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Political Factors and the Adoption of the Merit System of Judicial Selection

Joshua E. Montgomery

Abstract

There is widespread debate among politicians and academics as to the effectiveness and appropriateness of the merit system of judicial selection. Much of the literature on this subject is dedicated to the effects of the merit system *after* it has been adopted. The purpose of this paper was to examine the effects of certain political factors that may have created a political environment conducive to the adoption of the merit system. In this paper, three hypotheses were postulated and subsequently tested. The results of each test, while not as conclusive as anticipated, confirmed each of the hypotheses. The first conclusion of this study was that states are more likely than not to have the same party in control of *both* houses of the state legislature. The second conclusion was that states that adopted the merit system experienced a smaller amount of majority-party change in both houses of their legislatures prior to the adoption of the merit system than states that did not adopt the merit system. The final conclusion was that most states are more likely to adopt the merit system when they are bordered by other states that have the merit system.

1. Introduction

The merit system of judicial selection is the process by which the governor of a particular state selects a person from a short list of candidates, which is compiled by a non-partisan nominating commission. The nominating commission then appoints that person as a judge for a short, initial term. After serving out the initial term, the judge runs in a retention election (Dubois, 1990). In a retention election, the judge does not run against any other candidates and does not run on any party platform. Instead, the judge runs against his or her record and wins re-election by garnering a specified percentage of votes approving his or her retention of the judgeship (Canes-Wrone,

Clark, & Park, 2010). If a judge is retained, he or she then serves a full term in office (Dubois, 1990). The merit system is a method of selecting judges that is increasingly being implemented in the United States, and as such, it is an intriguing area of study. There has been a substantial amount of research regarding this topic in areas such as judicial decision making patterns of judges selected through the merit system, voter confidence in different methods of judicial decision making, and the role of money in judicial campaigns. Interestingly, the majority of the research regarding the merit system has focused on the *effects* of the merit system once it has been adopted, but not much of the research has focused on the *events and conditions* which may have led to the adoption of the merit system.

2. Literature Review: Merit Selection in the States

There has been a substantial amount of scholarly research devoted to the study of the evolving methods of judicial selection in the states. This body of research has been conducted over the last several decades and has sought to determine the consequences of judicial reform. There has been research conducted which suggests that adoption of the merit system can increase judicial independence and there has been research that is inconclusive on the subject. Similarly, there has been research conducted which investigates the positive and negative impact of money on judicial campaigns. Perhaps more relevant to the subject of this paper are the studies investigating the ability – or inability – of the merit selection to mitigate the negative impact of money on judicial campaigns, and ultimately the impact of money on judicial decisions made once judges are in office. Lastly, research has been conducted regarding the impact of campaigns on judicial decision-making.

2.1 A Brief History of the American Judiciary

Before discussing specific changes that have taken place over time in state judicial selection methods, it is necessary to examine the origins of the modern American judiciary and the values on which it was founded. Even before the time that the United States of America was formally founded as a sovereign country, it was argued that the judiciary should be independent from the other branches of government. In the mid-1700s, there was much agitation within the American colonies regarding the influence of the King of England on colonial judiciaries (Bailyn, 1967). The colonial governments

feared that justices who received their commissions and salaries from the Crown (the King of England) would not be able to effectively serve the role of a proper judiciary. The role of a proper judiciary, according to John Dickinson, was to “settle the contests between prerogative and liberty... *to ascertain the bounds of sovereign power, and to determine the rights of the subject,*” (as quoted in Bailyn, 1967, p. 74). The colonies argued that these duties of a proper judiciary could not be fulfilled by a judiciary dependent on the Crown for its commissions and salaries, especially when the commissions could be easily revoked. In addition to many other important issues, these frustrations over the interference of the British executive in the American colonies’ judiciaries led to the American Revolution, which ultimately ended with the United States of America gaining independence from the British.

The values on which the modern American judiciary was created were in place even before United States was founded. The concepts of accountability, independence, and impartiality were the cornerstones of the American judiciary. As John Dickinson expressed, proper government must be accountable to the people, and the judiciary was no exception (Bailyn, 1967). In Dickinson’s view, the judiciary *should*, however, be *independent* from the executive. At the time of Dickinson’s writing of his *Letters from a Farmer in Pennsylvania*, the governing executive was the King of England, and the judiciary was *not* independent from the executive (Bailyn, 1967). Some political figures of that time, such as John Adams, made the assertion that the jury system, which allowed for a trial-by-jury, allowed citizens to share in both judicial proceedings and the execution of laws (Bailyn, 1967). However, in some colonies, even jury trials were deemed illegal by the British government. The third important value, impartiality, was nearly impossible to realize in colonial America. The following excerpt from Bailyn’s *Origins of the American Revolution* effectively summarizes the frustrations of colonial Americans on the subject of the judiciary:

“Unless the judiciary could stand upon its own firm and independent foundations – unless, that is, judges held their positions by permanent tenure in no way dependent upon the will and pleasure of the executive – it would be ridiculous “to look for strict impartiality and a pure administration of justice, to expect that power should be confined within its legal limits, and right and justice done to the subject.” (Bailyn, 1967, p. 74-75).

