

**Institutions as Insulators:
Representational Drift on State Supreme Courts**

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Abstract

The variation in methods of selection used to populate the State Courts of Last Resort have led both amateur and academic institutional designers to ruminate on the effectiveness of methods of selection to produce representative agents. Many groups have rallied around one system or another with the goal of either balancing or maximizing one of these two competing values. This debate has led researchers to question whether judicial ideology is effectively leashed by the preferences of citizens, and what methods of selection better control judicial ideology in order to make a representative institution. We examine the fifty-two State Courts of Last Resort, and focus on how different selection methods impact the amount of “representative drift” between judicial and citizen ideologies. We conclude that selection methods which lack explicit and frequent checks on judicial representation through elections insulate their Courts from an ideological connection with the public.

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On November 4, 1986, Chief Justice Rose Bird, Associate Justice Cruz Reynoso, and Associate Justice Joseph Grodin were all removed from office by the voters of California in a historical retention election. The voters, upset about the trio's general opposition to the death penalty, took decisive action to bring the California Supreme Court back in line with their policy preferences. This action was unprecedented in the State of California, as not a single justice had been removed from office by the voters in the fifty-two years since this selection and retention system was first instituted in the state. Indeed, not a single justice has been removed by the voters of California since 1986.

Those who study elections in general were unlikely to be shocked that voters removed incumbents from office in California for decisions on a controversial issue. The public was exercising their right to hold public officials accountable as representatives of the public's opinion, especially on controversial issues such as the death penalty. Up to this point however, judicial retention elections were considered to be non-events; highly uncompetitive, with a great degree of ballot roll-off due to an unconcerned electorate (Abbe and Herrnson 2002; Bonneau, 2005). The events in California, while notable, cannot be taken in isolation. In Iowa in 2010 Chief Justice Marsha K. Ternus, Associate Justice Michael J. Streit, and Associate Justice David L. Baker were all removed from the bench by voters due to their decision in *Varnum v. Brien* (2009), which voters believed was out of step with the values of the state. Like the removal of the justices from California in 1986, the event in Iowa was equally historic, as it represented the first time

a justice had ever been removed from office by the voters in the state since the instillation of retention elections in 1962. The selection and retention institution in these states, the Missouri plan, is designed to insulate justices from politics. In these cases, it did such a good job, the justices did not know how to react when attacked during a campaign.

We begin from a central point: the instillation of retention elections has significantly impacted the way we think about courts as representative institutions in government. Retention elections are very different from other elections for office. Foremost, retention elections are designed to be uncontested. Justices who stand for retention do not face challengers, but instead stand in what can be considered a referendum on their performance. Second, because of the lack of challengers, incumbents often do not have to publicly defend their decision-making records. Finally, there is little need to raise money to counter opposition in retention elections because in most cases there is no such opposition (Bonneau 2005). This combination of factors leaves the electorate un-mobilized, uninformed, and unconcerned about the electoral competition. These factors also contribute to high amounts of ballot roll-off and a significantly dominant trend of voters retaining sitting justices, even when the justices may be ideologically out of step with the state (Klien and Baum 2001). It is our belief that these factors combine to insulate the justices from the electorate unless energized by a vigorous anti-incumbent campaign, which have been extremely rare events to this point.

If we believe that the Missouri Plan insulates judges we must therefore ask ourselves: is there something different about the nature of representation under different selection methods? While there are many facets of representation, among the most vital to a functioning democracy is the perception that representative agents are standing for

the population they serve either ideologically or via policy decisions (Dahl 1956; Pitkin 1967). Along with this, most scholars argue that democratic representation requires some type of accountability mechanism, most often through frequent elections (Pitkin 1967; Manin 1997; Mansbridge 2003). State supreme courts can help provide us with empirical leverage to ask and answer profound theoretical questions that relate to the very nature of what it is to govern and be governed (Brace and Hall 1995), questions that cannot be answered by focusing solely on the electoral connection between representatives and constituents.

Our focus is on the institution of selection and retention and how they translate public ideology into judicial ideology. There are fifty-two state supreme courts, which vary substantially concerning the method by which justices are selected and retained, ranging from gubernatorial appointments with life tenure to partisan elections. We seek to address how representative state courts are, acknowledging that representation could be a function of increasing levels of accountability or independence (Curry and Hurwitz 2010). Put more simply, certain selection methods should insulate the Court to varying degrees and thus, create more or less representative institutions, as they simultaneously create more accountable or independent judges. We seek to examine if the methods of selection and retention used to populate State Courts of Last Resort affect the degree to which those bodies represent the populace by measuring the amount of *drift* between the ideology of the Court, and the ideology of the public at large.

We begin our examination with a review of the literature on representation and how it relates to political institutions in order to understand how judicial institutions and judges can act as representative agents to the populace, with and without any formal act

of consent. Next, we present our data and methods, and provide hypothesis for what we believe will have a significant impact on what we refer to as “representative drift” - defined here as the absolute distance that the ideology of a political body is from the ideology of the citizens it serves. We analyze representative drift utilizing a two-stage estimation system, relying on a partial adjustment model to estimate the impact of method of selection on immediate changes to the level of representative drift between judges and their constituents, and an error correction model to estimate the impact on change in the level of drift between years in the study. Finally we discuss the substantive findings of our models and how the method of selection creates a more or less insulated environment for the Court, and allows judges to pass themselves off as representative agents of the people.

