Selecting Selection Systems

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Why do societies choose particular institutions of judicial selection and retention? Why do they formally alter those choices? We attempt to address these questions, first, by assessing what we can only call the standard story of judicial selection systems. On this explanation, the initial choice of institutions (and alterations in that choice) comes about through changes in the tide of history, that is, of societies "responding to popular ideas at different historical periods" (Glick and Vines 1973, 40).

Finding this story conceptually thin and empirically wanting, we turn to a different explanation. On this account, the creation of and changes in the institutions used to select and retain justices serving on (constitutional) courts of last resort must be analyzed as a bargaining process among relevant political actors, with their decisions reflecting their relative influence, preferences, and beliefs at the moment when the new institution is introduced—along with (and critically so) their level of uncertainty about future political circumstances. Among the interesting results our account yields is the following: As uncertainty increases, the probability of adopting (or changing to) institutions that lower the opportunity costs of justices (the political and other costs justices may incur when they act sincerely) also increases.

I Introduction

Of all the difficult choices confronting societies when they go about designing legal systems, among the most controversial are those pertaining to judicial selection and retention: How ought a nation select its judges and for how long should those jurists serve? Indeed, some of the most fervent constitutional debates—whether they transpired in Philadelphia in 1787 (Epstein and Walker 2000; Farber and Sherry 1990) or in Moscow in 1993-94 (Blankenagel 1994; Hausmaninger 1995)—over the institutional design of the judicial branch implicate not its power or competencies; they involved who would select and retain its members.[1]

Why institutions governing selection and retention engender such controversy is an interesting question, with no shortage of answers. But surely a principal one is that political actors and the public alike believe these institutions will affect the types of men and women who

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We used SPSS and STATA to analyze the data. artsci.wustl.edu/~polisci/epstein/research/selection.html houses all data and documentation necessary for replication.

[1]Haynes (1944, 4) actually traces controversies over judicial selection and tenure back to the 4th century B.C. For examples and discussions of particular debates, see Carrington 1998; Champagne 1988; Champagne and Haydel 1993; Friedman 1973; Grimes 1998; Noe 1997/1998; Pelander 1998; Roll 1990; Smith 1976; Smith 1951; Webster 1995; Wooster 1969; Ziskind 1969.

Haynes also points to immense scholarly and public interest in the subject. In the "United States alone," he notes, "whole shelves could be filled with the speeches, debates, books and articles that have been produced…dealing with the choice and tenure of judges." Writing nearly 40 years later, Dubois (1986, 31) claims that "It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection."

will serve and, in turn, the choices they, as judges, will make (*e.g.,* Brace and Hall 1993; Bright and Kennan 1995; Goldman 1997; Gryski, Main, and Dixon 1986; Hall 1984a; Hall 1987; Hall and Brace 1992; Langer 1998; Levin 1977; Peltason 1955; Pinello 1995; Sheldon and Maule 1997; Tabarrok and Helland 1999; Vines 1962; Volcansek and Lafon 1988). Some commentators, for example, assert that providing judges with life tenure leads to a more independent judiciary—one that places itself above the fray of ordinary politics (*e.g.,* Croly 1995; Segal and Spaeth 1993; Stevens 1995; Wiener 1996)—while those subjecting justices to periodic checks conducted by the public or its elected officials, to a more accountable one. Seen in this way, institutions for judicial selection and retention may convey important information about the values societies wish to foster (Gavison 1988; Grossman and Sarat 1971; Haynes 1944).

And possibilities for choice abound.[2] To be sure many nations, typically those using the civil-law system, have developed similar methods for training and "choosing" ordinary judges. But they depart from one another rather dramatically when it comes to the selection of constitutional court justices. In Germany, for example, justices are selected by Parliament, though 6 of the 16 must be chosen from among professional judges; in Bulgaria, one-third of the justices are selected by Parliament, one-third by the President, and one-third by judges sitting on other courts. Moreover, in some countries with centralized judicial review, justices serve for a limited period of time. In South Africa, for instance, they hold office for a single 12-year term, in Italy a single 9-year term. In others, including the Czech and Korean Republics, justices serve for a set, albeit renewable, term.

Variation is not, of course, limited to societies abroad. While the President nominates and the Senate confirms all federal U.S. judges, who then go on to serve during good behavior, institutions governing the selection of U.S. state judges differ from each other and usually from those for federal jurists. Today, the states follow one of five basic plans—partisan elections, non-partisan elections, gubernatorial appointment, legislative appointment, and the merit plan[3]—though the intra-plan differences (especially the terms of office) may be as great as those among them.