As the following sections of this paper will show, there was not *one* system of judicial selection that was adopted in every state. While the colonies, and later states, could agree that the British executive's direct involvement in the American judiciary was both unconstitutional and problematic, finding a standard alternative was less simple. However, in every state, judges were either directly elected by the people or were appointed and confirmed by popularly elected officials (National Center for State Courts, 2015).

2.2. The Concept of Merit

The Merriam-Webster dictionary provides three definitions of the word "merit," and they are as follows: 1) a good quality that deserves to be praised, 2) the quality of being good, important, or useful, and 3) having value or worth (Merriam-Webster, 2015). In the context of the judiciary, a judge who has merit would be a person who is qualified for and competent in that position. Merriam-Webster also provides a definition of a "merit system." A "Merit system" is defined as "a system by which appointments and promotions in the civil service are based on competence rather than political favoritism," (Merriam-Webster, 2015). Based solely on these definitions, a merit system of judicial selection sounds like an ideal method for selecting justices. However, the concept of merit in American politics is not as simple as these definitions may lead one to believe.

The United States Constitution remains fairly quiet on the requirements for justices of the Supreme Court, and leaves the creation of state courts up to the state legislatures. As Frost and Lindquist note, the United States were created as a constitutional democracy, which gives its citizens the right to govern themselves, albeit almost always through indirect means (2010). The United States were founded partially on the liberal democratic ideals of individual rights, freedom, and equality, which are realized through free and fair elections, as evidenced in the text of the Constitution (U.S. Const. art I; Rautenfeld, 2004). However, the American Bar Association notes that the original thirteen states did not have direct elections of their state judges, but rather judges were selected through gubernatorial appointments or legislative appointments (2000). The liberal democratic values of free and fair elections do not guarantee that the person most qualified to serve in any particular office will be elected to that office. In other words, the person with the most *merit* may not be elected to office.

As more and more states modified their judicial selection methods towards direct elections and away from appointments, it could be argued that the methods of judicial selection were beginning to be more closely aligned with liberal democratic values (ABA Standing Committee on Judicial Independence, 2000). However, as the American Bar Association has repeatedly pointed out, direct elections of judges became increasingly political and more prone to foster both corruption and biased rulings – things the United States were founded in an attempt to avoid (2000). The so-called “merit system” seeks to protect individual rights through fair and unbiased rulings that uphold the rule of law, (laws which provide for the protection of individual rights), through a system that seeks to place a judge with the greatest merit – the person most qualified to make a correct and unbiased ruling – in the adjudicating position (ABA Standing Committee on Judicial Independence, 2000). The merit system does not ignore the voice of the people, however, as it requires judges to face a yes-or-no retention election every several years, in which the voting public directly decides if a judge will continue to serve.

Interestingly, while corruption within the judiciary has always been a concern in this country, the perceived catalyst of that corruption has shifted over the years. In America’s formative years, ties to the executive branch of government were initially seen as the primary source of corruption (Bailyn, 1967). In the last several decades, the threat of corruption in the judiciary is perceived as stemming from the increasingly political nature of judicial campaigns (Frost & Lindquist, 2010). While the American judiciary is independent from the executive branch of the government, proponents of the merit system argue that a judiciary independent of corrupting political pressures is necessary (Frost & Lindquist, 2010; ABA Standing Committee on Judicial Independence, 2000; and ABA Coalition of Justice, 2008). Lastly, the concept of impartiality is one that proponents of the merit system say is more easily attainable through the merit system than through other selection methods. Not only are judicial candidates *chosen* by a number of knowledgeable individuals based on their merit, but they must run against their record after a short initial term (Frost & Lindquist, 2010; ABA Standing Committee on Judicial Independence, 2000; and ABA Coalition of Justice, 2008). One could even say that in the merit system, primary retention elections are simply the procedures by which the voting citizens determine the merit of their judges.

2.3 American Bar Association Guidelines for the Merit System

The American Bar Association has set forth a set of standards after which states can model their judicial selection systems in a report titled “Standards on State Judicial Selection” (2000). The standards were established in an attempt to help states establish efficient judicial selection systems that select the most qualified candidates. The standards were presented in three sections: Part A: Judicial Selection and Retention Criteria, Part B: Primary Actors in Selection Process, and Part C: Supporting Actors in Selection Process (ABA Standing Committee on Judicial Independence, 2000). Part A outlines criteria and qualifications for selection and retention of judges. In order to be selected as a possible candidate, an individual must meet certain experience, integrity, competence, temperament, and commitment-to-the-law criteria. In order for a judge to be retained, the ABA’s standards call for the examination of a judge’s behavior while in office, and provide criteria for doing so. Part B outlines the actors that should be present in the selection process. These actors include: the Judicial Eligibility Commission, the Judicial Nominating Commission, the appointing authority, the endorsing authority, and the retention evaluation body (ABA Standing Committee on Judicial Independence, 2000). The final section of the report identifies who the supporting actors may be in the judicial selection process. These include: bar associations, judicial candidates, individual attorneys, public and private organizations, and media interests (ABA Standing Committee on Judicial Independence, 2000).

