

Ideological Congruity on State Supreme Courts

Todd A. Curry
Department of Political Science
University of Texas at El Paso
500 W. University, Benedict Hall 304
El Paso, TX 79968
(915) 747-7967 (phone)
tacurry@utep.edu

Michael K. Romano
Department of Political Science
Shenandoah University
1460 University Drive, Davis Hall 205
Winchester, VA 22601
(540) 665-5554
mromano@su.edu

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Abstract

The methods of selection used to populate State Supreme Courts have led observers to question the effectiveness of these institutions to produce representative agents. We wish to know to what extent judicial ideology is constrained by citizens' preferences, and what institution best controls judicial ideology in order to produce a representative court. We examine the fifty-two supreme courts from 1995 to 2005, focusing on how different selection methods impact the amount of ideological drift between citizens and the judiciary. We conclude that institutions that lack an explicit ideological cue, such as partisanship, or frequent electoral checks on judges insulate their courts from an ideological connection with the public.

Keywords: State Supreme Courts, ideology, judicial selection

In late 2015 and 2016, the Supreme Court of Kansas came under attack from the popularly elected branches of government for what they deemed to be, “political bully tactics” and an, “assault on Kansas families, taxpayers, and elected appropriators” (Eckhold 2016). Much of this rhetoric centered on the court’s decision that the legislature’s funding of public education in the wake of significant tax cuts was too low and would therefore have systemic effects on poor and minority students. The state legislature and governor repeatedly imperiled the autonomy of the Supreme Court by threatening to suspend the courts funding and pass legislation to impeach justices if their decisions continued to “usurp” the power of the other branches. Governor Sam Brownback went so far as to call the Court “activist” and pushed for an amendment to the Kansas constitution that would give the governor more control over choosing justices for the state’s high court. Dennis Pyle, a sponsor of a bill seeking to strengthen impeachment authority over the court, went on record stating that, “if you’re going to make political rulings, then you should be politically accountable” (Eckhold 2016). The opinion of the state legislature and governor seemed clear: the current method of retention for Kansas’ judges, uncontested retention elections, did not provide the accountability *they* desired.

This political impasse was made possible, in part, by a rapidly changing electoral environment and a judiciary insulated from change because of its use of the Missouri Plan selection and retention system. From 2003-2011, Kansas cycled through four different governors. The first three, Governors Bill Graves, Kathleen Sebelius, and Mark Parkinson, would all be considered ideologically moderate to liberal¹. Beginning in 2010 however, the electoral environment in Kansas shifted to the point where liberal-moderate candidates

¹ During this time the Republican Party was fractionalized between conservatives and moderates. The Republican Party themselves moved more conservative and found electoral success.

were no longer compatible with the electorate. Governor Sam Brownback, a Tea Party favorite, was elected with over 63% of the vote in 2010, and the Republican majority in the Kansas House of Representatives increased by sixteen seats, giving them a 3/4th majority. While the governor initially selects judges in Kansas, judges are retained by an uncontested confidence vote known as a retention election. And while Tea Party backed politicians won by significant margins in 2010, four justices stood for retention election as well, all chosen by moderate-liberal governors. Their average retention vote: 63%.

We argue the conflict in Kansas should have been expected and even foreseen. Retention elections are supposed to act as the accountability check of what is known as the Missouri Plan system. The Missouri Plan is thought to be a balance between judicial independence from political elites and public accountability to the electorate (AJS 2012). The actual accountability contained within this system however is questionable, as Kansas in 2010 (and thereafter) demonstrates. Indeed, it is considered a noteworthy event when justices in Missouri plan states are removed from office (i.e. Iowa in 2010, and California in 1986). We claim this is because the Missouri Plan system is likely to exhibit a large degree of ideological drift, which is the tendency of an institution to be resistant to the changing ideology of the electorate.

Across institutional structures, a vital component of functioning democracies is the perception that the system works for the benefit of citizens. Inevitably, examinations that hinge on this belief must take into consideration the ability of political actors to serve as representatives of the peoples' interests both ideologically and by making substantive policy decisions (Dahl 1956; Pitkin 1967; Broockman 2016). Most often, discussions of democratic representation focus on the ideological link between one actor (or a group of

actors) and the mass public. We believe that judges are selected on the basis of such ideological representation, but that the method of retention modifies their ability to maintain a representative connection over time. Our argument rests not on the opinion that judges should be ideologically congruent with the public, but the acknowledgement that every method of selection for judges in the United States makes ideology a consideration during the process.

Our focus here is on how the institution of selection and retention translate public ideology into judicial ideology. To a significant degree, we feel that this analysis is also a measure of which selection systems create the most publicly accountable judges. State courts of last resort can provide us with empirical leverage in order to understand the nature of judicial representation, since states vary in the ways they retain membership on their courts. There are fifty-two state supreme courts, which vary substantially concerning the method by which justices are selected and retained². We theorize that while each method of selection facilitates this ideological link with the public in different ways, the method of retention likely functions to augment that original connection. States utilizing institutions that shield judges from politics in the retention process should have more independent courts, and thus be more likely to exhibit ideological drift. States utilizing institutions that prioritize politics in retention should have courts that are more accountable, and thus closer to the ideology of the populous.