Not only do practices in the U.S. states shore up the degree of variation in selection and retention institutions but they also demonstrate the malleability of those institutions: Virtually every state in the Union has altered its selection system at one time or another.[4] And the same could be said of many countries. In some cases, change has come after decades of experimentation with a particular mechanism; in others, it has occurred with all deliberate speed. Such was Russia, where constitutional court justices appointed in 1991 could expect to hold their jobs for life but

[2]We adopt some of the material in this and the next paragraph from Murphy, Pritchett, and Epstein (2001).

[3]Merit plans differ from state to state but typically they call for a screening committee, which may be composed of the state's chief justice, attorneys elected by the state's bar association, and lay people appointed by the governor, to nominate several candidates for each judicial vacancy. The governor makes the final selection but is ususally bound to choose from among the committee's candidates. At the first election after a year or two of service, the name of each new judge is put on the ballot with the question whether he or she should be retained in office. If the voters reject an incumbent, he or she is replaced by another "merit" candidate. If elected, the judge then serves a set term, at the end of which he or she is eligible for reelection.

[4]Based on data reported in Section 3 of this paper, between 1776 and 2000 on average states changed their method for the retention of state supreme court justices or the terms of office (*i.e.,* the length of time a justice holds his or her position before she or he must stand for reappointment) 4.8 times. Only 6 states have made no changes either in retention or terms.

those selected after the adoption of the new constitution in 1993 were granted only a single, limited term.

And, yet, despite all this variation in selection and retention systems and their apparent malleability, scholars have devoted almost no time to investigating questions associated with institutional choice: Why do societies choose particular selection and retention institutions? Why do they formally alter those choices? They have instead assumed that the answers to these questions lie in societal responses to "popular ideas at different historical periods" (Glick and Vines 1973. 40)—or what we can only call the "standard story" of judicial selection and retention—and have gone about analyzing the effect of those responses. Particular emphasis has been placed on whether various institutions produce different kinds of judges (*e.g.,* Alozie 1990; Berg et al. 1975; Canon 1972; Champagne 1986; Dubois 1983; Flango and Ducat 1979; Fund for Modern Courts 1985; Glick 1978; Glick and Emmert 1987; Graham 1990; Hall 1984b; Jacob 1964; Lanford 1992; Nagel 1973; O'Callaghan 1991; Scheb 1988; Tokarz 1986; Watson and Downing 1969) or lead judges to behave in different ways (*e.g.,* Atkins and Glick 1974; Brace and Hall 1993; Bright and Kennan 1995; Canon and Jaros 1970; Domino 1988; Gryski, Main, and Dixon 1986; Hall 1984a; Hall 1987; Hall 1992; Hall and Brace 1989; Hall and Brace 1992; Langer 1998; Lee 1970; Levin 1977; Nagel 1973; O'Callaghan 1991; Pinello 1995; Schneider and Maughan 1979; Stevens 1995; Tabarrok and Helland 1999; Vines 1962).

Certainly we understand the importance of investigating institutional effects; at the very least, the large body of literature on selection systems has uncovered regularities of some note. For example, we now know that particular types of institutions are more likely than others to induce sophisticated behavior on the part of actors—such that the greater the accountability established in the institution, the higher the opportunity costs for judges to act sincerely, and, thus, the more extensive sophisticated behavior will be (see, generally, Brace and Hall 1993; Brace and Hall 1997; Bright and Kennan 1995; Croly 1995; Gryski, Main, and Dixon 1986; Hall 1984a; Levin 1977; Pinello 1995; Stevens 1995; Tabarrok and Helland 1999).[5]

[5]We should offer three caveats to this statement. First, judicial specialists tend to speak in far more specific terms than do we. So, for example, rather than make claims about opportunity costs associated with particular selection institutions, they argue that popularly-elected justices are more likely to suppress dissents (Brace and Hall 1993; Vines 1962; Watson and Downing 1969) and reach decisions that reflect popular sentiment (Croly 1995; Gryski, Main, and Dixon 1986; Hall 1987; Pinello 1995; Stevens 1995; Tabarrok and Helland 1999) than are their appointed counterparts. To us, these are merely examples of the more general phenomenon; namely, the greater the accountability established in the institution, the higher the opportunity costs for judges to act sincerely.