2.4 The “Missouri Plan” and Changes in State Selection Methods

In his article “Learning about Judicial Independence: Institutional Change in the State Courts”, Hanssen noted that there are currently five distinct methods of selecting judges in the American States. Those methods are 1) partisan elections, 2) non-partisan elections, 3) gubernatorial appointment, 4) legislative appointment, and 5) the merit system, which combines appointment and election components (2004). In the early years of the United States, judges – many of whom had ties to the Royal Crown in England – were trusted less than elected representatives from among the American people, who were seen as more able to fairly govern citizens (Hanssen, 2004). As such, the judiciaries in the states were highly accountable to their respective legislatures. Throughout the following decades as the nation grew and evolved, the courts were given more independence. Many state courts modified their selection methods, changing from gubernatorial and legislative appointments to partisan elections

(Hanssen, 2004). This gave the courts a great deal of independence from the executive and legislative branches.

Sometime around the early 1900s, public concern began to arise regarding partisan judicial elections. The adoption of partisan elections did indeed give state judges a level of independence, albeit only from the other branches of government (Hanssen, 2004). While judges gained independence from the other branches of government, they also became tethered by the partisan politics through which they obtained their offices. Hanssen (2004) asserted that many states eventually moved to non-partisan elections in an attempt to mitigate the ability of “partisan forces” to capture elections (448). After several more decades, the merit system of judicial selection was adopted in 1940 in Missouri, marking a new era of change in state courts (Dubois, 1990).

The merit system of judicial selection that has been adopted in many states was first introduced in 1914 by a University of Northwestern Law Professor by the name of Albert M. Kales. It has since become known as the “Missouri Plan”, after Missouri became the first state to adopt it in 1940 (Dubois, 1990). As Puro et al. noted, after Missouri adopted the merit system in 1940, it was “virtually ignored for eighteen years and then adopted, in fairly rapid succession, by nineteen additional states over the next eighteen years” (as cited in Dubois, 1990, p. 25). States began to implement the merit system to select their judges in varying ways. In the majority of states, this was accomplished through the passage of state constitutional amendments. The specifics of these amendments, such as the role of the state bar association in creating nominating commissions were formal, constitutional agreements, while others were merely spoken agreements between the governor and the state bar (Sheldon, 1977). Most of the states that adopted the merit system did so between 1958 and 1976, which is a relatively short amount of time when considering how long these states have established judiciaries (Dubois, 1990). It is possible that states are more likely to enact institutional change when they have had a chance to observe the same change in a neighboring state, and it is one of the hypotheses of this paper that such is the case.

2.5 Merit Selection and Judicial Independence

One of the main areas of debate and research with regards to the merit system is its impact on judicial independence. In his article *Methods of Judicial Selection and their*

Impact on Judicial Independence, Gardner-Geyh defines an independent judiciary as one that is “insulated from political and other controls that could undermine their impartial judgment” (2008). Gardner-Geyh noted that judicial independence is widely regarded within legal professions as positive and necessary for the judiciary to uphold the rule of law (2008). Canes-Wrone, Clark, & Park also noted that societal benefits such as civil liberties and economic growth are associated with Judicial independence and assert that the legitimacy of the courts hinges on judicial independence (2010). On the other side of the debate is the concept of judicial accountability - which can be described as promoting institutional responsibility within the courts and collectively holding judges accountable for their actions as the third branch of government (Gardner-Geyh, 2008). Often, these two concepts – judicial independence and judicial accountability – conflict with one another. It is argued that the more publicly accountable judges are, the less independent they are (Canes-Wrone, Clark, & Park, 2010).

The merit system was developed in attempt to balance these two important aspects of the American Judiciary. When considering how best to balance these two aspects, it is important first consider several preliminary questions. As Harold See asked in his article *Judicial Selection and Decisional Independence*, what is an appropriate level of popular control in any particular state? (1998). See (1998) pointed out that if judges in a particular state have acted as a “superlegislature”, meaning that judges use their positions to “implement their own public policy predilections”, then it may be most appropriate for the public to select judges in the same way they select their legislators (p. 144). The second question See raised dealt with the frame of reference one uses when evaluating the merits of elections and/or appointments. See (1998) asked “what system offers the public the level of judicial accountability that is appropriate to the way in which judges function and are expected to function in their jurisdiction?” (p. 144). See (1998) urged caution and consideration of the differences among each state when answering this question. See’s third and final recommendation was for reformers and legal professionals to carefully examine the factors which have caused unrest with current judicial selection methods. These factors will likely include things such as the tone of judicial elections – whether the campaign is civil and about issues or whether it is personal and degrading – and the amount of money which is spent on judicial elections.

As Canes-Wrone, Clark, and Park stated in their study titled *Judicial Independence and Retention Elections*, a common assumption is that the absence of a contested judicial election will lead to judicial independence (2010). Research conducted by Franklin (2002) and Caldarone, et al (2009) argues that the afore-mentioned assumption is well-founded and claim that judicial independence is indeed more achievable through the merit system than it is through elections (Canes-Wrone, Clark, & Park, 2010). Canes-Wrone, Clark, & Park's research led them to a significantly different conclusion than Franklin and Caldarone, et al reached. Canes-Wrone, Clark, and Park analyzed both state supreme court decisions on the issue of abortion and public opinion regarding abortion from 1980 to present. Their results showed that, contrary to the common assumption, as public opinion on abortion shifted more in favor of abortion, judges began deciding cases in a more pro-life fashion (Canes-Wrone, Clark, & Park, 2010). As shown by the conflicting results of these studies mentioned above, the scholarship on the subject of merit selection and its impact on judicial independence is divided and inconclusive.