We examine if the methods of selection and retention used to populate state courts of last resort affect the degree to which those bodies are effective in generating and maintaining an ideological link between judges and the public. We analyze ideological drift

² The states of Texas and Oklahoma separate criminal and civil jurisdiction in their state courts of last resort, meaning that each state has two supreme courts.

utilizing data collected between 1995 and 2005 for each of the fifty-two state supreme courts in the United States in order to estimate the impact of variations in the method of selection and retention on the ideological distance between judges and the public as the audience for representation. Our findings demonstrate that all methods of selection and retention increase ideological drift compared to partisan elections. However, of all the methods of selection and retention used in the United States, we find in this analysis that the most likely to exhibit ideological drift are nonpartisan systems of elections. While this finding is not hypothesized, we find it is consistent with the relevant literature on nonpartisan elections (Calderone, Canes-Wrone and Clark 2009, Canes-Wrone and Clark 2009, Canes-Wrone, Clark, and Kelly 2014).

Judicial Independence and Ideological Accountability

The institutions used to select and retain state supreme court justices have proliferated and multiplied over time. With each new innovation, the rationale for institutional change in the judiciary centered on rhetoric over balancing judicial independence with judicial accountability (Streb 2007, Shugerman 2012). Indeed, judicial elections were initially proposed to make the judiciary independent from the parties and party government and directly accountable to the people. While independence and accountability are different concepts, they strongly related in one simple way: both relate to a judge's self-presentation and thus the ability of a court to enforce their rulings (Baum 2006). We define judicial independence and accountability following Tarr (2012); judicial independence is based upon the representation of judges as committed to the rule of law over popular pressure, whereas accountable judges are committed to remaining in check with the population they serve, at least within the modern era. Minus the three states that

grant their justices life tenure, all other systems are based upon the understanding that judges, as representatives in a constitutional system, require a legitimate check on their authority³. As a result, judges must cater to the desires of those who keep them in office (Baum 2006; Dahl 1956; Montanaro 2012; Rehfeld 2006). That is to say, no judge is fully independent, however some selections systems allow judges to be more insulated than others (Curry and Hurwitz 2016). Critics of partisan electoral systems argue that such systems fail to produce accountable judges entirely, and thus sacrifice independence from public for nothing (Geyh 2003). As a litany of research on judicial selection (Baum 2006; Hall 1987; 1992; 1995; Hall and Brace 1992; Brace and Hall 1995; Bonneau and Hall 2009, Bonneau and Cann 2015a) has determined, however, “these assertions have been shown to be overdrawn” (Hall 2015, 7).

Justices whom are worried about maintaining their judgeship during retention are therefore going to be less likely to act truly independently and more likely to act in accordance with what is desired from them. This is why we use the phrase ideological accountability. First, this phrase is not unique and has been used previously in scholarship addressing how Congress is becoming more ideologically polarized while the electorate is not (Sood and Iyengar 2013). Second, as systems of reappointment do not have elections but still contain accountability checks, the phrase electoral accountability is inappropriate. Ideological accountability and representation matter, because as the institutions of judicial selection and retention were designed, a discussion of the accountability of judges was explicit for each system (Streb 2007). Institutionally, this means that most states have both a selection mechanism *and* a retention mechanism that are not always mutually exclusive.

³ Massachusetts, New Hampshire, and Rhode Island grant their judges life tenure until age 70. New Jersey judges have an initial seven-year term and upon gubernatorial reappointment, are granted life tenure.

This configuration also means that while most judges are concerned with retention, some justices will be at more risk of removal than others. Despite the lip service that most judicial reform groups play to the perceived accountability of their systems, the likelihood of being held accountable across all the various methods of retention varies significantly (Curry and Hurwitz 2016).

Numerous states select and retain their justices through the same institution; however the dominant trend among the states is to combine two different institutions so that selection and retention are done in different ways. With minor variations, judges in the United States can be initially selected in two ways: elite appointment or contested election. The normative debate over the value of appointment or election based systems of selection focuses primarily on the ability of the institution to produce professional, independent judges. In elite appointment systems, where either the governor or legislature selects the individual judge⁴, proponents argue that tacit approval of the individual making the selection is enough to produce an accountable court, while still maximizing the independence of seated judges. State courts that initially appoint their justices behave quite similar to the federal judiciary, choosing judges based on ideological agreement with the selecting body⁵ (Langer 2002). As such, while the initial appointment is a step removed from the electorate, the body responsible still takes into account the nominee's ideology.

As an alternative to elite appointments, contested judicial elections are argued to maximize the accountability of the institution by compelling judges to justify their choices

⁴ While some elite appointments take place following a merit selection cycle, which develops a list for either the governor or legislature to choose from, the final choice is still left to an ideologically driven and responsive body.

⁵ This is not uncommon, considering that U.S. Supreme Court justices are only confirmed if they represent the majority's idea of appropriate jurisprudence (Collins and Ringhand 2013).

to the public through frequent elections where the public gets to decide whom they would prefer to represent them⁶. As such, ideological congruence between the candidates and the majority of voters will likely be a decisive factor for the victor. In the US context, two varieties of contested elections operate within the various states. Partisan elections behave very similarly to congressional elections, with a primary season to determine the party's nominee, followed by a general election cycle. The two party candidates appear on the ballot with party identification, providing a significant cue to voters. In states that utilize partisan electoral selection systems, party identification is often the deciding factor (Bonneau and Cann 2015b). In an effort to minimize the political consequences of elections while still maximizing accountability, some reformers have pushed states to adopt nonpartisan elections as the system of choice (Streb 2007). Logistically, nonpartisan elections are similar in form to partisan elections, though they lack partisan cues that make determining a candidate's ideology more difficult, though not impossible. They share a similar primary season, and generally (though there exists some variation) the top two vote getters face off during the general election. These elections usually experience significant campaign spending, and take on much of the rhetoric of partisan competitions. As such, many voters in nonpartisan races decide in an ideologically "correct" way, though not at the rates of voters in partisan elections (Bonneau and Cann 2015b, Rock and Baum 2010).