Representation and State Supreme Courts

Traditionally, theoretical work done on the concept of political representation has attempted to show how one individual is held accountable to a population for the decisions they make on their behalf. More recently, examinations of representation have turned their attention to the ability of non-elective political institutions to represent constituencies as well. Rehfeld (2006; 2009) and Saward (2012) have both reexamined representation by focusing specifically on the role of the “audience” and the ability of an agent to make “claims” to being representative of that audience. According to Rehfeld (2006), examinations of representation should take into account the audience of representation more thoroughly, rather than presuming some implicit “electorate.” By doing so, we can better understand representation more generally, which will allow researchers to make arguments about representation in cases where agents are not chosen

through election, such as lobbyists, diplomats, and non-elected judges. State supreme court justices, according to this general account, can still be representative agents 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. In these cases, the method of selection is important to keep in mind. Saward (2010) argues that representation should be seen as an evolving process in which agents construct claims to an audience about their ability to represent constituents' interests. Representation is evaluated, therefore, based on signals sent by representatives to their constituents about the substantive political activities they engage in, and whether or not constituents accept these activities as correct.

The substantive political activities that judges perform for the populace are often evaluated based on the dichotomy of judicial independence versus accountability. These terms and their definitions, however, are closely linked to the long-standing debate between "trustees" and "delegates" in representation literature. Both concepts place contradictory demands on the behavior of representatives: delegates are required to be responsive to changes in the population they serve and are held *accountable* for their responsiveness, whereas trustees are charged with utilizing their own *independent* judgment and must strive to prove they are serving in their constituencies "best interests." The events in California in 1986 and Iowa in 2010, discussed previously, provide us with an example of why the representative dichotomy between trustees and delegates is so significant to judicial politics. In both cases these justices likely viewed themselves as trustees of law and policy in their jurisdictions; however, retention elections remind judges that they may be sanctioned and are accountable to the electorate. While

accountability is reflective of the level of responsiveness that an representative has to the population, judicial independence is generally understood to be based on the ability of a judge to not be responsive to the population's whims.

Why the Method Matters

The understanding that representation requires some formal process through which a constituent population chooses its agents in politics is based, in principle, on the belief that legitimacy in democratic systems derives from the consent of the governed to be ruled by an outside institution or party. The early authors of democratic government understood the necessity of the formal consent of constituents in order for a legitimate form of authority to subsist in a democracy. Therefore, an appropriate method of selection is crucial for true democratic representation, as it is the basis through which legitimate authority is accepted and agreed to by citizens. 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. As of 2012, eighteen state supreme courts used a method of selection that makes the representative function of the judiciary explicit, either through partisan or non-partisan 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. At the most basic level, we anticipate that systems that incorporate competitive elections will elicit the most representation. These systems seek to maximize judicial accountability over judicial independence by holding frequent elections of judges, forcing judges to be answerable to citizens directly.

For Manin (1997, 85), methods of selection that are not based on election (like the use of the lot or appointment by executives) 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 their governors. 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 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 representative link in appointment systems as compared to electoral systems, though a representative link is established through the election of the deciding officials. 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 representational drifting that occurs between judges and the electorate over time, since judges will be less constrained by public opinion when making more controversial decisions. 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 representative overall since this connection is weaker in such systems.

The Missouri Plan presents a more complex situation for researchers interested in representation and methods of selection. The Missouri Plan could be viewed as incorporating both appointment and electoral consent as mechanisms of control by the governed. This 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 for appointment.¹ The method by which justices are retained in the Missouri Plan, however, differs significantly from either appointment or electoral systems. Justices are subjected to a confidence vote more similar to a state referendum rather than an electoral competition between an incumbent judge and a challenger. These retention elections are thought by their supporters, namely the American Judicature Society, to provide a representational link between the electorate and the individual justice. However, retention elections are often low salience events, plagued by a lack of voter information because of the lack of campaigning (Bonneau and Hall 2009). Voters rarely become energized by campaigns in retention elections. This leaves the governed unable to knowledgeably state whether a justice represents their interests, thereby removing the ability to establish the representational link.

We argue that justices in these systems do not have an explicit or implied representational link with the electorate. The vast majority of justices in retention elections simply do not campaign or raise money (Hanssen 2004). Furthermore, Dubios (1984, 403) states that “in uncontested retention elections, incumbents are consistently favored by wide margins, but there appears to be no relationship between the amount of information possessed by the voters about the incumbent and the decision to vote for or

against retention.” That is, the choice between “approve” or “remove” is patently different than the choice between two candidates. Therefore, we anticipate that the level of ideological representation will be the lowest in Missouri Plan states, as neither the selection by the governor nor the retention by the electorate serve to create the representational link.

There remains one type of system of selection system that does not fit neatly into the four methods of selection discussed above. The states of Illinois, New Mexico, and Pennsylvania utilize selection 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 election². Following the justice’s initial term, they must stand in a nonpartisan retention election, which is not contested. We anticipate that the representational link is forged through the contested partisan election. Over time, however, this representational link should decrease, as retention elections are more likely to create a representational deficit. Therefore, we anticipate that hybrid electoral systems will experience more drift than in partisan or nonpartisan states, but less than in appointment or Missouri Plan states.