2.6 Merit Selection, Money, and Politics

An area of ever-increasing debate and research is being devoted to the increasing amounts of money that are being spent on judicial campaigns. The impact of money on judicial selection is an important one because the amount of money spent on judicial campaigns, if excessive, could potentially upset the balance of judicial independence and accountability (Shepherd, 2009). In her article *Money, Politics, and Impartial Justice*, Shepherd pointed out that roughly ninety percent of all judicial matters in the United States are handled through the State courts, and roughly ninety percent of all state-court judges are elected through elections of one form or another (2009). When these two numbers are considered together, it becomes apparent that the vast majority of judicial matters at some point are handled by judges who either gained or retained their office through an election. The results of Shepherd's study of State Supreme Court decisions from all fifty states in the United States revealed two major findings. The first was that elections, particularly *partisan* elections, are much more likely to be heavily contested than other methods of judicial selection, and the second major finding was that judges up for re-election in partisan elections were likely to appeal to their "retention agents" – the voting public – in order to keep their jobs by ruling in non-controversial and popular ways (Shepherd, 2009). The combination of these two findings creates a

situation in which the rule of law and pursuit of justice can become secondary to re-election.

Shephard's study also investigated the effects money can have on the voting habits of judges. By measuring how likely judges were to vote in favor of certain groups which made campaign contributions in both partisan and non-partisan elections, Shephard was able to determine that there was a correlation (2009). Shephard investigated the relationship between the voting patterns of judges in cases dealing with pro-business groups, pro-labor groups, doctors and hospitals, insurance companies, and lawyer groups. Shephard found that, with the exception of lawyer groups who made campaign contributions, judges are more likely to vote in favor of groups that made financial contributions to their campaigns (2009). Importantly, Shephard pointed out that while there was a correlation between campaign contributions and the voting patterns of judges, the data could not specify which way the causality ran (2009). Essentially, Shephard's data could not definitively say that the campaign contributions influenced the judges' decisions, and not vice versa.

The above-described phenomenon was discussed at length by Martin Redish and Jenifer Aronoff in their article, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism* (2014). In this article, Redish and Aronoff take a position which is similar to the position reached by Shephard. While Shephard's data and conclusions seem to be predicated on the assumption that influences on judges deciding cases are inherently bad, Redish and Aronoff (2014) take a more legally-minded approach to the issue, particularly in the area of due process. Redish and Aronoff (2014) state that, "requiring judges to submit to popularly grounded methodologies to remain in office violates core constitutional values both in theory and in practice" (p. 33). Here the authors are simply acknowledging that judges have a right to rule against popular opinion if they believe such a ruling is appropriate. The authors quote U. S. Supreme Court Justice Antonin Scalia in his explanation of due process and elections when he stated that:

"Elected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench.... So if, as Justice Ginsburg claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—

the practice of electing judges is itself a violation of due process.” (Redish & Aronoff, 2014, p. 18).

Redish and Aronoff (2014) acknowledge that here Scalia correctly identifies the problem with the claim that elections as a means of judicial retention violates due process. However, Redish and Aronoff (2014) also assert that in his explanation, Justice Scalia also concedes the real problem with judicial elections: they make judges more apt to rule in ways that are more compatible with voters’ preferences than they are to rule in a less popular fashion, even if the less-popular ruling is the correct one.

The title of Choi, Gulati, and Posner’s article is a succinct summary of the conflicting opinions on methods of judicial selection in the states – *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* (2008). Choi, Gulati and Posner’s study investigated three aspects of judicial performance: opinion quality, productivity (number of opinions written), and independence (2008). The authors analyzed a set of high court opinions from every state over a period of three years. The author’s results presented some interesting conclusions. Elected judges were found to be more productive than appointed judges (Choi, Guati, & Posner, 2008). Productivity was defined as the total number of opinions written in one year by a judge. When opinion quality was considered, the opinions of appointed judges were found to be higher than the opinions of elected judges (Choi, Guati, & Posner, 2008). Opinion quality was defined by the number of out-of-state citation the opinions received. Lastly, independence of both sets of judges was examined. The results on independence were inconclusive, as elected judges and appointed judges enjoyed very similar amounts of independence – a finding not in line with the author’s original hypothesis (Choi, Guati, & Posner, 2008). Overall, the results of this comprehensive research study seem to suggest that the conventional wisdom, which holds that appointed judges are more independent and thus better than elected judges, may not be well-founded and should be more closely examined.

2.7 The Current State of Affairs

As Redish and Aronoff stated, currently thirty-nine states have some form of election through which their state court judges are selected (2014). The election method in these thirty-nine states may be partisan, non-partisan, or retention elections after an initial appointment (Redish & Aronoff, 2014). Choi, Gulati, and Posner (2008) and Keele

(2014) further broke down the current systems used by the states. However, Keele’s numbers are most recent, so they will be used as the data source for the current state judicial selection systems. Currently, eight states select their judges through partisan public elections, fourteen states select judges through non-partisan public elections, four states use some form of gubernatorial appointment, and two states use legislative appointment to select judges. Another fourteen employ a merit selection system in which a governor chooses from the nominating commission’s candidates, and eight states use a merit system in which the selected candidates must receive legislative or other consent (Redish & Aronoff, 2014). Redish and Aronoff’s list of judicial selection systems has depicted visually in Figure 2.7a below.