Following the initial selection, nearly all judges will face a retention cycle anywhere from 1 year to 12 years after their initial selection. Retention, as an institution, is designed in order to ensure judges in the states remain accountable in their decision-

⁶ Many states that use judicial elections empower the governor to select an individual when an absence occurs midterm. These nominated judges are required to stand in the next election cycle. They are much more likely to lose these elections than elected incumbents

making, and while institutional designers and advocates may claim the retention institution was created to remove inept judges, they functionally behave as ideological checks. The institutions of retention are thus the workhorses of judicial accountability. If these judges are concerned about their retention, these various institutions should condition their behavior to varying degrees, dependent upon the level of judicial accountability the institution elicits. Unlike methods of selection, judges in the states can be subjected to one of three primary types of retention: elite reappointment, contested elections, or a retention election. While the procedure used for elite reappointment and contested elections are unchanged as a mechanism of retention, they should cause incumbents to behave differently from initial nominees or candidates. That is to say, these institutions will condition judges' behavior. Generally, judges in pure appointment systems are relatively safe during their reappointment, since the same institution that initially appointed them to the bench handles their reappointment. These judges generally behave in such a fashion that that helps their retention, namely decided cases concerning recently passed laws in congruence with the wishes of the state government. This reinforces an ideological attachment, but in a different way than if the judges were responding to an electoral constituency (Langer 2002). While this might restrict their judicial independence to act decisively in all areas they want, they are free from direct accountability to the electorate. While rare, appointment systems do occasionally refuse to retain a judge, and generally for ideological reasons such as was the case in New Jersey when Chris Christie refused to reappoint two Democratic judges.

Unlike elite reappointment, retention through contested elections are a reflection on the political climate, the ideology of the voters, the ideology of the judge, and the

decisions they have made (Bonneau and Cann 2015a). The institution of partisan elections makes all this information, except for the decisions by the judge, explicit to the voting public. The average voter casting a ballot in a partisan judicial election need only reference the party identification of the candidates and act (Bonneau and Hall 2009). Nonpartisan elections provide a less clear decision to the voters. Formally, the absence of party identification removes a significant cue from the voters. However, relevant research demonstrates that judges can overcome this absence with targeted campaigning and rhetoric. In addition, we know that judges within electoral systems are more likely to decide salient issues in congruence with public opinion, especially during elections years (Brace and Boyea, 2008, Calderone, Cane-Wrone, Clark 2009). This means functionally that judges retained in contested election states are ideologically accountable to their constituency.

As a distinct contrast with contested elections, retention elections are uncontested confidence votes. Advocates for retention elections assume that judges will be held accountable by voters (Caufield 2009), though these systems experience low levels of campaigning and high levels of ballot roll-off (Klein and Baum 2001) which mean that less of the citizenry is engaged with the retention of judges. Retention elections have been found to significantly affect how judges relate with and decide cases (Savchak and Barghothl 2007), so it may be the case that there exists some connection between public will and decision-making as the retention election looms. However, we argue that this will ultimately cause a weaker ideological attachment to the electorate, since the electorate participating in the retention election may not be representative of the entire electorate. This will significantly reduce judicial accountability, as the direct tie between the judge

and the electorate will be uninformed and incomplete. Indeed, we feel that in the absence of interest group participation, like which happened in California in 1980 and Iowa in 2010, judges will rarely be removed from office ever. When they are, it will be because another group is campaigning against them, raising the issue of their decisions being ideologically out of step with the electorate.

Why the Method Matters

Ultimately, the combination of selection and retention systems should affect the degree to which a states' court will be either independent from or accountable to the states' electorate. While the initial selection method most certainly matters in forging the link with the electorate, contested elections or elite appointments initially do not effect accountability or independence directly as they are merely devices of selection. It isn't until after their selection, when judges become interested in staying on the court, that the institutions of retention should condition how they behave. That conditioning will largely depend upon the institution's effectiveness at keeping judges accountable to the public. While justices across all methods of selection join the bench because of an ideological attachment to the group choosing them, we argue that it is the combination of both the method of selection and retention that can facilitate ideological drift. We believe while selection institutions create a representational link between the electorate and the judge, the three different institutions utilized to retain judges in the states revitalize this link with varying degrees of success.

Given the court's often-tenuous link to the greater representative system, the question for institutional designers is which, if any, retention institution is effective in keeping judicial ideology in check with public ideology? All systems of retention utilized

by the states create an accountability check on judges, thus legitimating their authority via an “authorization step” (see Pitkin 1967; Montanaro 2012; Rehfeld 2006). This authorization step opens a judge up to scrutiny from the audience of representation responsible for retaining judges. According to Manin (1997), the most appropriate form of selection for the sake of democratic representation is via some form of election, since it allows constituents to consistently reaffirm their confidence in governors and representative agents over time. For Manin (1997, 85), methods of selection that are not based on election are only tacit forms of legitimization, since “the legitimacy of any particular outcome would derive exclusively from the consent to the procedure of selection.” Elective systems provide a “safer” alternative because citizens are able to not only reiterate their consent to the governing system itself by participating in elections, but also reaffirm their confidence in selected representatives as well.