Second, there is probably less agreement over the effect of selection mechanisms than there is over the impact of electoral rules—with some studies, albeit typically older ones, arguing that selection mechanisms do not affect dissent rates (Canon and Jaros 1970; Flango and Ducat 1979; Lee 1970) or other types of judicial behavior (Atkins and Glick 1974; Crynes 1995; Domino 1988; Schneider and Maughan 1979). Scholars are in greater accord over whether various selection systems produce more minority and women judges, those who are more professionally-qualified, and so on. The vast majority agree with Flango and Ducat (1979, 31): "It appears that neither educational, legal, local, prior experience, sex, race, non role characteristics clearly distinguish among judges appointed under each of the five types of selection systems" (see, *e.g.,* Alozie 1990; Berg et al. 1975; Canon 1972; Champagne 1986; Dubois 1983; Glick 1978; Glick and Emmert 1987; Watson and Downing 1969; but see Graham 1990; Scheb 1988; Tokarz 1986; Uhlmann 1977).

Finally (and, again, in contradistinction to literature on electoral rules), almost all conclusions about the effect of judicial selection and retention mechanisms emanate from studies on the U.S. states; comparative work is virtually non-existent. (The exceptions include Anenson 1997; Atkins 1989.; Bell 1988; Danelski 1969; Gadbois 1969; Meador 1983; Morrison 1969; Volcansek and Lafon 1988.) Some argue that the near-exclusive focus on the U.S. is highly problematic because differences among the state judicial selection systems are so trivial as to create

But it is exactly these sorts of findings that underscore the need to address—and to address systematically—questions of the causes of institutional choice and change. For if political scientists believe that institutions affect the behavior of actors, then surely the designers of those institutions believe the same and act on that belief (*i.e.*, they anticipate institutional effects and adopt those rules that maximize their preferences).

In this paper, we attempt to give these questions the attention they merit by, first, evaluating what we take to be the primary reason why this research area has laid so dormant: the existence of the standard story of institutional adoption and change—a story that, as we explain below, scholars have told decade after decade without seriously questioning its conceptual and empirical underpinnings.

The results of this evaluation lead us to conclude that a new account is necessary and, in the second part of the paper we offer one. On our account, the creation of and changes in the institutions used to select justices serving on (constitutional) courts of last resort must be analyzed as a bargaining process among relevant political actors, with their decisions reflecting their relative influence, preferences, and beliefs at the moment when the new institution is introduced—along with (and critically so) their level of uncertainty about future political circumstances.

Among the interesting results our account yields is the following: As uncertainty increases, the probability of adopting (or changing to) institutions that lower the opportunity costs of justices (again, the political and other costs justices may incur when they act sincerely) also increases. In other words, political uncertainty produces selection mechanisms that many scholars associate with judicial independence (*e.g.,* life tenure or long terms of office). Under certain conditions, the converse also holds: As uncertainty decreases, regimes may be more inclined to devise (or change) their institutions to increase judicial opportunity costs. This follows from the fact that the designers believe they will remain in power and, thus, hope to inculcate a beholden judiciary.

2 The Standard Story of the Choice of Judicial Selection Systems

As we note above, virtually no specialists have tackled important questions associated with the choice of judicial selection and retention systems. Explaining this void is not all that difficult: For decades now, scholars—at least those studying U.S. practices[6]—have accepted what we have labeled 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"(Glick and Vines 1973. 40). More specifically, the standard story unfolds in four chapters or "phases" of change, during each of which groups of reformers sought to supplant one

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distinctions without meaning (Baum 1995). We, of course, agree that incorporating cases abroad is highly advantageous. At the same time, we take issue with the general claim that differences among the states are negligible; we believe instead that the way scholars have approached those differences—by lumping states into broad *selection*-system categories (*e.g.,* partisan elections, non-partisan elections, and so on) without considering the dimensions of retention and terms of office—fails to exploit them, either theoretically or empirically. We offer a corrective in Section 3.