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 1975 through 2005. The ideology measure used was the PAJID score, developed in Brace, Langer, and Hall (2000). This measure

² While Michigan and Ohio also combine parts of two different types of selection mechanism (partisan and non-partisan) both are still electoral.

serves our purpose quite deftly as it is based on the Berry, Ringquist, Fording, and Hanson (1998) state ideology scores, and allow us to examine different judicial configurations simultaneously using a common metric. Our modeling strategy thus uses the average of the PAJID scores for the states' high court, and the corresponding citizen ideology Berry score.

Our main dependent variable in this analysis, representative drift, is defined here as the absolute distance that the ideology of a political body (in this case the judicial branch) is from the ideology of the citizens it serves. The conception of drift is based on the idea that substantive representation is dependent on the ability of agents to properly “act for” the audiences they serve through policy implementations and political decision making. Thus, better representation occurs when the ideology of the representative or representative body closely resembles the ideology of the electorate they serve. Here, we operationalize this closeness by examining the mean ideology of the institution to the citizen population in the state. Closeness, here, is defined as the ideological proximity that the institution of the judiciary is to the average ideology of the citizen body in the state. Since we are examining the level of distance from the citizen body, our indicator for representative drift is measured from zero to positive infinity. Closeness is highest when the mean judicial ideology is proximate to the mean ideology of citizens in the state and the level of drift is minimized; it is perfect when the two values are identical and drift equals zero.

We recognize that the PAJID scores are, in part, built using the Berry ideology scores. In states that use an electoral method, the citizen ideology score was used as a starting point for PAJID. Likewise, in states that utilize an appointment method, the

Berry government ideology score was the starting point. We feel this is not problematic for the purposes here for two reasons. The first comes from the calculation of the measure itself. The PAJID score, as calculated by Brace, Langer, and Hall (2000) is a composite score that incorporates not only the ideology of the judicial environment, but also weights the environment by the partisan identification of the judge on being elevated to the bench. The use of the Berry et al. scores as a beginning point allows us to start, as Rehfeld (2008) does, by focusing on the relevant set of selectors who are responsible for choosing a representative and their interests when selecting. The partisan adjustment, meanwhile, provides us with an independent factor that also affects a representative's decisions. As Brace, Langer, and Hall (2000) note, the inclusion of the partisan adjustment allows judicial ideology to vary when there is a difference between the partisanship of the judge and the ideology of the selecting agents.

Our second line of reasoning is based on the particulars of the modeling strategy utilized to calculate our measure of representative drift. The question posed here is whether variations in the method of selection insulate the court as an institution and provide it with better incentives to drift ideologically from the public. In order to test this, we aggregate the PAJID scores to produce a mean ideological score for the Court in each year. PAJID scores are created for each justice upon assuming the bench, and so shifts in ideology primarily occur when there is a change in membership. The citizen ideology score, however, does vary by year. It could be the case that we would find a relationship between this drift and methods of selection that utilize appointments, since the components of the PAJID score are different. To assess this, we estimated our models using the difference between the government ideology score and the PAJID scores. This

finding demonstrated that there is no systematic relationship between any of the methods of the selection and drift measured by this alternative specification, a finding that is at odds with our preferred specification of drift. We feel this demonstrates the robustness of measuring our dependent variable in this way. These models are available upon request.³

One final consideration has to do with the impact of correlations between the scores utilized to generate the ideological drift variable used in the analysis. In order to test the correlations between the different measures, a Pearson test was run on the various measures to test whether they exhibited a degree of correlation with each other. As would be expected, we do find that there is a correlation that exists between the PAJID scores and the Berry citizen scores. While this could prove to be problematic if we were examining the specific impact of citizen ideology on judicial ideology, here we focus specifically on whether these two measures affect the *drift* between the two. The results of the Pearson tests for correlation between our drift variable and citizen and judicial ideology both come back with non-significant results, providing us with support to reject the hypothesis that there exists a strong correlation between the measures.⁴

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 assumed to be based upon the attributes of

³ Ideally, we would like to use something similar to the Common Space scores because they are on a common metric but created in isolation to each other except for bridging observations. The ideology measures used here are the best currently available to us.

⁴ The exact results of the Pearson tests can be produced upon request by the authors.

those choosing the judges. Representative drift occurs when particular exogenous factors, such as method of selection, institutional constraints, or district characteristics force the judicial branch to change. In order to test the impact of these factors on the level of representative drift, we employ a two-prong modeling strategy, utilizing partial adjustment (PAM) and error correction models (ECM). The reason for using the two estimation strategies is that it allows us to first model the impact of institutional and demographic factors on the level of representative drift in any one year of our sample, while allowing us to also estimate which factors impact changes in representative drift between sampling years. We start with the familiar partial adjustment model in order to test how effective the method of selection is at changing the level of representative drift that exists within a state in a given year. While the partial adjustment model provides us with a way to interpret the effect of various shocks to representative drift at any one time-point in the sample, the error correction model allows us to better understand the nature of changes to representative drift over time by modeling the affect of the model coefficients on the change in representative drift from year-to-year.⁵ The single equation error correction model used here has been shown to be useful in previous work by Durr

⁵ The ECM, in the bivariate case, is written as: $\Delta Y_t = \alpha_0 + \alpha_1 Y_{t-1} + \beta_0 \Delta X_t + \beta_1 X_{t-1} + \beta_1 X_1 + \epsilon_t$, where changes in representative drift (ΔY_t) is modeled as a function of a constant (α_0), the past value of drift ($\alpha_1 Y_{t-1}$), the lagged level and current level of weak exogenous variables ($\beta_1 X_{t-1}$ and $\beta_1 X_1$ respectively), and the error term (ϵ_t). De Boef and Keele (2008) argue that the single equation ECM is appropriate for stationary time series and is not prone to spurious inference due to “near-integration” (see pg. 195), and is a reparameterization of the more familiar Autoregressive Distributive Lag (ADL) model.