When voters are unable to reaffirm this consent via elections, they are left with only a tacit connection to the judiciary via either the governor or legislature. Despite the link being weaker, these institutions do still put a value on accountability, as the institution authorized to retain judges is still linked to the will of the people. That is, citizens can still have some power over the retention of a judge in these states, however the level of participation required in order to affect the make-up of the court is higher than in states with contested or retention election. State supreme court justices, accordingly, can still be accountable to the citizens of their state so long as the audience they make claims to (whether that be the public, elite actors, or an amalgamation of both) recognize the judge as qualified for that position (Rehfeld 2006). In these cases, the method of retention is important to keep in mind.

If we begin with the rationale that all systems of retention value accountability in some fashion, representation in the judiciary can be viewed as a spectrum measuring the public's connection with a political office. Institutions that prioritize accountability should strive to make the link between public preferences and decisions explicit by ensuring that actors are held responsible for their choices. This is most efficiently done through a system of direct, contested elections. As of 2012, eighteen state supreme courts used a method of selection and retention that makes the representative function of the judiciary explicit in this way, either through partisan or nonpartisan elections. With varying term lengths, the electorates in these states regularly express their consent to be governed by choosing their own representatives in the judiciary. Initially, the movement toward judicial elections in the United States was hailed as, "an opportunity to provide the judiciary with its own separate constituency" (Sheldon and Maule 1997: pg. 4). According to Bonneau and Hall (2009), this allowed not only independence from the legislature, but also gave the public the ability to remove, "incompetent and arrogant judges" (pg. 7). At the most basic level, we anticipate that systems that incorporate competitive elections to both select and also retain judges will elicit the strongest ideological link between judges and citizens. These systems seek to maximize judicial accountability over judicial independence by holding frequent elections of judges, forcing judges to be answerable to citizens directly. We assume that partisan elections make the ideological link more explicit by providing a heuristic to constituents through the use of party identification of judges, thus simplifying the voting process for the public. While relevant research on nonpartisan elections has identified that on salient issues, judges are more likely to support the popular position of the majority of the electorate, salient issues are only an exceedingly small part of a judicial

docket (Calderone, Canes-Wrone and Clark 2009, Canes-Wrone and Clark 2009, Canes-Wrone, Clark, and Kelly 2014). We anticipate this should facilitate ideological drift more for nonpartisan, than partisan judges.

On the opposite end of the accountability spectrum are institutions that make the ideological link more tacit by giving the power of selection and retention to public officials, whom are responsive to the public's will. Arguably the most "independent" from public pressure, institutions that utilize elite appointment as the mechanism for selection and retention still must take into account public mood, as the wrong choice by a governor or legislature can lead to loss of office in the next election. Currently, twelve states employ a form of appointment system that provides an implicit connection regarding between elected officials and the consent of constituents. The connection between the selection and retention of judges and the electorate is implied in these systems because governors and members of the legislature select judges to occupy the bench in the interest of the people. This tacit consent weakens the accountability link in appointment systems as compared to electoral systems, though an ideological link is established through the election of the deciding officials. We anticipate that systems that utilize appointment methods (gubernatorial or legislative), with the accompanying tacit link between the electorate and the justice, will be less ideologically representative overall since this connection is weaker in such systems. This relationship is augmented by the term length of judicial appointments, as some states that use appointment methods are identical to the United States judiciary and grant judges lifetime tenure. This tenure may deepen the ideological drift that occurs between judges and the electorate over time, since judges will be less constrained by public opinion when making more controversial decisions.

States that break up their selection and retention mechanism, such as those states that utilize the Missouri Plan, present a more complex situation for researchers interested in representation and accountability since the institutions incorporate both appointment and electoral consent as mechanisms of control by the governed. Thus, we are primarily interested in this study whether the promise of the Missouri Plan fully holds when examined. According to the American Judicature Society, the promise of the Missouri Plan was to provide accountability to the electorate while lessening the “politicization” of the judiciary through contested elections. Proponents of the plan contend that the Missouri Plan ensures accountability in a similar fashion to a contested election without embroiling judges in politics by separating out the initial selection of judges from the act of retaining them later. Thus, the method of selection is similar to appointment systems, except that a nonpartisan commission compiles an initial list of candidates from which the governor is required by law to choose their appointee⁷. The method by which justices are retained in the Missouri Plan, however, differs significantly as justices are subjected to a confidence vote similar to a state referendum, rather than an electoral competition between an incumbent judge and a challenger. Retention elections are often low salience events, plagued by a lack of voter information because of the lack of campaigning (Bonneau and Hall 2009) thus leaving the governed unable to knowledgably state whether a justice represents their interests. These retention elections are thought by their supporters to provide an accountability link between the electorate and the individual justice, though research has shown that voters rarely become energized by campaigns in retention elections (Klein and Baum 2001).

⁷ In some appointment states governors also get their recommendations from a merit commission.

Based on this, we argue that while justices under the Missouri Plan are chosen in part based on their ability to ideologically represent the policy preferences of popularly elected governors, the link between judges and their constituency lapses over time due to the institution of retention elections leading to a greater ideological deficit. The vast majority of justices in retention elections do not campaign or raise money (Hanssen 2004), and thus tend to be woefully unprepared when independent campaigns arise to unseat them from the bench. Likewise, voters in retention elections have a hard time determining a “correct vote,” as they are unprepared to evaluate a seated judge because of the lack of competition. That is, the choice between “approve” or “remove” is patently different than the choice between two candidates (Dubois 1984). Accordingly, we hypothesize that the level of ideological representation will be the lowest in Missouri Plan states, as neither the selection by the governor nor the retention elections serve to create a significant representational link with the public. If the null hypothesis is true, however, the ideological deficit created by partisan elections and the Missouri Plan ought to be insignificant, vindicating proponent’s arguments that the Missouri Plan maintains an adequate link with the public compared to systems of retention that prioritize accountability through contested elections.