[6] U.S. practices are the only ones that have attracted serious scholarly attention (see the 3rd paragraph of note 5).

selection system with another with the supposed goal of creating a "better" judiciary (*e.g.,* Berkson, Beller, and Grimaldi 1980; Berkson 1980; Brown 1998; Bryce 1921; Carbon and Berkson 1980; Carrington 1998; Champagne and Haydel 1993; 1957; Elliott 1954; Escovitz, Kurland, and Gold 1975; Friedman 1973; Glick and Vines 1973; Goldschmidt 1994; Grimes 1998; Haynes 1944; Hurst 1950; Noe 1997/1998; Roll 1990; Scheuerman 1993; Sheldon and Maule 1997; Shuman and Champagne 1997; Stumpf and Culver 1992; Volcansek and Lafon 1988; Watson and Downing 1969; Webster 1995; Winters 1966; Winters 1968; Witte 1995)—with the term "better," while defined differently across time, always standing for some general societal benefit.

2.1 Chapter 1: The Revolutionary Period and Appointed Judiciaries

The standard story begins with the Revolutionary period, when—in response to a 1776 call issued by the Continental Congress— many of the states turned to the task of drafting constitutions. Most of their knowledge about legal systems, of course, came from England, where for centuries judges held their positions at the pleasure of the king, and their terms of office expired on the death of the sovereign who had appointed them. This dependence on royal favor frequently made for judicial subservience. But not until 1701 did the English Act of Settlement provide that judges should serve during good behavior, with removal contingent upon parliamentary approval. And it was not until 1760 that judges' commissions did not expire on the death of the king who had appointed them.

The British belief in the value of an independent judiciary was transplanted to America, and royal abuse of this principle was one of the grievances that gave a moral tinge to the Revolutionary cause. The Declaration of Independence accused George III of having "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."

It was the hostility toward any system enabling one individual to select and retain judges, on the standard story, that permeated constitution-drafting sessions in the states and in Philadelphia (*e.g.,* Champagne and Haydel 1993; Goldschmidt 1994; Sheldon and Maule 1997; Smith 1976; Webster 1995). Following this predilection, of course, could have led the states to adopt provisions calling for the election judges. But none did[7]—at least not for members of their highest benches. Rather, in the aftermath of the Revolution, they all retained some form of appointment, though, according to standard-story chroniclers, they attempted to diffuse power by giving legislatures either sole responsibility for judicial appointments (7 or 8 of the original 13 states[8])

[7]And not because "direct election of judges was unknown" (Orth 1992); indeed quite early on Vermont (1777), Georgia (1812), and Indiana (1816) provided for the election of some lower court judges (Croly 1995, 714; Hurst 1950). Rather, most probably eschewed elections out of a belief that "the electorate was not capable of evaluating the professional qualities of judicial candidates"(Grimes 1998).

As an aside, here and throughout the rest of the paper, we place emphasis on the selection and retention of judges serving on state courts of last resort (usually called state supreme courts). We emphasize these courts because we are interested in developing a theory of judicial selection that we can invoke to study (constitutional) courts of last resort here and abroad.

[8]The figure of 7 (e.g., Elliott 1954; Volcansek and Lafon 1988) or 8 (e.g. Grimes 1998; Sheldon and Maule 1997) depends on who is doing the chronicling. That scholars disagree on even basic facts about judicial selection systems shores up a problem that plagues much of this research: Analysts tend to rely on a few (flawed) secondary

or some role in them (5 or 6 of the 13);"most" also attempted to ensure judicial independence by guaranteeing judges virtual life tenure (see Elliott 1954; Grimes 1998; Sheldon and Maule 1997; Volcansek and Lafon 1988).

At the Philadelphia Constitutional Convention in 1787 the Framers were presented with several plans for choosing federal judges. Those delegates (*e.g.,* George Mason, Elbridge Gerry, and Oliver Ellsworth) who opposed a strong executive, wanted to follow the dominant state practice and vest appointing authority in Congress. Others (*e.g.,* Alexander Hamilton, James Madison, and Gouverneur Morris) wanted the executive to appoint judges. It was Hamilton who first suggested that the President nominate and the Senate confirm *all* federal judges, but the Convention twice rejected this compromise before finally adopting it. Following British practice and that emerging in the states, the new Constitution provided that federal judges should serve during good behavior.

2.2 Chapter 2: Jacksonian Democracy and Elected Judiciaries

On the standard story, then, the design of the original selection and retention systems involved little more than common applications of procedures about which the designers believed they had knowledge of institutional effects. A similar perspective informs the story's explanation of the three key instances of institutional change.