Figure 2.7a

System of Selection	Number of States Employing System
Partisan Public Elections	Eight (8)
Non-Partisan Public Elections	Fourteen (14)
Gubernatorial Appointment	Four (4)
Legislative Appointment	Two (2)
Merit System	Twenty-Two (22) – 14 governor-selected, 8 governor-selected and legislatively confirmed

(Redish & Aronoff, 2014)

3. Hypothesis & Model

This paper investigated the impact of three variables on the decisions of states to change their judicial selection methods from popular elections or appointments to a merit system of judicial selection. This was accomplished by testing several variables in twenty-four states. This paper primarily researched two aspects of the political environment that may be correlated to the adoption of the merit system. These two factors are, 1) the patterns of legislative elections, and 2) the adoption of the merit system by surrounding states. These two factors were examined through the testing of three hypotheses.

The first hypothesis states that States that made the change to the merit system of judicial selection were more likely to be governed by the Republican Party at the time of the change than by the Democratic Party. Because the merit system, at least theoretically, provides judges with more insulation from politics, it is expected that the merit system will be implemented by primarily Republican-majority state legislatures. It is no secret that in American politics, Democrats tend to be more progressive than Republicans. For this reason, it is expected that a judicial selection system which allows justices to serve 8-year terms and be relatively isolated from public opinion would be appealing to Republican legislatures.

The second hypothesis states that States experience a greater level of consistency in the majority party in the years leading up to the time the state made the change to the merit system of judicial selection than states that did not adopt the merit system. The reasoning behind this claim is simple. As has been discussed already, one of the selling points for supporters of the merit system is that the merit system balances independence and accountability and minimizes the role politics play in the courts (See, 1998; Canes-Wrone, Clark & Park, 2010). It seems that a state legislature that has been governed by one party for a period of at least several elections may not look kindly on an increasingly politicized judicial selection process. Thus, the hypothesis holds that states will adopt the merit system after a long period of majority governance by one party.

The third hypothesis states that states that adopted the merit system were more likely to be surrounded by other states that had already adopted the merit system than are states that did not adopt the merit system. The reasoning behind this hypothesis is simple. States may be hesitant to implement an entirely new form of judicial selection if they have not had a chance to see it in action. However, based on that same logic, if a state is bordered by one or more states which have enacted the Missouri Plan, that state may be more likely to adopt the merit system for itself.

4. Research Design

The three hypotheses that were tested were: 1) States that made the change to the merit system of judicial selection were more likely to be governed by the Republican Party at the time of the change than by the Democratic Party, 2) States experience a

greater level of consistency in the majority party in the years leading up to the time the state made the change to the merit system of judicial selection than states that did not adopt the merit system, and 3) States that adopted the merit system were surrounded by other states which had already adopted the merit system. Each hypothesis was tested using a specifically designed research method. The research methods designed for all three hypotheses are discussed in detail below.

4.1 Hypothesis 1

The first hypothesis was that States that made the change to the merit system of judicial selection were more likely to be governed by the Republican Party at the time of the change than by the Democratic Party. This was tested by recording which party was in the majority at the time the merit system was adopted in twelve states' appellate courts. The states in the data set are mid-western and western states, with the exception of Florida. The states that were examined were Arizona, Tennessee, Florida, Iowa, Indiana, Missouri, South Dakota, Kansas, Wyoming, Colorado, and Utah. The majority party in both the House of Representatives and Senate for each state within the data set was measured.

The findings are organized in a chart in Figure 4.1a below. The states which were the subject of this study are listed in column 1. Column 2 lists the years in which the merit system was adopted by each state within the data set. Tennessee has two dates listed because the merit system was adopted once, repealed, and adopted again (National Center for State Courts, 2015). Column 3 lists the majority party in the House of Representatives of each corresponding state at the time of the adoption of the merit system in said state. Lastly, column 4 lists the majority party in each state's Senate at the time of the adoption of the merit system in said state. In columns 3 and 4, a lower-case "r" was used to represent the Republican Party as the majority for a particular state. A capital "D" was used to represent a majority of Democrats in a particular state.

Figure 4.1a

1. States Employing Merit System	2. Year Merit System Adopted**	3. Majority Party in Year Merit System Adopted (House)***	4. Majority Party in Year Merit System Adopted (Senate)
Arizona	1974	r	r
Tennessee	1971*, 1994	D	D
Florida	1976	D	D
Oklahoma	1987	D	D
Iowa	1962	r	r
Indiana	1970	r	r
Missouri	1940	D	D
South Dakota	1980	r	r
Kansas	1972	r	r
Wyoming	1972	r	r
Utah	1985	r	r
Colorado	1966	r	r
Totals:		r =8, D =4	r =8, D =4
* Tennessee adopted the merit system for all appellate courts in 1971 via an amendment, but repealed the amendment in 1974. 20 years later, Tennessee once again adopted the merit system for all appellate courts. Democrats had the majority in Tennessee in both houses from 1970 - 1994 (National Center for State Courts, 2015; Dubin, 2007).			
**Data in Column 2 was derived from the National Center for State Courts (2015).			
***Data in Columns 3 and 4 was derived from Michael Dubin's <i>Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006</i> (2007).			

