partisan elections.

Interim appointments do exist in most states with partisan and non-partisan elections. In these cases, the governor can appoint a new justice who will have to stand for election as the incumbent in the next cycle, usually in the same year. Unlike those justices in appointment systems, a justice wishing to install an ideologically similar justice faces a significant deficiency. The seat would only be guaranteed for eight months because of the nature of the elections cycle. If the justice retired because she felt it was likely they would lose in the following election, it is probable that the new
incumbent would suffer a similar fate\textsuperscript{29}. Some states however do grant a significant advantage to mid-term appoints. Some states (in my sample Oregon and Michigan), justices appointed to replace a retirement are listed on the ballot as the incumbent. Knowing the strong incumbency advantage that exist in non-partisan elections when incumbency is listed on the ballot (Schaffner, Streb, Wright 2001), I anticipate that justices in systems that allow mid-term appointments to be listed with incumbent, will be less likely to retire following a close election.

What about the Missouri Plan, which uses aspects of both appointment and elections? Should we expect justices in that type of selection system to behave more similarly to judges in appointive systems (where the ideology of the governor is a critical motivating factor); or instead, would they be most influenced by the likelihood of a defeat in their retention elections? I argue that justices facing retention elections in Missouri Plan systems are more likely to behave like justices in appointment systems rather in electoral systems. Hall (2001a) examined retention elections and found that justices in those systems had the propensity to behave like justices in electoral systems when retiring. However, she did not examine their propensity to retire in situations where ideological congruence would allow a similar successor. I argue that while these justices must account to the public in retention elections, they are likely aware of the institutions within which they work. That is, despite the media attention surrounding the retention elections in Iowa in 2010 in which several justices failed to retain their seats on the bench, the reality is that sitting justices run an extremely low risk of electoral defeat in

\textsuperscript{29} It may be the case that justices in electoral systems are more likely to retire when they fear they are going to lose the next election and there is an ideological congruent governor present, though that condition is not examined in this project.
retention elections (Hall 2001b; see also Curry and Hurwitz 2010, who found that justices
in retention elections have the longest tenure rates compared to those in appointive or
electoral systems).\(^{30}\) Consequently, we should not anticipate that retention elections are a
significant motivator in terms of justices' retirement decisions. Since justices in states
utilizing the Missouri Plan realize that the probability of defeat in retention elections is
extremely low, forward-looking jurists should be unmoved by having to run in retention
elections. Instead, based on these institutional arrangements they should be more similar
to justices in states with gubernatorial appointment, such that they are unlikely to
retire when a member of the opposite political party occupies the governorship. Indeed,
while Hall (2001a) found that justices may strategically retire in retention elections as
their ideological distance from the electorate increases, she also finds that partisan
congruence with the governor has a larger statistical effect on retirements. That is, the
likelihood of retirement should increase for justices in merit systems when the governor
is of the same party.

My hypotheses are dependent upon whether a justice serves in an appointive or
merit system on the one hand, or in an electoral system on the other. If a judge serves in
a gubernatorial appointment system, legislative selection system, or Missouri system with
a retention election, the only pragmatic way to retire strategically is to leave when the
replacing institution is of a similar ideology:

\[
\text{H1: Justices in states with gubernatorial appointment, legislative selection,}
\]
\[
\text{or retention elections are more likely to retire when the respective}
\]
\[
\text{appointive body (governor or legislature) is ideologically similar.}
\]

\(^{30}\) But see Dudley (1997), who did not find any significant differences in turnover across the various
methods of selection. His analysis, however, did not contain control variables, nor did it examine the
potential influences on a justice's decision to retire.
However, if the justice’s retention is dependent upon a partisan, non-partisan, or hybrid electoral system (but not a retention election), strategic retirement should come when a justice perceives an electoral threat:

H2a: Justices in states with partisan, non-partisan, or hybrid electoral systems are more likely to retire when the probability of electoral defeat increases.

H2b: Justices in states with partisan, non-partisan, or hybrid electoral systems are more likely to retire when their ideological distance from the electorate increases.

**Data and Methods**

I have collected data on the length of tenure for every individual state supreme court justice who served in one of eighteen states from 1980 to 2005. States are categorized as employing one of the following selection and retention systems: 1) appointment, whether gubernatorial or legislative; 2) Missouri Plan; 3) partisan election; 4) non-partisan election; or 5) hybrid election. Sixteen of these states were selected because they incorporate classic features of appointive systems, merit systems, partisan elections, and non-partisan elections, all without significant modification.

Four states from each of these systems were randomly chosen so that all of the categories would be equally represented. I also included two additional states, Michigan and Ohio, because they are hybrid electoral systems, with traits of both partisan and non-partisan elections, and traits fully unique to themselves (Easter 2011). In Michigan, the party organizations themselves nominate the candidates in party conventions; however, the candidates appear on the general election ballot without a party identification. In Ohio, the candidates are initially selected in partisan primaries, but the general elections
are non-partisan contests (Hurwitz 2010). Table 7 displays the states I analyzed and their respective methods of selection, as well as the number of justices and departures for each state for the time period examined.