There remains one type of system of selection system that does not fit neatly into the four methods of retention discussed thus far. The states of Illinois, New Mexico, and Pennsylvania utilize mixed selection and retention systems that incorporate features of partisan elections as well as retention elections. In these systems, which we term a “hybrid” election system, open seats are chosen via partisan election⁸. Following the justice’s initial

⁸ Several adaptations of the model were performed in order to account for variations in how states may label their method of selection. While Michigan and Ohio also combine parts of two different mechanisms

term, judges must stand in a nonpartisan retention election similar to the Missouri Plan. Presumably, the initial selection method via partisan elections should provide a stronger link to the electorate than elite appointment. Arguably, however, citizens' opinion on a political actor tends to be formed retrospectively after taking office, which may mitigate the power a partisan *selection* of a judge will have. Thus, the institution of an uncontested retention election in order to retain judges may increase the ideological deficit between judges and citizens over time, as we anticipate with systems like the Missouri Plan. We therefore anticipate that the ideological link forged through the contested partisan election will not be able to make a noteworthy impact the ability of a judge to represent citizens. As a result, the ability of the public to hold a judge accountable via retention elections will be less likely. Over time, the attachment forged in the initial selection should decrease since retention elections are more likely to create an ideological deficit. Because of the variation in forging the electoral link, we anticipate that hybrid electoral systems will experience drift similar to the level found in systems that utilize a nonpartisan election and will experience less drift than system that utilize appointment selection and an uncontested retention such as the Missouri Plan. While the initial method of selection is quite different from hybrid states to Missouri Plan states, they share retention elections as a means of keeping justices in office. It remains to be seen if this direct ideological link will erode over time due to the method of retention. The summary table for our expected rank ordering can be found in Table 1.

for selection and retention both are still electoral. In order to test whether these have a significant effect on the outcomes presented, we ran consecutive models that included these states as either nonpartisan systems or partisan systems and found no significant change in the effects of the model. Likewise, the hybrid states of Illinois, New Mexico, and Pennsylvania could be considered variations in the Missouri Plan system, as they both utilize retention elections as an accountability mechanism. We combined Hybrid with Missouri Plan in an alternative model and find no significant impact on the model.

[Insert Table 1 here]

Modeling the Nature of Representation in State Supreme Courts

In order to analyze whether the methods of selection and retention used to populate state supreme courts, we collected longitudinal data by year on the average ideology of the fifty-two supreme courts from 1995 through 2005. The difficulty in constructing a measure that matches ideological consistency between state courts and the public lies in the absence of finding measures that are directly comparable. Here, judicial ideology was measured using the recently released dynamic ideal point estimations (SDirt) developed by Windett, Harden, and Hall (2015), and public ideology was measured with the well-established Berry, Ringquist, Fording, and Hanson (1998) scores.⁹ To ensure comparability, we follow a three-step process based on Kassow, Songer, and Fix (2012) in order to produce a valid approximation. First, we normalize and take a z-score of the Berry et al. (1998) measure for citizen ideology in each year under examination. Next, we take the inverse, then normalize the SDirt scores from Windett et al. (2015) and produce a similar z-score. Finally, utilizing the normalized scores, we calculate a measure of drift by taking the absolute distance between judicial ideology and public ideology. Drift here is defined by the ideological proximity that the institution of the judiciary is to the average ideology of the citizen body. Drift is lowest when judicial ideology is proximate to the mean ideology of the public; it is perfect when the two values are identical and drift equals zero.

⁹ We chose to utilize the SDirt scores over the PAJID scores since our theory expects yearly change from both judges and the public. An alternative model utilizing the PAJID scores in lieu of the SDirt scores is included in the appendix to this paper. Variation in the results in these models is largely a product of one of two things. Either a change in citizen ideology precipitates a change in the ideological deficit – something that either measure would adjust for – or a justice is replaced on the bench. We believe that since judicial ideology is only able to change when a justice leaves the bench, the PAJID scores are less precise than the SDirt scores for the purposes of this study.

The average of our drift variable is 1.05 with a standard deviation of .847. It ranges as low as .006 and as high as 4.93. To give this some context, in 2003 Chief Justice Ray Moore was removed from his position on the Alabama Supreme Court. In that year, our measure of drift for the Alabama Court - which includes Moore - was .454, well below the average. In 2004, Justice Drayton Nabers was nominated as a replacement, and in that year the drift score for the Alabama Court went up to 1.66, a change of 1.206 points¹⁰. While this is a large increase in the data, it provides a baseline to understand institutional effects.

Our model starts with the assumption that there exists an equilibrium point between public ideology and judicial ideology in the states that responds to both endogenous and exogenous shocks over time. The observed judicial ideology in a state represents the makeup of the bench, which is based upon the attributes of those choosing the judges. Ideological drift occurs under two different conditions. First, drift can occur when particular exogenous factors, such as method of retention, institutional constraints, or district characteristics force the judicial branch to change, thus causing a deficit between the mean ideology of the court and the mean ideology of the public. Second, drift can occur when the electorate responds to similar exogenous factors, bringing it out of sync with the ideology of the judiciary. In order to test the impact of these factors on the level of representative drift, we employ a single-equation, error correction model (ECM) with a random effect¹¹ for state and year. We believe an ECM is most appropriate because it

¹⁰ Less than two years later Nabers was defeated in his first election attempt, replaced by a Democrat, Sue Bell Cobb, the only Democrat on Alabama's Supreme Court at the time.