The findings shown above in Figure 4.1a are not as strong as what was originally expected. As is shown in columns 3 and 4, two-thirds of states that adopted the merit system did so with a majority of Republicans in both the State House and State Senate. The results indicate that there is indeed a statistical correlation between a majority Republican House and Senate. However, this correlation is not as strong as was originally expected. Based on the data shown in Figure 4a, 66.6% of states had a majority Republican House of Representatives and Senate at the time those states adopted the merit system. Also, the remaining 33.3% of states had a majority of Democrats in their House of Representatives and Senate at the time of their adoption of the merit system.

What is interesting about the findings is the consistency within each state in terms of the majority party. While the majority party was not the same for all of the states which

were measured, regardless of which party was in the majority, the *same majority party was* in control of both the House of Representatives and the Senate for each state. While this was not an aspect that the original hypothesis sought to measure, it is nonetheless noteworthy. Having both houses of the state legislature controlled by the same majority party is certainly not uncommon, while at the same time the presence of a different majority party in each of a state's legislative houses is not uncommon either (Dubin, 2015). Based on the data in Figure 4.1a, it can certainly be said that there is a strong correlation between 1) the adoption of the merit system by a state and 2) single-party control of *both* houses of that particular state's legislature.

4.2 Hypothesis 2

The second hypothesis was that States experience a greater level of consistency in the majority party in the years leading up to the time the state made the change to the merit system of judicial selection than states that did not adopt the merit system. It was expected that states would *not* experience a great deal of legislative unrest prior to the adoption of the merit system. For the purposes of this study, legislative unrest will be defined as the change in majority party after an election. This occurs when one party is voted into the majority over the current majority party. This hypothesis was tested by comparing twelve states that have adopted the merit system – the variable group - to twelve states that have not adopted the merit system – the control group.

The pattern of the change in majority party was measured in each of twenty-four mostly-mid-western and western states. The variable group, which was comprised of states which **have** adopted the merit system, included Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Oklahoma, South Dakota, Tennessee, and Wyoming. The control group, which was comprised of states which **have not** adopted the merit system, included Arkansas, Illinois, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Mexico, North Dakota, Ohio, Texas, and Wisconsin.

The period of measurement for each state in the variable group was the two decades of elections preceding the adoption of the merit system in each state. The actual calendar-year time period varied for each state because the states being studied adopted the merit system at different times. For instance, in Iowa, the period of measurement was from 1942 until 1962 because Iowa adopted the merit system in 1962, whereas the

period of measurement for Indiana was 1950 to 1970 because Indiana adopted the merit system in 1970.

The period of measurement for each state in the control group, (with the exceptions of Michigan and Mississippi), was 1952-1974. These twenty-two years were selected to be measured because 1973 was the average year in which the twelve states in the variable group adopted the merit system. Since most states only held elections in even years, the period of measurement was expanded to twenty-two years. Kentucky and Mississippi, which held elections on odd years, were the exceptions. The time period of measurement for Kentucky was 1953-1973. Due to the fact that Mississippi only held elections every four years, the period of measurement for Mississippi was expanded to the twenty-four years between 1951 and 1975. This was done in an attempt to cover the time period of measurement used for the other ten states.

For the variable group, which is depicted in Figure 4.2a, with the exception of Kansas, all of the states being studied held legislative elections every two years for both legislative houses. Kansas' Senate held elections every four years during the twenty-year time period which was measured. Eleven election cycles were measured for both houses in all states within the data set, except in the Kansas Senate, which only held 6 elections. Column 1 of Figure 4.2a lists the states in the variable group. Columns 2 and 3 show the pattern of change in majority party after each election in the state's House of Representatives and Senate, respectively. The only two parties in control of the state legislatures were the Republican and Democratic parties. Each letter in Columns 2 and 3 corresponds to the majority party in control after an election. A lowercase "r" represents the Republican Party, and a capital "D" represents the Democratic Party. For example, if over three elections, the Republicans have the majority in the first two elections and the Democrats took the majority in the third election, this would be depicted as "rr D" in Figure 4.2a. In the instance that neither party held a majority in a particular election, a capital "T" is used to represent this occurrence. A tie ("T") is counted as a change in majority party. In the instance of a tie, neither party has the required majority to pass laws, so a tie is considered a change in majority party, as listed in columns 4 and 5.

Columns 4 and 5 of Figure 4.2a list the number of changes between majority parties over the twenty-year measurement period for the state houses of representatives and state senates, respectively. These two columns, (4 and 5), depict the level of legislative

unrest in each state's legislature in the 11 elections prior to the adoption of the merit system. Essentially, the larger the number of changes, the greater the amount of legislative unrest present in a particular state. Column 6 lists the year in which the merit system was adopted by each state. Column 7 shows the time period which was measured for each state.

For the control group, which is depicted in Figure 4.2b, all of the data is depicted in the same fashion as it is Figure 4.2a. Column 1 lists the states in the control group, and columns 2 and 3 show the pattern of change in each state's House of Representatives and Senate, respectively. Columns 4 and 5 show the number of changes in majority party in each state's House of Representatives and Senate, respectively, and Column 6 lists the time period of measurement for each state.