Table 7

*Descriptive Statistics*

<table>
<thead>
<tr>
<th>States</th>
<th>Method of Selection</th>
<th>Number of Justices</th>
<th>Number of Retirements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Electoral Systems:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alabama</td>
<td>Partisan Election</td>
<td>31</td>
<td>15</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Partisan Election</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>Texas</td>
<td>Partisan Election</td>
<td>43</td>
<td>22</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Partisan Election</td>
<td>19</td>
<td>10</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Non-partisan Election</td>
<td>20</td>
<td>7</td>
</tr>
<tr>
<td>Oregon</td>
<td>Non-partisan Election</td>
<td>24</td>
<td>15</td>
</tr>
<tr>
<td>Washington</td>
<td>Non-partisan Election</td>
<td>28</td>
<td>15</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Non-partisan Election</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>Michigan</td>
<td>Hybrid Election</td>
<td>20</td>
<td>10</td>
</tr>
<tr>
<td>Ohio</td>
<td>Hybrid Election</td>
<td>23</td>
<td>10</td>
</tr>
<tr>
<td><strong>Appointive Systems:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>Missouri Plan</td>
<td>20</td>
<td>12</td>
</tr>
<tr>
<td>Kansas</td>
<td>Missouri Plan</td>
<td>18</td>
<td>10</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Missouri Plan</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Missouri Plan</td>
<td>19</td>
<td>10</td>
</tr>
<tr>
<td>Maine</td>
<td>Gubernatorial Appointment</td>
<td>22</td>
<td>11</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Gubernatorial Appointment</td>
<td>19</td>
<td>12</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Legislative Election</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>Virginia</td>
<td>Legislative Election</td>
<td>17</td>
<td>12</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td></td>
<td>401</td>
<td>206</td>
</tr>
</tbody>
</table>
I utilized two different statistical models, with each testing a specific hypothesis. Consequently, the causal variables are different with each model, since each grouping of judicial selection systems allows for judges to retire strategically in different ways. In systems that utilize appointments, I utilized the partisan identification of the judge and the party identification of the party in power of the institution in charge of the nomination to create a dichotomous measure of partisan agreement.\(^\text{31}\)

For states with popular election I developed a coding scheme to measure a close electoral victory. For states which do not use blanket electoral systems, elections in which the incumbent received less than 55% were coded as having a close election; a coding scheme that comports with the categorizations used in general electoral studies. In electoral systems which utilize blanket elections to election justices, a close election was determined by taking the average expected distribution of the vote and adding three. For example, if five candidates were running we would expect an even distribution of 20% vote share. Therefore, individuals who won receiving less than 24% of the vote are coding as having a close election. I also employ a similar ideological distance measure as that used in the appointments model. The ideological distance used is the absolute value of the justices’ PAJID score, and the Berry ideology score for the electorate.

While keenly interested in how selection systems condition retirements, I acknowledge that individuals may retire for reasons unrelated to the risks levied upon them because of the institution system in which they serve. I therefore include other measures intended to control for conditions that may cause individuals to retire. First,

\(^{31}\)Ideally, I would use the same measure that is used in the elections model, but the specific Berry et al. scores do not accurately measure the ideology of the nominating institution, but the government as a whole, therefore, the measure would not actually measure the desired concept.
there are personal characteristics of the justice that may cause them to retire. An age variable is included as individuals are more likely to retire as they get older.

Additionally, while there are inconsistent findings concerning gender and minority status with respect to their likelihood of serving on a court of last resort, a few analyses have considered their effect on the tenure length of justices (see Curry and Hurwitz 2010), and thus I include such variables here for purposes of model specification.

Second, institutional characteristics may affect the likelihood of a justice to retire. I control for Missouri Plan systems, as justices in these systems have statistically longer tenures than justices in all other selection systems (Curry and Hurwitz 2010). States also have various term lengths. Justices in states with longer term lengths may retire later than those with shorter terms, since they have to undergo their retention process less often. Judicial salary may also have an influence, and thus control for that as well. The raw salary of the justice was used. These data come from the Annual Survey of Judicial Salaries (1980-2005) authorized by the National Center for State Courts.

Furthermore, justices may be more likely to retire as their workload increases. A simple total of disposed cases by the state supreme court were used to measure this variable. These data were also obtained from the Court Statistics Project, also run by the National Center for State Courts (NCSC 2011). In some states that utilize elections candidates do not run statewide, but instead for district seats on the state courts of last resort. Acknowledging that incumbents in these districts may be less likely to lose an election given the smaller geographic area and close ties to a community, a dichotomous variable for district representation was included in the model. Finally, two states in the
elections sample, Oregon and Michigan, allow mid-term appointments to be listed on the ballot as incumbents. In order to control for the advantage being listed as the incumbent may give a retiring justice, I include a dichotomous variable to control for the ballot effects in these two states.

There may be issues of observational equivalence when identifying a strategic retirement. The statistical analysis attempts to identify, and control for other alternative factors that may influence a justice’s likelihood of retirement. However, even with various controls, an individual retiring under strategic conditions, may not be retiring for strategic motivations. As with any study of individuals, it is difficult to control for all other possible variables. I feel that those I have identified would be the most likely culprits in causing individuals to retire, and by controlling for them, I claim the variable of interest (depending on the model) is accurately influencing the probability of strategic behavior.