(1992), Keele (2007), and Ramirez (2009) since it allows us to estimate both short- and long-term relationships over time, while still affording us a large pooled sample to draw inferences from.

Our primary hypothesis here is that the method of selection will significantly impact the ability of the judicial branch to remain in representative equilibrium with the electorate over time. For the purposes of analysis, method of selection is separated into five categories: 1) partisan elections; 2) non-partisan 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 1 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 believed to be the most representative, and each of the other four methods of selections will cause significant variation in representative drift over time. The nature of our longitudinal study allows us to examine states that have changed their method of selection over the course of the thirty years within our analysis. Eleven states have changed their method of selection since 1975, and will serve to provide within-state test of our hypotheses.

[Insert Table 1 about here]

We have collected data on the various institutional rules that govern these Courts of Last Resort in expectation that they will affect the nature of ideological movement in various ways. First, we suspect that longer term lengths for the tenure of supreme court

justices will result in less ideological change in the judiciary, which will correspond to an increasing representation deficit between the two. Second, a court with discretionary jurisdiction will get to choose at least some of the cases they will hear within a term. This will decrease workload from an entirely proscribed docket, and will likely increase job satisfaction, thus incentivizing justices to remain on the bench longer. Therefore, this should also increase the representational deficit. We also include a variable that measures whether there is an intermediate appellate court (IAC) operating within the state.⁶ An IAC reduces the burdens upon the Court of Last Resort, thereby increase the likelihood of remaining on the bench. Lastly, we include a variable that signifies whether the justices represent a proscribed region, representing that region instead of their state as a whole. We hypothesize that this variable will also increase the representational deficit. This is for two reasons: First, individuals who represent smaller areas, be it districts or regions, should find it easier to maintain their offices, regardless of the method of retention; Second, individuals who represent a district may be out of step ideologically with the aggregate of the state, yet remain in line with their district.

Turning to variables that we expect to affect the changing citizen ideology of the state, we utilize a measure of the percent of the electorate that voted for the democratic gubernatorial candidate in the most recent election. This should serve as an indicator of electorate ideological shifts. We also include a dummy variable for states in the southern census region, as these states experienced realignment from democrat to republican over the time period of our analysis, which would explain citizen ideological movement

⁶ While many states with IACs' also have discretionary jurisdiction, this is not universally true in the US context.

(Black and Black 2003). Furthermore, 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 include two variables that measure other aspects of the population: proportion of the voting age population that is sixty-five or older and percentage of the voting population that is non-white. We anticipate that as the proportion of senior citizens increase, the citizen ideology will become more conservative. Likewise, we expect as the percentage of minority population increases the citizen ideology will become more liberal (Jewett 2001). Finally, we include a measure of per capita income normalized to 2005 dollars. We hypothesize that as per capita income increases the population will become more conservative (Gelman 2009).

Results

Before examining the fully specified model, it is appropriate to graphically assess whether the selections systems facially represent the trends we hypothesize. Figure 1 displays a cursory examination of five states that exemplify the five different methods of selection. Looking at Texas, a partisan election state, we see that citizen ideology and court ideology mostly track together, as hypothesized, and that the level of drift has only one major spike during the time period sampled with a difference of ten. An examination of the nonpartisan election state of Washington shows that while it experiences more drift, the two generally track consistently as well. Indeed, this general trend is found in both the hybrid state example (Pennsylvania) and the appointment state example

(Vermont), to varying degrees of difference. Missouri, the pinnacle example of a “Missouri Plan” state, is the only state depicted in which citizen ideology and judicial ideologies are not positively related. Facial examination of Missouri and the Missouri Plan shows an inverse relationship between citizen ideology and judicial ideology. As the citizen ideology gets more liberal, the court ideology gets more conservative. This result is promising, as it provides facial validity to our hypotheses.

[Insert Figure 1 about here]

Turning now to the partial adjustment and error correction models, our findings largely match our expectations with regard to how different methods of selection affect representative drift in state supreme courts. Both of our models perform soundly, and provide strong evidence in support of partisan methods of selection being more representative than retention elections and appointment systems.⁷ Looking first at the partial adjustment model, we find that when regressing representative drift simply on the methods of selection along with the lagged levels of citizen ideology, judicial ideology, and government ideology, switching from a partisan to a nonpartisan electoral system has

⁷ Several tests were implemented to verify the assumptions of our models. 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). Strong exogeneity or Granger causality is not necessarily required, however, for unbiased estimation utilizing ECM with OLS (Durr, 1992). Finally, a Hansen (1991) test and CUSUM test of both models show no signs of parameter instability.

no significant impact on the level of representative drift. In fact, while the direction of the coefficient moves in a positive direction, indicative of an increase in representational drift when using a nonpartisan method of selection, the magnitude of the coefficient is relatively small (0.145). This result falls in line with the literature on partisan versus nonpartisan elections, which argues that levels of knowledge are lower in nonpartisan elections since voters are unable to use simple heuristics like party identification when deciding whom to vote for (Bonneau and Hall 2009; Curry 2012).