Depending on the particular version of this story, the first change—a move toward the popular election of judges—came about as a result of Jefferson's charges in the early 1800s of a run-a-away, aristocratic, and unaccountable judiciary (Croly 1995; Roll 1990), 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) (*e.g.,* Brown 1998; Bryce 1921; Escovitz, Kurland, and Gold 1975; Webster 1995), or both (Haynes 1944; Hurst 1950; Volcansek and Lafon 1988). Mississippi was, in 1832, the first state to select all of its judges via partisan elections; and from there "a democratic spirit swept the young nation" (Roll 1990, 841)—one designed to force greater accountability of judges by broadening the base from which they would have to garner support.

Regardless of whether this "spirit" was "based on emotion rather than on a deliberative evaluation of experience under the appointive system" (Hurst 1950, 140), it indeed seemed to have engulfed the country. As standard-story chroniclers like to point out (1) 19 of the 21 constitutional conventions held between 1846 and 1860 approved documents that adopted popular election for (at least some of) their judges; (2) by the time of the Civil War, 19 of 34 states (Carpenter 1918, 181) or 21 of 30 states (Hall 1984a) or 21 of 34 (Grimes 1998) or 22 of 34 (Elliott 1954) or 24 of 34 (Escovitz, Kurland, and Gold 1975) (see note 8) had adopted elections (though not necessarily for all judges); and (3) every new state admitted to the Union between 1846 and 1912 provided for the election of (again, at least some) judges (Roll 1990).

2.3 Chapter 3: Machine Politics and the Move to Non-Partisan Elections

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sources— especially *The Book of the States,* Berkson et al. (1980), and Haynes (1944)—and thus transmit errors from one piece of research to the next. In this section, we rely on those "flawed" data since they have become a part of the standard story; in the next, we present analyses based on "corrected" data.

Despite this apparently ringing endorsement of electoral mechanisms for judicial selection and retention, it was not long before a new tide began to rise. This one, according to the standard account, probably appeared as early as 1853 (Berkson, Beller, and Grimaldi 1980), gained in strength right before the turn of the century (Noe 1997/1998), and reached its zenith during the progressive movement (Carrington 1998; Grimes 1998; Webster 1995). Such is hardly surprising since this new response 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" (Grimes 1998,2273).

According to the standard story, the states were quick to respond to this latest selection-mechanism backlash: In an effort to take "the judge out of politics" they began invoking non-partisan ballots for judges. Cook County in Illinois was the first but states followed suit such that by 1927, 12 placed judges on the ballot without reference to their party affiliation (Carbon and Berkson 1980).

2.4 Chapter 4: Legal Progressives and the Merit Plan

While some reformers continued to push states to adopt non-partisan ballots, others began deriding elections altogether. As early as 1906, in an-oft cited speech before the American Bar Association, Roscoe Pound (1962) proclaimed that "putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[9] To Pound (joined several years later by William Howard Taft) not even non-partisan elections satisfactorily removed judges from politics because they still had to campaign to attain and retain office. Others too became disenchanted with that non-partisan elections but for a different reason; namely, "candidates for judgeships [continued to be] regularly selected by party leaders and thurst upon an unknowledgeable electorate which, unguided by party labels, was not able to make reasoned choices" (Berkson, Beller, and Grimaldi 1980) (see also Belknap 1992; Brown 1998; Grimes 1998; Webster 1995; Winters 1968).

A response to these concerns came in 1914, when Northwestern Law School Professor and Director of the newly-formed American Judicature Society's research wing, Albert M. Kales (1914), offered what he called a "non-partisan court plan" (now often termed the merit or Missouri plan)—a compromise of sorts between post-Revolutionary mechanisms that stressed judicial independence and those of Jacksonian democracy that emphasized accountability (*e.g.,* Champagne and Haydel 1993; Sheldon and Lovrich 1991). Under Kales's proposal, states create a judicial commission, which nominates candidates solely on the basis of merit. From the

[9]Actually criticisms of elections came nearly a century before Pound's speech. In 1821, Justice Joseph Story expressed concern about the trend toward elections. And in 1835, Alexis de Tocqueville (1954, 289) wrote: "Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself."

commission's list, the state's Chief Justice (the only elected judicial office under the plan) selects judges, who later run in non-competitive, non-partisan retention elections (Belknap 1992; Carbon and Berkson 1980; Roll 1990; Winters 1968). A decade or so later, social scientist Harold Laski (1926), chimed in, suggesting various modifications to the Kales plan. He argued that the governor rather than the Chief Justice ought make the appointments from the commission's list. (Laski also opposed retention elections; he believed judges should have life tenure.)