The appropriate statistical method to analyze data of this sort is an event history model, also known as a hazard model (Collett 2003). There are a number of hazard models from which to choose, based on the assumptions of the model and the data utilized. The model I opted to employ for the appointment systems is a Cox proportional hazard model (hereafter, “Cox models”). There are two reasons why this model specification is appropriate for the question being asked. First, a proportional hazards model makes no assumption concerning the distributional form of the duration dependency. Since my theory does not assume the duration dependency takes a specific functional form, the Cox model is more robust. Second, unlike the elections models which have two predominant ways by which justices leave the bench, only an extremely
small minority of justices leave the bench in appointment systems by another means than retirement. Thus, the Cox proportional hazard model is most appropriate for this question (Box-Steffensmeier and Jones 2004; Cox 1972).

In order to identify a Cox hazard model, the analyst must first assess the proportionality of hazard rates across different values of the independent variables. "The Cox Model assumes that the hazard function of any two individuals with different values on one or more covariates differ only by a factor or proportionality" (Box-Steffensmeier and Zorn 2001, 974). If this assumption does not hold true, the estimates of all the covariates in the model could be biased, not just the offending variables. Following the lead of Box-Steffensmeier and Zorn, I examined the assumption of proportionality by testing the scaled Schoenfeld residuals, and found no evidence of non-proportionality.

The model estimated for justices in judicial election states follows the same event history motivation but differs with regards to choice of statistical method used. Justices in electoral states leave the bench in primarily two ways, retirement and losing an election. This demands a modeling choice that will estimate a hazard model for each type of event and allow the coefficients of the variables to differ across each type of event. While a stratified Cox Model will estimate different baseline hazards for each type of event, it does not allow the coefficients to vary for each event type. Box-Steffensmeier and Jones (2004) recommended using a particular specification of a multinomial logit (MNL) model for this type of competing risk. They stated,

As a method to account for complications posed by competing risks, the MNL model is an attractive choice for much the same reasons the binary

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32 Out of the 93 justices in our sample, only 9 leave by other means. One justice lost a retention election, six justices were nominated to the federal bench, and two justices passed away. These justices are considered right censored for this analysis.
logic model is chosen in the context of single-way transitions models. It may be estimated by maximum likelihood and the parameters are interpretable as logit coefficients (p. 173).

The multinomial logit is estimated as a series of linked logit functions which allows the coefficients for each event to be compared directly with each other. The baseline category is that of a non-event; in this context, an individual serving for another year. Temporal dependence is handled in this model by including the log of the duration as a control variable.

A MNL model employed in an event history context must meet the same conditions as in other contexts, namely that it meets the assumption of independence of irrelevant alternatives. In the event history context this is also known as the assumption of independent risks. By using a MNL one assumes that the baseline hazards for each type of \( k \) events are independent. This means I assume that the baseline hazard rate for retirements is different from that of losing an election. In this context, the data-generating process creates a circumstance where the three categories analyzed in this MNL context are theoretically discrete and independent. The decision to serve another term (the baseline category) is a positive action on behalf of the justice, while losing an election is not. Furthermore, the decision to retire, while it may be conditioned by the assumption one may lose an election, is unaffected by an electoral loss, indeed retirement cannot occur after electoral defeat. I statistically test this assumption using the Hausman test and found no evidence of dependent risks (Long 1997).

Employing event history models to examine temporally ordered data has a rich history in political science (see Box-Steffensmeier and Jones 2004), including research on judicial politics. For instance, Shipan and Shannon (2003) used a hazard model to
examine the duration of Supreme Court nominations and confirmation, while Langer et al. (2003) applied hazard models to analyze how associate justices on state supreme courts select their chief justices. From a methodological perspective this chapter is analogous to these studies.

When dealing with hazard models, issues of left truncation and right censoring become apparent. Left truncation occurs when an individual in the dataset joined the risk pool prior to the first observation. In this study it means a justice was selected for a judicial position at some point before I begin the analysis in 1980. These individuals do not enter at $t=0$, because the records allow us to know when their tenure first began as a Supreme Court justice. Thus, a justice may have been unobserved for 8 years of prior tenure, but when she enters the risk pool at the beginning of the analysis we code the data as if she began her tenure at $t=9$, thus solving any left truncation issues. Right censoring occurs when a justice continues to serve after the end of the observation period in 2005. In event history analysis, this circumstance is not problematic, because we are interested in the occurrence and non-occurrence of an event, in these cases retirements or lost elections, during the period of analysis. That is, individuals who are coded as left truncated in the data contribute information to the model at the point they become observed, while right censored data contribute information to the model until they are no longer observed (Box-Steffensmeier and Jones 2004).

Finally, when estimating the Cox model appointment systems, it is appropriate to cluster the standard errors based upon the state. This allows for variation between the states to be controlled for. The MNL approach allows for the use of a simple robust sandwich estimator to solve for possible deviations in the standard errors.
Results

Before examining the systematic causes of judicial retirements, it is helpful to know the conditions under which justices retire. Table 8 displays the descriptive conditions under which individuals justices in both merit and electoral systems left the bench. Justices in appointment systems (a category which include gubernatorial appointments, legislative elections and the Missouri Plan) were more likely to retire under a condition where their successor could be chosen by a like-minded individual or body.

This lends credence to the hypothesis that judges in these systems are likely to behave strategically in their retirement. Justices in electoral systems (partisan elections, non-partisan elections, and hybrid elections), however, do not appear to retire strategically, as many more justices retire after a large electoral victory, not a close victory as anticipated. Furthermore, justices who face a previous close election, are more likely to depart the bench by losing the following election.