Appointment systems, which include both gubernatorial appointment and legislative selection, experience significantly more drift than partisan or nonpartisan electoral systems. Without including institutional and district level constraints, having an appointment style method of selection in a state has the effect of increasing the level of representative drift by 3.650 points compared to other systems. Substantively, this means that at any point over the course of our analysis, appointment systems have a representational deficit nearly four points greater than partisan elections, a finding that is in line with our initial set of expectations that appointment systems only provide a tacit form of consent from the electorate. Similarly, Missouri Plan systems experience significantly more drift than partisan electoral systems, increasing the amount of representative drift by 3.778 points compared to other methods of selection. Thus in the simple model of selection methods, without additional constraints, our initial expectation of the rank order of methods of selection are correct, with the exception of hybrid electoral systems.

The three states that use these systems (Illinois, New Mexico, and Pennsylvania) experience significantly *less* representational drift when compared to partisan elections,

decreasing the amount of representative drift at any one time by 1.872 points. These hybrid electoral states incorporate a partisan election for open seats, but justices do not run for contested re-election. Instead, they face retention elections like those in Missouri Plan states. We anticipate that because partisan elections are incorporated into the system, the electorate has more information available about the justices when voting in retention elections, a situation that is not mirrored in Missouri Plan states.

[Insert Table 2 about here]

Next, we compare the results of our baseline model to the full model including institutional and citizen characteristics variables. Our first expectation that nonpartisan elections will experience more drift compared to partisan elections remains insignificant in the full model. While the coefficient still positively increases the amount of representative drift, it is not significant to any standard measure. Both appointment systems and hybrid electoral systems reach a minimal level of significance ($p < .10$), and the Missouri Plan follows our previously stated expectations with regard to drift. The substantive effect of the use of the Missouri Plan is comparable to the previous simple model, with an increase in representative drift almost four points higher compared to other systems measured in the model (coef. = 3.766, S.E. = 1.51). Similar to the Missouri Plan, appointment systems are found to increase the amount of drift found between the public and judges by 2.670 points, likely due to the fact that these systems introduce formal insulation controls that protect judges from public pressure. Both of these selection and retention methods were specifically designed to protect judges from the “politics” of elections and, to some extent, they function as intended. The ideology of the

Court, especially in the case of the Missouri Plan, is significantly slower to react to changes in the ideology of the populace.

Hybrid electoral systems are the only method in the model found to decrease the level representative drift by -2.091 points compared to other systems. This result is surprising to us, since at first glance it would seem that the electorate would become less knowledgeable of judges over time, thus increasing the level of representative drift. We believe that hybrid electoral systems create a unique campaigning environment for judges that allows the electorate to learn just enough about a particular judge to make an informed decision, thus maintaining an accountable system while still limiting the influence of politics on judicial decision making. One state within our sample (New Mexico) changed from partisan elections to hybrid elections during the period of study, and provides a unique example of the power of hybrid systems. Figure 2 shows the citizen ideology, court ideology and the difference over the time of our analysis. We added a reference line at 1988, which is when New Mexico adopted hybrid election as its method of selection and retention. It appears that following the adoption, the citizen ideology began to track more consistently with court ideology. One clear conclusion we can draw right now, based on these results, is that research on judicial selection should pay careful attention to hybrid systems when developing their models, as their presence does impact the selection of judicial officers.

[Insert figure 2 about here]

Looking at the institutional variables in the model, what we find is that term length does not have any significant impact on the amount of representative drift measured in a state. Having discretionary jurisdiction over cases does in fact increase the

amount of representative drift between judges and citizens over time. Having discretionary jurisdiction increases the amount of drift between judges and citizens by 2.357 points overall. One interesting surprise is the impact of having an intermediate appellate court in the state. Contrary to our hypothesis that IACs should increase the amount of representative drift, what we find in the model is that states with intermediate courts actually decrease the amount of representative drift by -3.322 points. We reason that intermediate courts may decrease the amount of drift between judges and citizens by decreasing the likelihood that judges will be placed on cases where they may move out of step with the electorate's ideology. If cases have the potential to be decided at the appellate level without the intervention of a state's supreme court, this could mitigate the ability of citizens to associate judges with unpopular decisions, thus providing a layer of protection for judges.

Finally, we discover that one citizen characteristic has a minimal effect on the amount of representative drift in state supreme courts. Our full model finds that increases in the per capita income in a state increase the amount of representative drift. Individuals who are wealthier are more likely to turn out to vote in elections. States with higher per capita income, and by proxy likely higher voter turnout, thereby increase the connection between the mass ideology of the state and the judicial ideology of the Court, either through implicit or explicit affirmations of representatives' claims.

Turning now to the error correction model in Table 3, we can compare changes that directly impact the level of representative drift in any one year as compared to what affects the between year change in drift in the sample.