¹¹ The results of a Hausman test for fixed vs. random effects indicate that we cannot reject the null hypothesis that the unobserved heterogeneity is uncorrelated with the regressors. In this case, a random-effects model is more appropriate due to the efficiency of calculating the estimator in the model. We run the model utilizing a robust covariance matrix in order to account for any heteroskedasticity and serial correlation in the model. The authors can produce exact results for the Hausman tests for the models upon request.

allows us to model the impact of institutional and demographic factors on the level of ideological drift in any one year of our sample, while allowing us to also estimate which factors impact changes in drift between states in the sample. Error correction models allow us to better understand the nature of changes to ideological drift over time by modeling the affect of the model coefficients on drift from year-to-year. The single equation error correction model used here has been shown to be useful in previous work by Durr (1992), Keele (2007), Ramirez (2009), and Windett, Harden, and Hall (2015) since it allows us to estimate both short- and long-term relationships over time, while still affording us a large pooled sample in order to draw inferences.

For the purposes of analysis, we begin with the assumption that the method of selection forges an initial “link” with the public either through explicit election or through a tacit connection to elite appointers. This link is then tested over time with variations in the method of retention. Overall, this allows us to generate the five categories are used in the analysis: 1) partisan elections; 2) nonpartisan elections; 3) appointment systems (including both gubernatorial and legislative mechanisms); 4) Missouri Plan; and 5) systems that utilize partisan elections for open seats but retention elections following (referred to below as “hybrid” systems). Table 2 displays the state classifications. In the analysis below, we first follow the assumption in the literature on representation that electoral systems are best at maintaining equilibrium between political actors and the electorate, since agents are subject to frequent elections. Thus in our analysis, partisan elections are hypothesized to be the most ideologically consistent, and each of the other four methods of selections will cause significant variation in ideological drift over time.

This means in our model that the coefficients for each selection system will be compared to the drift in our baseline category, partisan elections.

[Insert Table 2 about here]

To provide a fuller evaluation of what influences changes in ideological drift, we collect data from two broad areas we believe should impact either judicial ideology or alternatively citizen ideology. First, we collect data on the institutional rules that govern Courts of Last Resort with the expectation that they will affect the nature of ideological movement. Specifically, we collect data on tenure and tenure length, jurisdiction, and the presence of an intermediate appellate court (IAC). We suspect that variations in tenure and term length of supreme court justices will result in less ideological change in the judiciary. Specifically, two variables – the literal term length as well as the average tenure on the court - should correspond to an increasing ideological deficit between judicial and citizen ideology.¹² In contrast, we hypothesize that states which institute mandatory retirement ages for judges will likely have a lower level of drift compared to states that do not. We also hypothesize that a court with discretionary jurisdiction will likely see an increase in ideological drift compared to those with mandatory jurisdictions. Courts with discretionary jurisdictions get to choose at least some of the cases they will hear within a term, can more easily dodge difficult questions, keeping them away from a mobilized interest group or public. This will decrease workload from an entirely proscribed docket, and will likely increase job satisfaction, thus incentivizing justices to remain on the bench longer. This should therefore increase the ideological deficit, as justices will be more likely to remain on the bench over a longer period of time. As we find in Figure 1 below, the average tenure

¹² Drift is a concept which occurs over time, and the longer time that is allowed between retention cycles should facilitate more drift.

for judges with discretionary jurisdictions significantly more variable compared to those with mandatory jurisdiction. Last, we assume that an IAC reduces the burdens upon the Court of Last Resort, thereby increase the likelihood of remaining on the bench.¹³

[Insert Figure 1 about here]

Our second broad area of controls focuses on variables that we expect to affect citizen ideology of the state. We draw attention to measures that specifically target primary demographic categories that may impact voting and the ideology of the electorate. First, we include a variable that measures the percentage of the population the state that lives in an urban area. We anticipate that as a state increases in urbanization, the citizen ideology will become more liberal (Brown 1995; Jewett 2001). In a similar vein, we include a measure for percent of the population with a high school diploma and anticipate that education has liberalizing effect on citizen ideology (Wolfinger and Rosenstone 1980). We also include two variables that measure other aspects of the population: proportion of the voting age population that is sixty-five or older and the per capita income normalized to 2005 dollars. We anticipate that as the proportion of senior citizens increase, the citizen ideology will become more conservative. We hypothesize that as per capita income increases the population will become more conservative (Gelman 2009).

Finally, we include two lagged indicators that specifically target normal fluctuations in political ideologies on the Court and in the public. We assume that ideological drift may correct itself from one time period to the next as a result of changes in the population or the bench. Fluctuations in the public's ideology may cause a deficit

¹³ We recognize that not all judges are chosen statewide. Louisiana and Illinois both have districts which choose judges. However, do the lack of accurate ideology measures down to these district levels, we model them state wide for consistency.

between citizens and judges. This deficit may be corrected for naturally as issues change from one year to the next, or it may be corrected by an adjustment to judicial ideology. We assume that citizen ideology in the previous time period will likely lead to an increase in ideological drift in the next. However, this should be countered by judicial ideology, which should adjust from each to correct for deficits caused by changes in citizen ideology.