Figure 4.2a – Variable Group

1. States Employing Merit System	2. Pattern of Election (House)****	3. Pattern of Election (Senate)	4. Number of Changes in Majority Party (House)	5. Number of Changes in Majority Party (Senate)	6. Year Merit System Adopted***	7. Time Period of Measurement
Arizona	DDDDDD rrrr	DDDDDD rrrr D	1	2	1974	1954-1974
Colorado	r D rrr DDD r D r	rrrrr DDD rrr	6	2	1966	1946-1966
Florida	DDDDDDDDDDDDDD**	DDDDDDDDDDDDDD**	0	0	1976	1956-1976
Indiana	rrrr D rr D rrr	rrrrr D r DD rr	4	4	1970	1950-1970
Iowa	rrrrrrrrrr	rrrrrrrrrr	0	0	1962	1942-1962
Kansas	rrrrrrrrrr	rrrrrr*	0	0	1972	1952-1972
Missouri	r D rrr DDDDD	r DDDDDDDDD	3	1	1940	1920-1940
Oklahoma	DDDDDDDDDD	DDDDDDDDDD	0	0	1987	1967-1987
South Dakota	rrrrrr T rrrr	rrrrrr DD rrr	2	2	1980	1960-1980
Tennessee	DDDDDDDDDD	DDDDDDDDDD	0	0	1971*, 1994	1974-1994
Utah	rr D r D rrrr	rrrr DD rrrr	4	2	1985	1965-1984
Wyoming	r T r D rr D rrr	rrrrrrrrrr	6	0	1972	1952-1972
Average Number of Changes:			2.167	1.0834		

* Tennessee adopted the merit system for all appellate courts in 1971 via an amendment, but repealed the amendment in 1974. 20 years later, Tennessee once again adopted the merit system for all appellate courts. Democrats had the majority in Tennessee in both houses from 1970 - 1994 (National Center for State Courts, 2015; Dubin, 2007).

**Due to legislative reapportionment, there were 2 elections held in Florida in both 1962 and 1966 (Dubin, 2015).

***Data in Columns 1 and 6 derived from the National Center for State Courts (2015).

****Data shown in Columns 2 through 5 derived from Michael Dubin’s Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006 (2007).

Figure 4.2b – Control Group

1. States Not Employing Merit System	2. Pattern of Election (House)	3. Pattern of Election (Senate)	4. Number of Changes in Majority Party (House)	5. Number of Changes in Majority Party (Senate)	6. Time Period of Measurement
Arkansas	DDDDDDDDDDDD	DDDDDDDDDDDD	0	0	1952-1974*
Illinois	rrr D rr D rrrr D	rrrrrrr T r D	5	3	
Kentucky	DDDDDDDDDDDD	DDDDDDDDDDDD	0	0	1953-1973
Michigan	rrr T rr D r DDDD	rrrrrr D r T D	5	4	1952-1974
Minnesota	r DDDD rrrrr DD	rrrrr D	3	1	
Mississippi	DDDDDD	DDDDDD	0	0	1951-1975
Montana	r DDD rr D rrr D	rr DDDDDDDDDDD	5	1	1952-1974
New Mexico	r DDDDDDDDDDD	DDDDDDDD	1	0	
North Dakota	rrrrrrrrrrr	rrrrrr D rrrr	0	2	
Ohio	rrr D rrrrrr DD	rrr D rr T rrrr D	3	5	
Texas	DDDDDDDDDDDD	DDDDDDDDDDDD	0	0	
Wisconsin	rrr D rr D rr DDD	rrrrrrrrrrr D	5	1	
Average Number of Changes:			2.25	1.4167	

*The time period of measurement for each state was the 22-year period from 1952-1974. This number is based off of the average year in which the 12 states in Figure 4.2a adopted the merit system, which was 1973. Because most states held elections only on even years, the period of measurement was expanded to cover the 21 years prior to the average merit-system adoption date of 1973. Kentucky and Mississippi, which held elections on odd years, were the exceptions. The time period of measurement for Kentucky was 1953-1973. The period of measurement for Mississippi was 1951-1975, due to the fact that Mississippi only held elections every four years.

The data results are consistent with the original hypothesis overall, although the results are not as strong as originally expected. The original hypothesis predicted that states would experience a greater level of consistency in the majority party in the years leading up to the time the state made the change to the merit system of judicial selection than states that did not adopt the merit system. The average number of changes in majority party over the time period of measurement was depicted at the bottom of columns 4 and 5 in both Figure 4.2a and Figure 4.2b. For the variable group, the average number of changes in majority party in the state House of Representatives was 2.167 changes. This is only slightly less than the average number of changes that were found for the control group. The control group's average number of changes in majority party in the House of Representatives was 2.25 changes. The same occurrence was found in the state Senates. For the variable group, the average number of changes in majority party in the state Senate was 1.0834 changes. This is less than the average number of changes in the state Senate for the control group, which averaged 1.4167 changes.