[Insert Table 3 about here]

The first model presented in Table 3 presents the results of the simple ECM of the methods of selection without institutional and constituent constraints. Unlike the partial-adjustment model, which assesses the nature of drift at any moment in time, the ECM examines how the variables cause variation in drift over time. The simple ECM demonstrates that without additional statistical controls, selection methods that utilize some form of appointment mechanism initially perpetuate the increase of representational drift over time, which falls in line with our previous expectations. In the initial model, both appointment states and Missouri Plan states perpetuate representational drift over time by about one point. This means that for Appointment systems, the change in representative drift from time point $t-1$ to time point t will be approximately 0.856 points higher than non-appointment systems overall. Similarly, Missouri Plan systems will perpetuate an increase in the change in representative drift of 1.013 points between each time point. The initial finding from the partial-adjustment model that hybrid electoral systems decrease the level of representative drift is still present in the ECM estimates; however, they do not reach statistical significance at any recognized level. Changes in representative drift are affected by changes in the ideological makeup of the state according to the ECM results as well. The level of representative drift at time $t-1$ is found to decrease the change in the level of drift, indicating that there is strain put on the political system to come back to a level of ideological congruence between judges and the citizens they serve. However, fluctuations in citizen ideology from year to year do cause strain on the system, increasing the level of representative drift by 0.049 points between time periods.

In the full model with statistical controls, the initial finding concerning appointment states washes out, leaving only Missouri Plan states as having any significant impact on the variation in representative drift over time. States that use the Missouri Plan increase their representational drift between years by almost 1.187 points. The use of the Missouri Plan will also lead to an increase in the level of representative drift totaling to 3.297 across future time periods.⁸ Interestingly, intermediate appellate courts, as in the PAM model, reduce the representational drift between years as well. Substantively, the inclusion of IACs in judicial systems has the effect of decreasing the change in representative drift by -1.254 points at time $t+1$, and decreases the level of representative drift by 3.483 points across future time periods as well. Over the time of our analysis, numerous states instituted intermediate appellate courts, but there are currently ten states without them.⁹ These states cover all the various methods of selection and retention utilized in the United States, except for hybrid electoral systems. Furthermore, New Hampshire and West Virginia both have discretionary jurisdiction without having an IAC. We argue that IACs serve the role of taking cases which may put the Supreme Court on the wrong ideological side of potentially controversial issues. For those wishing to reduce the drift between their high court and its citizens, therefore, one solution could be to institute an intermediate appeals court.

⁸ The total effect, or long-run multiplier coefficient, is calculated by taking the coefficient estimate for Missouri Plan systems and dividing by the rate of error correction (De Boef and Keele 2008, pg. 192).

⁹ These states are Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

Conclusions

Comparing the methods of selection across both models, we come to a consistent finding: states that use the Missouri Plan have the highest representational deficit between their Court of Last Resort and their citizenry, even though the system incorporates regular retention elections. Situated within the context of our findings, the retention elections in California in 1986 and Iowa in 2010 should be understood as exceedingly rare occurrences where the voters in Missouri Plan states reined in their judiciaries. As our models clearly demonstrate, states that use the Missouri Plan clearly insulate justices from the populace. This simultaneously creates a situation in which justices are the least representative agent, but also the most independent. Ultimately, judges in Missouri Plan systems do not correspond to any understanding of the delegate model as explain by theorists. Contrary to the claims made by groups like the AJS, the retention elections utilized in the Missouri Plan are not an effective means by which to forge a representational link between courts and the electorate. Since voters in Missouri Plan states do not have any means through which they can effectively learn about justices on the bench, which is common in electoral systems, competition is minimized because judges do not have to respond to challengers to the office.

This finding is juxtaposed to the conclusion that both partisan and nonpartisan elections for justices generate courts that are closely joined with their electorates. The representational links here are 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

constrained by the ideology of the electorate, thus reducing the amount of representational drift and effectively tethering judges to their constituency.

Appointment systems, as we anticipated, are more representative than the Missouri Plan, but less than either partisan or nonpartisan elections. Though, when we add statistical controls to both models, the nature of representational drift is statistically similar to what we find in partisan electoral states. We feel that this is because the tacit representation link is weaker than those forged in competitive elections. Governors and legislatures choosing on behalf of the electorate mitigate the connection between judges and the populous. However, these courts do have constituents who are responsible for their retention. These political elites serve to pull back against the drift of the judiciary, keeping it closer to the ideology of the public.

To understand the unexpected result concerning hybrid elections, we must discuss the differences between partisan elections, hybrid elections, and the Missouri Plan. In the initial contest of selecting a justice, there is nothing that differentiates a partisan electoral system from a hybrid system. The representational link is explicit, and is tied specifically to the contested election. Furthermore, there is nothing institutionally different between the retention elections that occur within states that use the Missouri Plan and hybrid elections. Why then do justices in hybrid systems experience less drift than in partisan systems, and substantially less drift than in the Missouri Plan? We argue it is actually the use of contested elections during the initial selection of judges that provides the answer to both queries. The initial contested election in a hybrid system supplies the voter with information that is simply not available within the Missouri Plan system. The voters have been educated about potential justices during the selection process, allowing them to

come to a more informed decision, a circumstance that does not exist in the Missouri Plan but does exist in partisan elections. However, elections are not entirely based upon ideological congruence. Contested elections can also turn on personal characteristics (Abramowitz 1988, Enelow and Hinich 1982), media coverage (Lau *et al.* 1999, Shaw 1999), or scandals (Dimock and Jacobson 1995, Lawrence and Bennett 2001). Indeed, repeated contested elections may actually *increase* representation drift because the choice of the electorate may turn on something other than ideological congruence with the candidate.

