Remarks for the American Academy of Political and Social Science

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April 15, 2002

Between 1776 and 2000, on average, the U.S. states changed the way they choose their justices 4.8 times: some altered the rules governing selection and retention—say, moving from partisan elections to some form of merit selection; some altered the length of time justices hold their positions before they may be reappointed or reelected; some did both. Only 6 states made no changes either to their original selection/retention systems or to the terms of office.

Why have the states made so many changes? Generations of scholars have answered this question with what we can only call the "standard story" of judicial selection systems. On this explanation, the initial choice of judicial selection mechanisms (and alterations in that choice) comes about through changes in the tide of history, that is, of states "responding to popular ideas at different historical periods." In other words, this story characterizes the states' choices (and historical changes in those choices) as simple, nearly reflexive, responses to the ideas of "popular" reformers—reformers who sought to supplant one selection system with another with the supposed goal of creating a "better" judiciary (with the term "better," while defined differently across time, always standing for some general societal benefit) So, for example, when Thomas Jefferson pushed for an elected judiciary, he did so—according to standard story chrononiclers— to further democratic principles.

Jefferson is only one of many "reformers" in this story. If we were to put all of their efforts together—at least according to the standard story—a particular pattern of reform emerges.

•From the period roughly between 1776 and the 1830s, states adopted selection and retention systems that give judges a great deal of independence—systems that, say, provide for life tenure. That is because, according to the standard story, the framers of state constitutions were responding (read: hostile) to previous systems used in England that "made Judges dependent on [the King's] will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."

•From the period roughly between the 1830s and 1910s, we would expect (again on the standard story) to see a dramatic decrease in selection and retention systems designed to promote judicial independence and increase in those designed to promote judicial accountability, such as the partisan elections of justices and shorter terms of office. That is because the states were supposedly responding Jefferson's charges in the early 1800s of a run-a-away, aristocratic, and unaccountable judiciary or Jackson's emphasis several decades later on the importance of broad popular participation in government (along with his hostility toward elitist judges produced by appointed systems).

• Finally, in the last chapters of the standard story, which begin the 1910s and continue today, new calls for change emerged—calls that took the form of a growing disdain for partisan judicial campaigns and all the politics those entailed. Especially distasteful to reformers and members of newly-emerging local bar associations was the control political machines in many major cities exerted over the judicial selection process. Machine politics, they alleged, was causing citizens to view the judiciary as "corrupt, incompetent, and controlled by special interests." States were supposedly quick to respond to this latest selection-mechanism backlash by, initially, invoking non-partisan ballots for judges and, later, moving to merit selection.

So, overall, the standard story paints a picture of judicial selection systems designed to promote high levels of judicial independence in the first fifty years or so of the nation's history, low judicial independence (high accountability) in the next eighty, and a return, though only to moderate levels, of independence from the 1910s through today.

This story has been told and retold so many times that to call it conventional wisdom is to undercharacterize its place in the socio-legal literature. It appears, in one version or another, in virtually every scholarly study of judicial selection; it forms the centerpiece of discussions of selection in nearly all contemporary judicial process texts; and it has even been repeated by judges in court opinions

It also is remarkably flawed on any number of levels. An obvious problem is that it omits the role of politics. So, for example, no one in this story is out for his or her own individual political gain (or so it seems), even though we know from specific accounts that this was emphatically not the case. Take the example of Jefferson, who, under the standard story, pushed for an elected judiciary to further democratic principles. To support their belief that Jefferson pushed for an elected judiciary to further democratic principles standard-story tellers often point to a letter he wrote in 1820: "Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their…power is the more dangerous as they are in office for life, and not responsible, as the other functionaries, to the elective control". And, yet, Jefferson never expressed such democratic fervor prior to his presidency; in fact, until 1803, he was an ardent supporter of life tenure for judges: Why the conversion? A principled change of heart? Hardly. Jefferson only discovered democracy and accountability for judges after learning of the U.S. Supreme Court's decision in *Marbury v. Madison* (1803). If he could not control policy produced by appointed, life-tenured judges at least he could give control of their tenure to a group that did support his views, the electorate.

There are other flaws I could mention—*e.g.,* nowhere does partisan politics enter into the standard story, even though many scholars acknowledge that the choice of judicial selection and retention mechanisms is inherently a political choice with political implications, or as Lawrence Friedman once put it, "American statesmen were not naïve; they knew it mattered what judges believed and who they were. How judges were to be chosen and how they were to act was a political issue in the Revolutionary generation, at a pitch of intensity rarely reached before." To us, though, among the most important problem is this: Not only do we learn from the data we collected— which consist of the selection practices (and changes in those practice) used in every state since 1776—that the story fails to reflect actual practices in the states, the data are actually inconsistent with the story as well.

In a nutshell, while the standard story says that we should have seen a return to selection and retention systems that are designed to promote judicial independence, the data do not show this. Rather, the U.S. states have, overtime, have adopted selection and retention systems designed to hold their justices more and more accountable; no downward trend appears to exist. The states, in other words, *seem* to be coordinating on schemes—such as shorter terms of office—designed to generate relative judicial (de)independence—not relative independence.

This is not what the standard story predicts but to us it seems entirely predictable. To see this assume, as we do, that legislators want to create selection mechanisms that will best serve *their* long-term political goals—mostly they want justices to decide cases in ways that favor their political interests; they don't necessarily want independent judges but rather those that are accountable to them. But, because attaining this goal requires them to figure out the relationship between their present political preferences and the long-term effects of the rules on judicial selection and retention, their preferences over these rules will vary depending on their beliefs about present and future political conditions. So, for example, the more uncertain those conditions—in the fundamental sense that legislators do not know the political circumstances they will face in the future—the less the legislators will prefer to constrain the court and, thus, the greater the independence the institutional rules will provide the justices.

This may have been the case when the states first created the courts—that the framers of state constitutions may have had great deal of uncertainty over their own political futures or about the public's preferences—preferences that may affect future political outcomes (*e.g.,* elections). And that may be why they gave their judges life tenure. But this is no longer the case. Political uncertainty in our country and for politicians has

declined substantially over time and with that decline has come changes in selection/retention systems designed to make judges more accountable and less independent, to raise the costs for judges who aren't accountable to the public. It is thus not surprising to hear reports of justices who don't dissent from death penalty decisions that affirm convictions—even if they sincerely disagree with that outcome. To dissent may be tantamount to committing political/judicial suicide.

Is this a good or bad thing? It depends on your perspective. If you believe, as the framers of the U.S. Constitution apparently did, that one branch of government ought stand above the political fray and make decisions on the basis of "law" and not politics, then it's a bad thing. But, if you believe, as many social scientists and (apparently) members of the public do, that judges do not stand above the fray even when they have life tenure, that their own political preferences—and not the law—are the primary determinants of their decisions, then forcing accountability, in much the same way we force accountability on all other politicians, is not so bad.