Table 8

*Departure Conditions*

<table>
<thead>
<tr>
<th>Appointment Systems</th>
<th>Electoral Systems</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Retirements</td>
</tr>
<tr>
<td>Different Parties</td>
<td>34</td>
</tr>
<tr>
<td>Same Parties</td>
<td>50</td>
</tr>
<tr>
<td></td>
<td>84</td>
</tr>
</tbody>
</table>

33 Appointment systems include states that employ gubernatorial appointments, legislative selection, and the Missouri Plan, while electoral systems include states that utilize partisan elections, non-partisan elections, and hybrid elections (Michigan and Ohio). See Table 7 for details.
It is now appropriate to present the statistical model for appointive systems to examine whether or not these descriptive results are systematic in nature. The findings of the full hazard model for appointments are contained in Table 9. My hypothesis that justices of the same ideology as the appointing authority are more likely to retire is supported by the analysis, as the Ideological Agreement variable obtains statistical significance and is correctly signed. This signifies that individual justices in merit-based and other appointive systems are more likely to retire when there is a high likelihood that their replacement shares their policy preferences. Justices selected and retained by these various forms of appointment are likely to engage in strategic behavior when it comes to retirement.  

Table 9

*Cox Proportional Hazards Model for Appointment Systems*

<table>
<thead>
<tr>
<th>Variable</th>
<th>Estimate (s.e)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Term Length</td>
<td>-.019 (.027)</td>
</tr>
<tr>
<td>Gender</td>
<td>-.802 (.250)*</td>
</tr>
<tr>
<td>Minority</td>
<td>.508 (.210)*</td>
</tr>
<tr>
<td>Age</td>
<td>.007 (.002)*</td>
</tr>
<tr>
<td>Salary</td>
<td>8.24 (.3.78)*</td>
</tr>
<tr>
<td>Workload</td>
<td>-.000 (.001)</td>
</tr>
<tr>
<td>Ideological Agreement</td>
<td>.022 (.013)*</td>
</tr>
</tbody>
</table>

Log Likelihood = -293.501
LR Chi2 = 984.67
Prob>Chi1 = 0.00
N = 1548
Scaled Schonfeld residual global test p>chi2 = 0.77

34 The use of the ideological difference variable provided an insignificant finding. I believe this is because the Berry et al. (1998) scores measure the entire government’s ideological standing, not a specific institution, be it governor or legislature, which this analysis calls for. Thus, I only include the Ideological Agreement Variable in the model while dropping the Ideological Difference variable, since the latter does not measure what I am seeking to operationalize.
A number of the control variables also proved influential. In particular, age is a dominant variable in the model. As a justice’s age increases, she is more likely to retire, an intuitive and obvious finding, as age is a critical factor for any individual’s decision to cease working. Thus, it is clear that this variable needs to be included to ensure the model is not under-specified. Even so, when age is included in the model, the key variable of interest, ideological agreement, remains significant, demonstrating its importance to this issue of retirement in appointive selection systems.

Two personal variables, gender and minority, significantly affect retirement in appointive systems, but in opposite directions. Women are more likely to stay in office longer until their retirement, while minority justices are more likely to retire from the bench more quickly.

Finally, salary is the one institutional control variable that is statistically significant in the model. As salary increases, individuals are more likely to leave the bench. This variable is likely absorbing some variation that would normally be attributed to age, as salary generally increases over time with age, and there is no sound theoretical reason to assume that higher salaries cause individuals to retire from the bench. Interestingly, term length and workload have no influence on retirements in appointive systems.

In the MNL models for justices in states which utilize electoral selection methods there is also evidence of strategic behavior. As evidenced by Table 4, I find that ideological distance from the electorate is a strong predictor of retirement, even when controlling for numerous other factors. Indeed, an ideological distance increase by a
factor of one unit increases an individual’s likelihood of retiring over losing an election by 95%.

Table 4

*Multinomial Logit Duration Model for Electoral Systems*

<table>
<thead>
<tr>
<th>Variable</th>
<th>Retirements</th>
<th>Electoral Defeats</th>
<th>Odds of R over E</th>
<th>Odds of E over R</th>
</tr>
</thead>
<tbody>
<tr>
<td>Close Election</td>
<td>.334 (.217)</td>
<td>1.24 (.443)*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ideological Dist.</td>
<td>.041 (.015)*</td>
<td>-.057 (.044)</td>
<td>1.06</td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>.104 (.020)*</td>
<td>.006 (.031)</td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td>Workload</td>
<td>.000 (.000)</td>
<td>.000 (.000)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Salary</td>
<td>-7.91 (4.01)*</td>
<td>-4.38 (8.39)</td>
<td>1.01</td>
<td></td>
</tr>
<tr>
<td>Ballot Incumbent</td>
<td>-.064 (.227)</td>
<td>-2.24 (1.05)*</td>
<td></td>
<td>.901</td>
</tr>
<tr>
<td>Term Length</td>
<td>-.069 (.058)</td>
<td>-.089 (.129)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>District</td>
<td>-.593 (.326)*</td>
<td>-.391 (.786)</td>
<td>.430</td>
<td></td>
</tr>
<tr>
<td>Gender</td>
<td>-.114 (.377)</td>
<td>-.177 (.604)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minority</td>
<td>.345 (.495)</td>
<td>.711 (.569)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log (Duration)</td>
<td>.519 (.164)</td>
<td>.154 (.272)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-9.52 (1.16)*</td>
<td>-4.39 (2.17)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Log Likelihood = -532.731  
Chi2 = 133.25  
Prob>Chi2 = 0.00  
N = 2048  