We believe that the results here provide researchers with a guidepost to better study the process and theory of representation more fully. While there is not much variation in the forms of representation at the federal level in the United States, there is much variation in representative systems within the states and the world (Rehfeld, 2006). In studying the judicial systems at the state level, we find that judicial appointments and contested elections are vital in legitimizing the authority of democratic institutions and political figures. These selection methods contain political elements throughout their processes, and ultimately form judiciaries with low levels of representative drift. On the contrary, Missouri Plan schemes are intended to exclude politics from their processes, but actually cause a sharp increase in representative drift between judges and their constituencies. Indeed, it is only when outside groups mobilize the electorate, like in the occurrences in California and Iowa, that Missouri Plan states exhibit a representational link.

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Table 1. Selection Systems for State Courts of Last Resort, 2005.

Partisan Elections	Term Length	Non-Partisan Elections	Term Length	Missouri Plan	Term Length	Appointment	Term Length	Hybrid Elections	Term Length
Alabama	6	Arkansas	8	Alaska	10	Connecticut	8	Illinois	10
Arkansas*	8	Florida*	6	Arizona	6	Delaware	12	New Mexico	8
Georgia*	6	Georgia	6	California	12	Hawaii	10	Pennsylvania	10
Louisiana	10	Idaho	6	Colorado	10	Maine	7		
Mississippi*	8	Kentucky	8	Florida	6	Massachusetts	Life		
New Mexico*	8	Maryland*	10	Indiana	10	New Hampshire	Life		
North Carolina*	8	Michigan	8	Iowa	8	New Jersey	7		
Texas**	6	Minnesota	6	Kansas	6	New York	14		
Texas**	6	Mississippi	8	Maryland	10	Rhode Island	Life		
West Virginia	12	Montana*	8	Missouri	12	South Carolina	10		
		Nevada	6	Nebraska	6	Vermont	6		
		North Carolina	8	Oklahoma**	6	Virginia	12		
		North Dakota	10	Oklahoma**	6				
		Ohio	6	South Dakota	8				
		Oregon	6	Tennessee	8				
		South Dakota*	6	Utah	10				
		Tennessee*	8	Wyoming	8				
		Utah*	10						
		Washington	6						
		Wisconsin	10						

Source: Data taken from <http://www.judicialselection.us/>, Web site administered by the American Judicature Society.

*These states are entered twice as they have changed methods of selection over time.

**Texas and Oklahoma have two supreme courts, one civil and one criminal.

Table 2 - Partial Adjustment Model of Representative Drift in State Supreme Courts

	Model 1: Method of Selection		Model 2: Full Model	
	Coefficients	(SE)	Coefficient	(SE)
<i>Nonpartisan Elections</i>	0.145	(0.84)	0.339	(0.97)
<i>Appointment Systems</i>	3.650**	(1.39)	2.670+	(1.51)
<i>Missouri Plan</i>	3.778***	(1.09)	3.766*	(1.51)
<i>"Hybrid" Systems</i>	-1.872*	(0.78)	-2.091+	(1.26)
<i>Term Length</i>	-	-	0.007	(0.02)
<i>Discretionary Juris.</i>	-	-	2.357*	(0.97)
<i>Intermediate Appeals</i>	-	-	-3.322***	(0.84)
<i>Regional Rep.</i>	-	-	-0.064	(1.05)
<i>South</i>	-	-	-0.994	(1.34)
<i>% Democratic Win</i>	-	-	-0.041	(0.03)
<i>Urban Pop.</i>	-	-	0.008	(0.03)
<i>High School Diploma</i>	-	-	0.018	(0.11)
<i>Pop. over 65</i>	-	-	-0.200	(0.15)
<i>Minority Pop.</i>	-	-	0.055	(0.03)
<i>Per Capita Income</i>	-	-	-4.043+	(2.34)
<i>Citizen Ideology_{t-1}</i>	0.016	(0.10)	0.051	(0.10)
<i>Judicial Ideology_{t-1}</i>	-0.047	(0.09)	-0.064	(0.09)
<i>Government Ideology_{t-1}</i>	0.014	(0.01)	0.017	(0.01)
<i>Constant</i>	6.724***		26.114*	
<i>N</i>	1512		1512	
<i>Root MSE</i>	6.482		6.331	
<i>R²</i>	0.08		0.12	

+p<.10; *p<.05; **p<.01; ***p<.001

- Coefficients and standard errors are based on a robust-clustering on a state's unique ID code.

Table 3 - Error Correction Model for Change in Representative Drift in State Supreme Courts