Results

Before examining the fully specified model, we take a moment to examine whether methods of selection exhibit the trends that we have previously hypothesized. Figure 1 presents a cursory examination of the average ideological drift between citizens and judges overlaid with the average drift for the five major options for selecting judges in the United States. While it is expected that judges may be ideologically different than their constituent publics, the graphs in Figure 1 demonstrate that certain methods of selection allow for more or less drift than others on average.¹⁴ Starting with our baseline for the model, partisan selection methods do exhibit a much lower amount of drift over time compared to the average. This gives us a good starting point for confirming our assumption that partisan selection provides the greatest level of congruence with the ideology of the public. Comparatively, nonpartisan selection methods exhibit more erratic spikes in congruence, indicative that the loss of partisanship may have a significant impact on the ability of the public to check judicial ideology. A similar result is exhibited in appointment-based systems as well. Appointment-based systems, as

¹⁴ We note here that currently we have no theory to address the specific directionality, either liberal or conservative, of drift as presented in the model. Our models do not attempt to argue that judges (or citizens) are becoming more or less liberal/conservative, only which ideology shifts and causes shocks to the ideological equilibrium present in a judicial system. While we are sure that readers will be interested in predicting the ideological direction of these shocks, we must reserve that study for another date.

expected, tend to track closely to the average level of drift, but tend to exhibit slightly more drift overall than partisan systems. This is likely due to the fact that judges in these systems only have the tacit consent of constituents, since they are selected via elite political actors rather than the mass public. Based on the preliminary findings in Figure 1, the Missouri Plan and Hybrid selection plans tends to exhibit higher levels of representational drift compared to the average judicial system, behaving in a similar fashion to nonpartisan elections.

[Insert Figure 2 about here]

Turning now to error-correction model in Table 3, our findings largely match our expectations with regard to how different methods of selection affect ideological drift in state supreme courts. The model performs soundly, and provides strong evidence in support of partisan methods of selection being more ideological representative than nonpartisan elections, retention elections, and appointment systems.¹⁵

[Insert Table 3 about here]

Compared to partisan selection systems, where judges can be evaluated by the public using commonly accepted ideological heuristics and tools, no other system of selection significantly decreases drift between judges and the citizens they serve. Figure 2 graphically displays the impact of variations in methods of selection on the level of ideological drift found in the model. Our first expectation that nonpartisan elections will

¹⁵Several tests were implemented to verify the assumptions of our models. While the models do result in low R^2 , this is likely due to inherent nuances in judicial systems that are immeasurable given our modeling strategy, however this is the most appropriate way for us to model the differences among such systems. A Granger causality test from a VARX model finds some evidence of endogeneity between judicial ideology and citizen ideology, with some indication that citizen ideology Granger causes judicial ideology ($p < .05$; the specification is based on a simple model of the ideology measures with two lags of each regressor determined by Lagrange Multiplier tests). Finally, a Hansen (1991) test and CUSUM test of both models show no signs of parameter instability.

experience more drift compared to partisan elections remains significant in the full model. Interestingly, nonpartisan electoral systems have a much greater magnitude of effect than appointment and Missouri plan systems, increasing drift by 0.488 points. Considering what is known concerning nonpartisan elections, we feel that the loss of partisan heuristics leaves the public with a less clear understanding of judicial ideology, and no easy way for judges to overcome accountability gaps with citizens. This inevitably causes wide gaps in ideological congruence, and leave judges less accountable as a result. While a number of studies demonstrate that nonpartisan judges are more likely to decided cases consistent with public opinion, those effects are only examined in salient cases (Calderone, Canes-Wrone and Clark 2009, Canes-Wrone and Clark 2009, Canes-Wrone, Clark, and Kelly 2014). However, the vast majority of cases are simply not salient. Since judicial ideology measures consist of all the output of the judges (especially the SDirt scores), our findings are not necessarily inconsistent with these findings. In salient cases, with easy issues, judges tow the ideological line. On average, however, they can drift considerably on non-salient issues, which make up the majority of their docket.

Appointment systems also follow our previously stated expectations, increasing the amount of drive by 0.369 points. Appointment systems, as should be expected, have a weak link to the public's ideology since the representational link is tacit, based on who is in power in the executive and legislature at the time. The system builds in weaker accountability links by forcing the public to go through an intermediary when choosing judges, with the understanding that judicial ideology will have some link to public ideology via an intermediary government branch.

Unlike in the preliminary model, the Missouri Plan and Hybrid selection systems both reach statistical significance when we consider institutional and citizen-level variables. The substantive effect of the use of the Missouri Plan increases ideological drift by 0.340 points. Hybrid systems have the greatest magnitude of drift compared to other methods of selection, increasing the drift between judicial and public ideology by 0.525 points. This is likely due to the fact that these systems introduce formal insulation controls that protect judges from public pressure. Without heuristic cues or a viable challenger that can give the public a reasonable alternative, judges are able to deviate significantly from the public ideology because the accountability link proposed by proponents of these institutions do not effectively function to keep judges accountable. Both of these selection and retention methods were specifically designed to protect judges from the “politics” of elections through the institution of retention elections and, to some extent, they function as intended. That hybrid systems exhibit more drift than Missouri Plan states is likely a function of two joint factors. First, with only three states to compare to seventeen, small variations in any one state can significantly affect an institution’s drift. Second, the state of Illinois, one of the hybrid states, elects its judges in districts. With the variation between upstate (Cook County) seats and downstate seats, we have an issue of theory mismatch with our data. While our justice ideology scores are accurate, the citizen ideology scores measure the entire state, not the specific districts.