Figure 16 displays the predictable probability of retirement or losing an election across the range of ideological distance values. Though the probability of leaving by either method is close when the ideological distance is small, the probability of departing by retirement increases linearly while the probability of leaving from an electoral defeat remains flat. While close elections are not a statistically significant predictor for retirement, it does obtain significance in the model estimated for those who lose
elections. Therefore, justices who have endured a previous close election are 369% more likely to lose their following election than retire. Figure 17 shows the probability of leaving the bench either by retirement or losing an election given a previous close election. While the probability remains consistent for retirements, the probability of losing an election sharply increases.

\[ Figure 16. \text{Predicted probability of competing risks by ideological distance.} \]

One additional variable obtains statistical significance in the elections model. Ballot incumbency significantly decreases the likelihood a justice will lose an election. Knowing what we do of incumbency effects, this finding is not shocking. However, the ballot incumbency does not reduce the likelihood of retirement. It could be the case that incumbents may want to retire when they are risking electoral defeat and the governor is
of the same party. However, that occurrence is rare enough within my data to make estimation difficult.

Figure 17. Predicted probability for competing risks by previous election returns.

Three additional variables obtain statistical significance in the retirement model. First, age is a significant factor in retirements from the bench. It seems intuitive to assume that the older an individual is, the more likely he is to retire. Also, as the total workload of the court increases, the likelihood of a justice departing the bench also increases. Finally, having district-based elections is negatively related to the likelihood an individual will retire from the bench. It is likely the fact that elections via districts engender a closer tie between the elected official and the constituency than statewide
elections. This likely makes the justices feel they have a safe seat, reducing the likelihood of their voluntary retirement.

Discussion

The debate concerning the most appropriate method of selection for choosing state supreme court justices is increasing in volatility at many levels, with some states including South Carolina (Boniti 2011), Nevada (German 2009), Tennessee (Locker 2009), Michigan (Gilber 2010), and Wisconsin (Raftery 2011) discussing possible changes to their selection mechanisms. Advocates for moving away from electoral systems claim that systems that use an appointment mechanism, particularly the Missouri Plan, will shield the justices from politics. The American Judicature Society claims,

Not only does merit selection ensure that only the most qualified candidates become judges, but it also limits the influence of any one political party or public official. In doing so, it frees judges from overt political influence and promotes a fair and impartial judiciary. (AJS 2011)

Confirming some of the findings of Bonneau and Hall (2009), my results call into question some of the claims of reformers. I find that judges in appointive systems, including the Missouri Plan, are more likely to retire when the body charged with selecting their replacement is ideologically compatible. Substantively, this means that judges consider their own ideological proclivities as well as those of potential successor’s sufficiently important motivators when deciding whether to retire.

This is a keenly strategic, political action on the part of the retiring justice, and it is not a decision that is free from overt political influence. The institutional nature of these appointment systems that are designed in theory to shield judges from political influences allows them to make strategic, political decisions surrounding retirement. In
particular, retiring justices in appointive systems strategically seek to ensure that their ideological preferences remain on the bench long after they have chosen to leave it.

Judges in electoral systems also engage in strategic behavior when choosing to depart the bench. Strategic justices should not wish to lose an election, but instead choose to retire from the bench on their own terms. Of the two variables I believe a justice would use as indicators of a possible electoral defeat (ideological distance from the electorate and previous close election), one obtained statistical significance, indicating that justices do consider their electoral chances when deciding when to retire.

The claim that judges are apolitical diviners of the law finds little support in empirical reality. Judges are political beings. Changing the method of selection and retention for judges does not change this reality, it merely changes the way in which the strategic calculation will be conditioned. Ultimately, this chapter finds that justices in state courts of last resort, regardless of the method of selection are likely to be forward-looking, strategic actors when choosing to depart the bench.

The choices made by these justices when leaving the bench epitomizes the core values each type of selection mechanism seeks to elicit. Justices in competitive electoral systems who leave the bench because they fear losing an election are behaving in a highly accountable fashion. Feeling that the electorate will remove them from office, the justice chooses to retire, thereby educing the pinnacle value of the electoral mechanism; accountability. Whereas, when justices in appointment systems leave the bench strategically, they are doing so to further judicial independence from the electorate. By maintaining the ideological balance within the judicial office, the departing justice is
advocating for a consistent jurisprudence from the bench, one of the hallmarks of judicial independence.

Both types of systems give the justices within them the institutional means to engage in strategic behavior when leaving the bench. Strategic retirement in both systems, whether intended or unintended by the institutional designers, ultimately serves the desired values of the designers. Accountability and independence in the judicial enterprise can be increased or decreased in significant ways by modifying the method of selection, but one cannot remove politics from the judicial mind.
REFERENCES


CHAPTER VI

CONCLUSION

Beyond debates about the normative claims concerning the methods of judicial selection used in state supreme courts, individuals often miss the reason why we should care. Accountability and independence are not goals that exist in a vacuum. The concern over the nature by which the states populate their courts of last resort stems from the recognition that these justices make policy. Their decisions are binding precedent to the citizens and lawmakers which reside within their state. The accountability versus independence debate should be viewed in the terms of public policy. Do we want justices to be relatively unrestrained in their ability to make policy or should they have to answer to either the public or the other branches of government for their decisions?