The data do show a small number of changes overall in the time period of measurement for the variable group, suggesting that the hypothesis was correct. However, while the control group experienced slightly more changes than the variable group, the control group experienced very few changes as well. While it appears that there is a correlation between the adoption of the merit system and a state legislature that has experienced very few changes in majority party, it seems unlikely that such a situation actually has an impact on the adoption of the merit system.

4.3 Hypothesis 3

The third hypothesis predicted that states that adopted the merit system were more likely to be surrounded by other states that had already adopted the merit system than are states that did not adopt the merit system. This hypothesis was tested by comparing eight states that *have* adopted the merit system – the variable group – to eight states that *have not* adopted the merit system – the control group. The states in the control group were Iowa, South Dakota, Wyoming, Colorado, Kansas, Tennessee, Oklahoma, and Nebraska. All of the states selected for the variable group were mid-western states. The states in the control group were also mid-western states and

included Kentucky, Illinois, Wisconsin, Minnesota, Arkansas, New Mexico, and North Dakota. All sixteen states that were selected for study are connected to each other, (there are no stand-alone states), and are all Midwestern states. These states were selected in an attempt to only compare states that were geographically and socio-economically similar.

The data for the variable-group study are recorded in Figure 4.3a below. Column 1 lists the states that were studied. These states have all adopted the merit system. Column 2 lists the number of states that share a border with the state in column 1. Column 3 lists the years in which the merit system was adopted for each state. Column 4 lists the number of bordering states, (of the number listed in column 2), that had already adopted the merit system *by the year (listed in column 3) that the state being examined adopted the merit system*. Column 5 gives the percentage of bordering states that were already employing the merit system in the year the merit system was adopted in the state in the corresponding row listed in column 1. The averaged total numbers listed in columns 2, 4, and 5 are listed in the bottom row of Figure 4.3a.

The data for the control group is presented in Figure 4.3b below. The data is presented in the exact same format as the data in Figure 4.3a, with the exception of the date listed in Column 3. The date listed in column 3 of Figure 4.3b is 1973. This was the average date on which the twelve states from Figure 4.2a adopted the merit system. This average date was used as the date of measurement for the control group. For each state listed in column 1 of Figure 4.3b, the number of bordering states which were employing the merit system *in 1973* was measured.

Figure 4.3a – Variable Group

1. States Employing Merit System	2. Number of Surrounding States*	3. Year Merit System Adopted	4. Number Employing Merit System at Time of Adoption	5. Ratio (%)
Iowa	7	1962	2	28.60%
South Dakota	6	1980	3	50%
Wyoming	6	1972	1	16.67%
Colorado	7	1966	1	14.29%
Kansas	4	1972	3	75%
Tennessee	8	1971, 1994	1	12.50%
Oklahoma	6	1987	3	50%
Nebraska	6	1962	1	16.67%

Average Total:	6.25	Average Total:	1.875	32.97%
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*All data in Figure 4.3a was derived from the National Center for State Courts (2015).

Figure 4.3b – Control Group

1. States	2. Number of Surrounding States	3. Year Measured	4. Number Employing Merit System During Year Measured	5. Ratio (%)
Ohio	5	1973	1	20.00%
Kentucky	7		2	28.57%
Illinois	5		3	60.00%
Wisconsin	4		1	25%
Minnesota	4		1	25%
Arkansas	6		2	33.34%
New Mexico	5		1	20%
North Dakota	3		0	0.00%
Average Total:	4.875	Average Total:	1.375	26.49%

*All data in Figure 4.3b was derived from the National Center for State Courts (2015).

The results of the study are consistent with the original hypothesis. The original hypothesis predicted that states that adopted the merit system were more likely to be surrounded by other states that had already adopted the merit system than were states that did not adopt the merit system. As the data in the above two tables shows, states that adopted the merit system, (the variable group), were bordered by both a greater number and greater percentage of states that had already adopted the merit system. States that had *not* adopted the merit system – the control group – were bordered by less merit-system-employing states than the variable group. On average, almost 33% of the states bordering variable-group states had already adopted the merit system. Only 26% of the control group states were bordered by states that had already adopted the merit system.

5. Conclusion

Based on all of the data that was analyzed when testing the three hypotheses, several conclusions can be drawn, in addition to the conclusions already drawn above. While the evidence does not *overwhelmingly* support the assertion that a Republican-controlled state legislature was more likely to implement the merit system, the data

does suggest that such is the case. A similar statement can be made with regard to the level of majority-party consistency in the years leading up to the adoption of the merit system in the examined states. While the data does overwhelmingly establish that states that have *not* adopted the merit system experience more changes in majority party in their state legislature, the data does suggest that such may be the case. Lastly, the data also seems to suggest that states that adopt the merit system are likely to be bordered by other states already utilizing the merit system, although the data is not conclusive on the subject.

The only definitive conclusion that can be reached from the results of this study is that more research is needed. There are many other political factors besides the ones researched for this paper that may lead to the adoption of the merit system. Such things as the effect of interest groups on state politics at the time of the adoption the merit system may lend insight into the subject. Also, voter demographics may play role in the process. One other area of possible research into the subject is the concept of reapportionment in the states, and more specifically how reapportionment relates to the afore-mentioned factors with relation to changing judicial selection methods. These areas of study and more, along with the research presented in this paper, could lend valuable insight into the nature of changing political practices and values in the United States of America.

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