	Model 1: Methods of Selection		Model 2: Full Model	
	Coefficients	(SE)	Coefficient	(SE)
<i>Nonpartisan Elections</i>	-0.151	(0.39)	0.077	(0.49)
<i>Appointment Systems</i>	0.856*	(0.41)	0.772	(0.51)
<i>Missouri Plan</i>	1.013**	(0.39)	1.187*	(0.51)
<i>"Hybrid" Systems</i>	-0.834	(0.64)	-0.780	(0.76)
<i>Term Length</i>	-	-	0.002	(0.01)
<i>Discretionary Juris.</i>	-	-	0.768	(0.57)
<i>Intermediate Appeals</i>	-	-	-1.254*	(0.56)
<i>Regional Rep.</i>	-	-	0.091	(0.40)
<i>South</i>	-	-	-0.266	(0.43)
<i>% Democratic Win</i>	-	-	-0.008	(0.01)
<i>Urban Pop.</i>	-	-	0.007	(0.01)
<i>High School Diploma</i>	-	-	-0.026	(0.04)
<i>Pop. over 65</i>	-	-	-0.084	(0.06)
<i>Minority Pop.</i>	-	-	0.010	(0.01)
<i>Per Capita Income</i>	-	-	-0.073	(0.85)
<i>Representative Drift_{t-1}</i>	-0.348***	(0.02)	-0.360***	(0.02)
<i>Δ Citizen Ideology</i>	0.049*	(0.02)	0.048*	(0.02)
<i>Δ Judicial Ideology</i>	-0.156**	(0.06)	-0.147**	(0.06)
<i>Δ Government Ideology</i>	-0.025*	(0.01)	-0.026*	(0.01)
<i>Constant</i>	2.286***		6.083+	
<i>N</i>	1512		1512	
<i>Mean VIF</i>	1.282		1.586	
<i>Root MSE</i>	4.826		4.809	
<i>R²</i>	0.19		0.19	

+p<.10; *p<.05; **p<.01; ***p<.001

- Coefficients and standard errors are based on a robust-clustering on a state's unique ID code.

Figure 1. Representational Drift in State Supreme Courts, Examples

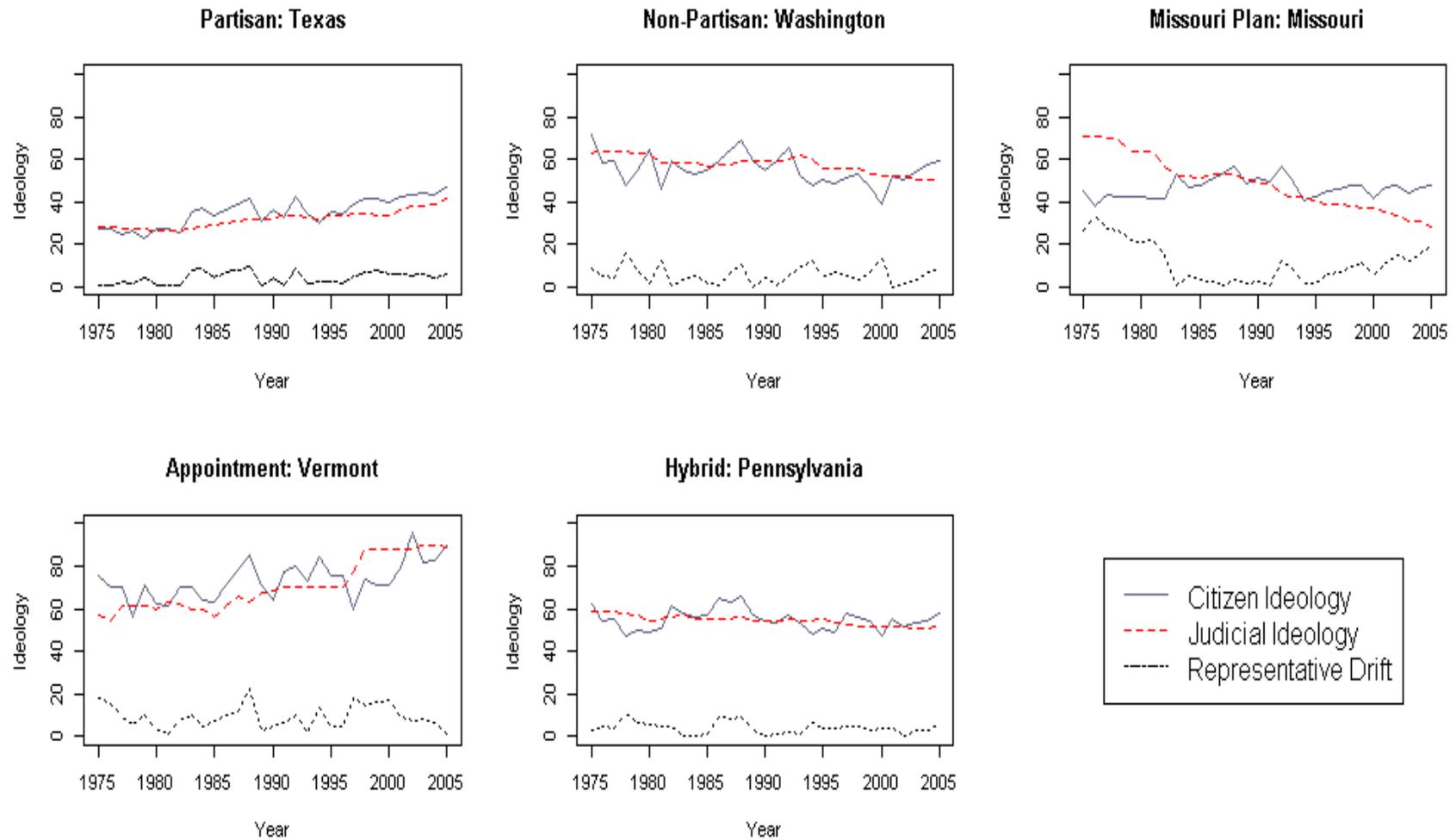


Figure 2. New Mexico