The answers to these questions should affect the type of institutional mechanism that is chosen to staff and retain state supreme courts. The length of judicial careers is affected by the methods of selection and retention used in the various states. Indeed, even the reasons justices choose to depart the bench are affected by these institutions. The logical connection is that these methods used by the states have policy ramifications. If they did not, groups like the AJS, ABA, and the Federalist Society would not have lined on up different sides of the debate. The reality is that which method of selection a state chooses has a direct relationship on Laswell’s (1935), “who gets what, when, and how.”
My interest on the length and determinants of judicial careers is not because I feel there is a correct answer, but instead I feel there is a lack of empirical information and evidence to inform the debate. While there exists much literature on the behavior of justices on state supreme courts in terms of decisional output or electoral success, we still know precious little about their careers. This is the reason I have attempted to fill this gap in the literature.

The judicial reform movement generally motivates their claims from a normative theoretical standpoint. Grasping an anachronism, long since disproven by waves of legal realists and political scientists, these reformers cling tightly to the belief that judges decide cases entirely based on 'the law'. Eschewing empirical findings that date back to at least Pritchett’s work on *The Roosevelt Court* in 1948, these groups hold steadfast that judicial behavior is a function of only the facts, the case, and the law.

Their critiques of judicial elections claim that if judges are made responsible to a constituency and forced to campaign, then something else, beyond the law, may influence their behavior on the bench. They disregard the empirical work which demonstrates that judges are influenced by their ideologies even in a system which almost entirely removes any type of accountability (Segal and Spaeth 2002). Furthermore, while they recognize that judicial elections could have an effect on judicial decision-making, they fail to acknowledge that so do appointment-based systems (see Langer 2002) and even their favored Missouri Plan (see Brace and Hall 1990). In short, institutions matter for judicial behavior in both electoral systems and appointment systems.

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35 Pritchett (1968, 487) noted, “the [L]egal [R]ealists, influenced by pragmatism, behavioral psychology, psychoanalysis, and statistical sociology, sought reality in human behavior and judicial conduct. They believed that judicial decision-making may be influenced by the ‘hunches’ of judges, and that close cases are commonly decided on the basis of extra-legal factors.”
Before a true informed debate concerning methods of judicial selection can take place, the institutional designers and policy advocates should collectively acknowledge three concepts, which if not articulated serve to mislead the public. First, judges make judicial decisions based on more inputs than merely the law, and while perhaps the source of those inputs can be mitigated or changed, no institutional arrangement can delete their existence. Second, institutions themselves have effects on the individuals that work within them—even judges—and these too will affect judicial behavior. Finally, judicial selection is a political process in any of the methods of selection currently in use.

Institutional designers or policy advocates who wish to change the method of judicial selection generally have normative motivations, rarely backed by empirical analysis. This dissertation has both a theoretical and policy motivation. Using the starting point of neoinstitutionalism, I have sought to examine how the institutions which are used to staff state courts of last resort affect the tenure length and behavior of individual justices under varying political circumstances. While it remains to be seen if the findings generated in this work will find the ears of those it seeks to inform, I have done this research in hopes it will give empirical information to those who are involved in the judicial selection debate.

**Does Institutional Variation Matter?**

Looking across each of the three empirical chapters there is one consistent story being retold: the type of institution used to select state supreme court justices has observable and measurable effects on judicial tenure. While justices in each of the methods of selection used in the U.S. are charged with performing the same job, their careers and behavior are quite different in observable and predictable ways. There are
three lessons which can be taken away from this study. First, institutions can have effects that their creators did not anticipate, and are thus unintended. Second, while campaign spending has an effect on the outcome of elections, it does not seem to have a direct effect on the length of judicial careers. Lastly, strategic political behavior cannot be removed by modifying a method of selection; it will only be channeled in a different way.

**The Accountability of Retention Elections**

It seems quite clear from the publications of groups like the American Judicature Society and the American Bar Association that their intention for the Missouri Plan was to create a system where selection was based on the merit qualifications of the individual, while balancing the accountability function with regular retention elections. Describing how justices are kept accountable in merit selections systems, the AJS states,

> After an initial term of office, judges are evaluated on the basis of their performance on the bench by the voters in an uncontested retention election...This provides an opportunity to remove from office those who do not fulfill their judicial responsibilities. (AJS 2012, 2)

When examining the empirical evidence, it becomes clear that justices in Missouri Plan states are very rarely removed from office via these uncontested retention elections. In my sample of four states from 1980 to 2005 which utilize the Missouri Plan, only one justice was removed by retention elections. The Missouri Plan, when compared with other methods of selection, has on average the longest tenure for its individual justices. Even when controlling for numerous mitigating factors, justices whom are retained by retention elections have an exceedingly low risk of removal by comparison to the other systems. While some may claim this is because the merit system promotes the selection of better-qualified candidates, empirical studies do not bear this out (see Choi, Gulati and
Empirical studies do show that the average voter during a retention election has very little information about the incumbent, and if they choose to vote in the contest, are making a generally uninformed decision (Klein and Baum 2001). While the other two electoral systems serve their accountability function, I question whether the nature of a retention election can as well.