[Insert Figure 3 about here]

Interestingly, we find here that drift has much more to do with characteristics of judicial ideology than with changes in citizen ideology. Looking specifically at the error-correction variables included in the models, we find that the amount of drift present

between the judiciary and the public often readjusts due to shifts and changes in judges' ideology. Looking at Table 3, we find that the lagged judicial ideology of a court has the effect of decreasing drift by -0.144 points, all else equal. What this indicates, we believe, is that the court is acting in a way that is more responsive to public ideology than the public ideology being responsive to the court's ideology. This is indicative of a representative body attempting to maintain ideological consistency across institutional structures. In order to fully test the ramifications of this, we ran an alternative model specification including an interaction term between methods of selection and the lagged judicial ideology. Whereas some methods of selection do seem better than others in terms of the magnitude with which they respond to public ideology, none of the interacted methods of selection reach statistical significance at a 0.05 level. We believe that this finding helps further provide evidence to our primary theory: namely, that judges in the states attempt to act as representative agents of the public though the method of retention mitigates how much congruence there needs to be.¹⁶

Notably, none of our other control variables reach conventional level of statistical significance. We believe this is largely due to two unique factors present in the current data. First, concerning our dependent variable, two circumstances can cause movement in our measure of drift, shifts in judicial ideology or shifts in citizen ideology. Large shifts in judicial ideology are generally a function of individual justice replacement. As we find in our analysis, this likely accounts for the largest adjustment in ideological drift over time in the model. Shifts in citizen ideology are generally a function of demographic

¹⁶ Since none of the interaction variables reach standards of significance at a $p < .05$ level, we do not reproduce the results of the alternative specification model here. The model can be found in our online appendix, along with other robustness checks.

changes, which generally takes place over time and are difficult to detect in only ten years time. This brings us to a second factor that currently affects our analysis. Currently, the SDirt scores only go back to 1995, which limits our ability to examine judicial ideology in a dynamic fashion for longer than ten years. We are confident that with as more years are added to the sample, additional variables would attain statistical significance. We encourage those interested to examine our online appendix, in which we replicate our models using a longer time series utilizing the PAJID scores in place of the SDirt scores utilized in the above analysis.¹⁷

Conclusions

Five justices were up for retention in Kansas in 2016, four of which were nominated by governors before Sam Brownback took office. These justices have been consistently attacked by the legislature and the governor as being out of step with the politics and political environment of the state. However, all five judges were retained in non-contested retention elections: referendums for their seats. While the votes counts were lower than the previous election cycle none of the justices targeted by Brownback were removed from office. How can the same electorate which chooses highly conservative politicians for the governor and legislature actively retain moderate to liberal judges?

The forgoing analysis may provide us with some answers. Concurrent with our findings, recall justices' within the Missouri Plan have their initial selection in the hands of an elite body. While the governor likely chooses justices to match their own ideology,

¹⁷ The authors have replicated and extended this study using the PAJID scores in place of the SDIRT scores, and the substantive variables remain significant, and many of the controls attain significance as well. These models, which range from 1976-2005, are available in an online appendix. While the SDirt scores do currently go up to 2010, the addition of five years of data between 2005 and 2010 would likely not provide enough empirical information on changes to citizen demographics to significantly impact the findings of the models presented.

that ideology is what the public has endorsed through the electoral process. When these justices are retained through retention elections, little information is available to the public regarding their tenure on the court. Judicial retention elections are low salient events for the public, often with little to no campaigning involved. This creates a situation in which justices are very loosely tied to their constituency. They are not ideologically accountable to an elite body, and with the lack of information available, are not ideologically accountable to the electorate. As such, this facilitates an ideological shift of courts away from the public.¹⁸

This finding is juxtaposed to the conclusion that partisan elections for justices generate courts that are more closely joined with their electorates. The ideological connection between the court and constituency is more explicit, identical to those we expect from members of legislatures who regularly have to respond to the electorate and make claims regarding their ability to effectively represent their constituents. These justices are installed and maintained, in part, because of their ideological closeness to the electorate, thus reducing the amount of ideological drift by tethering judges to their constituency.

While nonpartisan judges exist in an institution that is nearly the mirror of partisan judges, some have argued that in the absence of a partisan label, nonpartisan justices only have to decide salient cases consistently with the wishes of the electorate to be retained (Calderone, Canes-Wrone and Clark 2009, Canes-Wrone and Clark 2009, Canes-Wrone, Clark, and Kelly 2014). The vast majority of cases though, are not salient.

¹⁸Judicial Performance Evaluations (JPEs) are a new development in wide use, which may be able to mitigate this ideological deficit, but scholarly work calls into question their effectiveness (Gill and Retzl 2014).

Therefore, while these nonpartisan courts are representing their constituencies' wishes on salient issues, they are not bound to their constituency's ideology on all other issues.

This falls in line with the literature that argues nonpartisan elections weaken the ability of the electorate to make a "correct" voting decision, since vital information about judicial ideology (in the form of party identification) is missing (Bonneau and Hall 2009, Klein and Baum 2001, but see Bonneau and Cann 2015).

Beyond the archetype of partisan elections, we are left with four systems that statistically increase drift between the ideology of the electorate and the judges who sit in judgment over them. We believe that the results here provide researchers with a guidepost to better study the theory of representation and public accountability more fully. While there is not much variation in the forms of selection and retention at the federal level in the United States, there is significant variation in between the systems within the states (Rehfeld, 2006). In studying the judicial systems at the state level, we find that partisan elections are pivotal for ensuring the accountability of democratic institutions and political figures. This selection and retention method contains political elements throughout the processes, and ultimately forms a judiciary with low levels of ideological drift. The removal of these elements, such as the removal of partisan identifiers or direct competition, has the effect of confusing or limiting the ability of the public to declare whether a judges values match. Retention systems which make this information difficult to obtain either by removing it from the ballot (nonpartisan elections), reducing the need for campaigning (Missouri Plan), or moving retention to an elite body (appointment systems) limit access of information to the public and ultimately reduce the ability of the people in these states to keep their judiciary accountable.

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