**Campaign Spending and Judicial Tenure**

There can be little doubt that the amount of money spent in judicial campaigns has drastically risen in the past twenty years. A myriad of studies demonstrate the effect of campaign spending on electoral fortunes, even in judicial elections, generally finding that campaign spending benefits the challenger more than it does the incumbent (Bonneau 2007, Bonneau and Hall 2009). Many of the reform groups however, are making further claims about the effects of campaign spending. They have argued in publications that along with increased campaign spending there is also a substantive reduction in judicial independence. They claim that the low knowledge electorate is energized by high amounts of campaign spending in the form of negative ads, and this in turn increases the likelihood incumbents will lose. Examining the data, these hypothesized patterns are not borne out. When controlling for numerous factors there is no statistical difference between individuals who had no challenger (and thus little to no campaign spending) and individuals who faced well-funded challengers. Money has an effect on elections, but that effect does not bleed over in the length of judicial careers.

**Strategic Retirement in State Supreme Courts**

The decision to retire can occur for numerous reasons. From old age, job dissatisfaction, to wanting to spend more time with the grandkids, the decision to retire
from any job has multiple inputs, and justices on state supreme courts are no different. These individuals however, have different goals to consider. Justices on state supreme courts may have political motivations for the timing and reasons they retire. Despite claims from reform groups that the Missouri Plan and other merit-based selection systems mitigate the effect of politics on judicial behavior, these justices still make decisions based on ideology. Indeed, like judges in the federal system, justices in systems which utilize appointments are able to calculate the likelihood that their successor will share their ideological disposition.

As my research demonstrates, they are therefore more likely to retire when they share a similar ideology with that of the appointing body. This is not to say that justices in electoral systems do not also engage in strategic retirement, merely that their calculations are different. Justices in electoral systems do not have the ability to predict nearly as easily the ideology of their permanent successor. Open seat elections are inherently difficult to forecast, leaving sitting justices unsure of the outcome if they retire. Even though the institution of election leaves them insufficient information regarding their successor, it still encourages a type of strategic behavior. Justices whom feel they may lose their next election are more likely to retire than risk electoral defeat.

The cost of retirement is the loss of incumbency and power, while the loss of an election is significantly more costly. Risk-averse justices faced with this situation have the option to behave strategically. Unlike the claims articulated by judicial reform groups, appointment mechanisms do not sever or even diminish political influence on justices’ behavior. Modifying the institutions within which they operate only channels the political behavior differently, or introduces new ways for political behavior entirely.
Methodological Contribution

Event history analysis has a short but valuable history in political science research. At its core, event history analysis is concerned with the time until an event occurs, and then models what factors increase or decrease the likelihood of this occurrence. The nature of careers, in this case judicial careers, are a natural fit for being analyzed using event history. As this work has shown, judicial tenure is best understood as time at risk. Each individual justice in my sample should be considered at risk of leaving the bench in any number of ways, each of which can be specifically modeled. The judicial career of any individual is the time until an event occurs, with intervening markers along the way. For individuals with a long tenure on the court, this could be either a history of successful elections or retentions. The examination of elections in isolation fails to recognize numerous inputs along the way. The question of why individuals lose elections is just as valuable as under what circumstances are individuals at an increased risk for losing an election. Event history analysis is robust enough to answer these questions.

The Future of State Court Research

While once Brace and Hall (2001, 99) could write, “There is a remarkable and unfortunate asymmetry between the political importance and the methodological usefulness of state supreme courts and the attention given to them by the research community,” I feel this time has since passed. The study of state supreme courts has blossomed into a methodologically rich and robust subfield within judicial politics. The study of state supreme courts is increasingly appealing as the institutional variation across

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36 A judicial career is also ripe for a repeated event analysis within the event history context.
the states allows for a truly comparative analysis. This variation allows researchers to gain significant leverage over causal questions.

It is this institutional variation would I feel should be further exploited in the upcoming years concerning the analysis of state supreme courts. The process of judicial decision-making should be relatively similar across all courts of last resort; however, there are should be observable differences in how cases are decided, how opinions are drafted, and in states which give their courts discretionary jurisdiction, differences in the types of cases they take. The State Supreme Court Data Project has facilitated much of this work; however, specialized questions still require individualized data collection, which has prevented many interesting and timely questions from being analyzed. A long-term funded project to collect data for decisions in all 50 states would serve the discipline greatly.

There has been a trend, both historically and currently, to analyze a specific issue or case type before state supreme courts. Canes-Wrone, Clark, and Park (2012) are the most recent work in this trend. Analyzing abortion decisions, they develop a model of judicial decision-making, which seeks to explain the observable differences across states which use public elections, including retention elections. While the work is both theoretically and empirically rich, their findings are far from parsimonious. Much of the foundation of the judicial politics subfield was built on the parsimonious nature concerning personal attribute models, which led to the attitudinal model (Segal and Spaeth 2002). Work on state supreme courts, while borrowing considerably from this literature, has yet to develop its own parsimonious model. Certainly, there should be numerous commonalities across all courts, which will allow for the development of a
model of judicial decision-making writ large. While institutions should play a role in the disposition of cases, the role of justices in a court of last resort is the same across all states. I feel a general model of judicial decision-making could be developed for state courts, recognizing that while their decisions are still open to appeal, the process is rare, as is oversight from the federal judiciary.

As a discipline however, I feel the best service we can do is to continue to examine the claims of both judicial reform groups and defenders of judicial elections like the Federalist Society. To this end, my next project examines which method of selection has the greatest ideological congruence with the populace of their respective states. Using data on the 51 state supreme courts, I will examine using hierarchical time series, how long, if ever, systems converge on the ideology of the public, thus examining the representative function of the judicial branch in the states. This research will provide further information to the accountability vs. independence debate.

Also, while the PAJID scores are the best measures of individual justice ideology that we have, they have two flaws. First, they are invariant with respect to time. Justices who serve on the bench for any number of years retain the same ideology score. Considering what we know of U.S. Supreme Court Justices (Epstein, Martin, Quinn, and Segal 2007), it is quite likely that ideological drift does occur over the tenure of a justice’s career. Second, the PAJID scores were created using the Berry et al. state and government ideology scores as an important factor. The way in which the PAJID scores are calculated, the measures for justices in any appointment system take into account institutions, which have little effect on the justices appointment, and thus miss specifying the measure. A new measure of justice ideology could be created by using a method of
analyzing iterated votes to construct a latent measure of ideology, like that which was done by Martin and Quinn (2002). This measure would take into account ideological drift over time, and be responsive to changes in the types of cases over time and regional variations concerning the nature of party identification.

Lastly, arising from the work done here, there appears to be a significant question concerning the nature of the tenure of women and minorities on state supreme courts. As the analysis contained herein has demonstrated, women are much more likely to have considerably longer tenures than men, while minorities are more likely to have significantly shorter tenures. While it has demonstrated elsewhere (see Hurwitz and Lanier 2012) that women and minorities face little difficulty getting on the bench in state supreme courts across all the methods of selection, my research has demonstrated that there may be some factors either increasing, or decreasing, their likelihood of retention across the various systems. We simply need more research in this area, coupled with a larger sample than the one here, to actively engage this question with the needed statistical leverage.

At the beginning of this work I talked about the events that occurred in Iowa in 2010. Three sitting justices, including the chief justice, lost their bids for retention. In the entire previous history of Iowa, not a single justice had lost a bid for retention, yet in 2010, three were removed at once. This was a historic event, not only for Iowa but for retention elections as a whole. Justices in retention election states have traditionally had easy re-elections, most times skating through without the need to campaign or even raise money. There are notable exceptions to this trend, and most individuals remember names
like Rose Bird, David Lanphier, and Penny White because they are among the rare individuals who have been removed in Missouri Plan states by the voters.

A question has been raised that perhaps something has patently changed concerning the nature of retention elections. Following the decision in *Citizens United v. Federal Election Commission* (2010), some have posited that retention elections provide an outlet where advocacy groups will get the largest payoff for money spent (Sample 2011). Considering justices in these systems rarely need to fundraise and campaign to retain their seats, a moderately funded campaign against them will have significant payoffs for groups wishing to oust a justice.

While the event in Iowa received the most press coverage, in 2010 interest groups also actively spent money trying to remove a justice in Illinois. Furthermore, many commentators have expressed concern that the occurrence in 2010 was not just a blip on the screen, but the beginning of a trend. Iowa’s governor, Terry Branstad, voiced concerning that the remaining Iowa justice who did not stand for retention in 2010, Justice David Wiggins, will face a well-organized campaign (Boshart 2011).

The substantive findings of this dissertation demonstrate that institutions condition certain types of behavior in state supreme courts, but that they can also have other effects that condition the behavior of those not serving on these courts. Canes-Wrone, Clark, and Park (2012) demonstrate that justices in retention election states are cognizant of votes they cast on high saliency issues, specifically abortion; though, considering the 2010 retention elections in Iowa, these findings likely should apply to other issues like gay rights and the death penalty. The response that Canes-Wrone et al. find is likely not a direct function of the electorate, as the electorate would have to be
made aware of said decisions in some fashion before they could respond. It is the institution of uncontested retention elections that has given rise to interest groups in these situations and it is the history of retention elections that has ill-equipped justices to respond. For the 2012 election cycle, two things are certain:

First, justices standing in retention elections that do not encounter interest group spending will likely be retained at the same level as justices in electoral states that face no challengers. Second, justices standing in retention elections that do encounter interest group spending will have a much more difficult time being retained than most justices in electoral states which do have challengers. The most important difference is, nearly every justices standing for re-election in states which use partisan or non-partisan electoral methods to staff their bench are facing a challenger, while only four of the twenty-one justices in retention election states are facing interest group challenges to their legitimacy.

The debate concerning the nature of judicial selection mechanisms in the U.S. is not likely to go away soon. The implications have distinct policy effects that could significantly modify the rule of law in many states. This debate is valuable, as it serves to engage the public and make them consider the way the judiciary is constituted and the method by which it is staffed.

Furthermore, this engagement with the public will likely increase efficacy in the judicial system by familiarizing them with its role in society. This debate however, should not be based on normative assumptions and outright myths. As social scientists, we should attempt, as I have here, to take these testable hypotheses and subject them to empirical scrutiny. Considering one of the goals of science is to generate knowledge, I
see social scientists as having no higher calling outside of giving the public empirical information to motivate their political decisions.