In 1934 California became the first state to adopt a merit plan, though it differed rather markedly from the ones offered by Kales and Laski. Under the California's adaptation, judges were to be appointed by the governor with the consent of a 3-person commission (consisting of the Chief Justice, the presiding judge of a district court of appeal, the Attorney General)—in other words, a sort of merit plan in reverse. Three years later, the American Bar Association endorsed the more traditional version of merit selection,[10] which Missouri adopted in 1940. Under Missouri's scheme, a 7-member judicial commission sends a list of three candidates to the governor. After the governor makes a selection from the list, the judge's name appears on the ballot (unopposed) in the first general election after appointment; thereafter, at the end of each 12-year term, the judge runs unopposed on a non-partisan retention ballot (see note 3).

Over the next few decades, most states that changed their selection system moved toward to the merit plan.[11] They did so, at least according to the standard story, out of a belief that merit selection would transform "the general level of the judiciary, in terms of intelligence, integrity, legal ability and quality in performance" (Winters 1968, 780).[12]

3 An Evaluation of the Standard Account

The standard 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 (*e.g.,* Brown 1998; Carrington 1998; Champagne and Haydel 1993; Glick and Vines 1973; Goldschmidt 1994; Grimes 1998; Haynes 1944; Noe 1997/1998; Roll 1990; Scheuerman 1993; Sheldon and Maule 1997; Shuman and Champagne 1997; Volcansek and Lafon 1988; Watson and Downing 1969; Webster 1995; Witte 1995); it forms the centerpiece of discussions of selection in nearly all contemporary judicial process texts (*e.g.,* Carp and Stidham 1998; Stumpf 1998; Tarr 1999); and it has even been repeated by judges in court opinions (*e.g.,* Smith v. Higinbothom 1946). It also is remarkably thin and, in many ways, remarkably misleading.

We are certainly not the first to level such charges. Despite the standard story's place in the literature, it has been the target of criticism—though much of it has come from studies of

[10]The plan the ABA endorsed, though vague, was something of a cross between Kales's and Laski's. It called for the executive or another elected officer to select a judge from a list presented by an unelected agency. It endorsed retention elections, as well as the possibility of legislative confirmation of the governor's choice.

[11]As Sheldon and Maule (1997) put it: "The trend now favors the Missouri plan."

[12]Over the next decade or so, scholars may be adding a fifth chapter to the standard story, as the merit plan "has come under increasing fire from the left and the right, with liberals arguing that minorities are underrepresented on the bench and conservatives viewing it as undemocratic" (Pelander 1998, 668; see also Carrington 1998, 106, who writes: The merit plan is now "seen by many as a masquerade to put political power in the hands of the organized bar and other members of the elite.").

particular chapters in the story. Hall (1984a, 347), for example, takes issue with the conclusion that "that broadened base of popular political power associated with Jacksonian Democratic party prompted [the] sweeping" move toward partisan elections (see also Hall 1983). Rather, he gives the credit (or blame) to the nation's lawyers, who believed that elections would maximize the prestige of judges (and, by implication, of themselves).[13] Likewise, Puro and her colleagues (1985)—implicitly taking issue with the standard story—argue that we must look toward diffusion "theory" to account for the "widespread" adoption of the Missouri plan. As they explain it, policy diffusion occurs among states that share common features. And though it was not clear to them from the onset which features would be relevant to the adoption of merit selection, they eventually learned that states with non-professional legislatures and relatively large urban populations found it most attractive.

These and other particular critiques may not be especially compelling, but they do have the virtue of shoring up various gaps and weaknesses in the standard story. To us, the key shortcomings boil down to three: the omission of politics, the failure to consider political motives, and the lack of systematic empirical support.

3.1 Where's the Politics?

Despite scholarly recognition that the choice of judicial selection and retention mechanisms is inherently a political choice with political implications—or as Friedman (1985, 124) puts 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"—the standard account is notably devoid of politics. Rather, it views the choice of institutions (and changes in that choice) as a simple, nearly reflexive, response to some prevailing social sentiment that something is amiss in the judiciary.

Nothing could be further from political reality, as various accounts of debates in the states and, of course, in Philadelphia shore up. Earlier, we mentioned that, despite their experience with British practice, some of the framers wanted the executive to retain control of the judicial appointments. Debates in various states may have been more acrimonious (see, *e.g.,* Ziskind 1969); even the idea of life tenure was the cause of serious controversy in some. If constitution drafters were merely responding to social conditions, it is hard to explain ensuing disagreements at the founding period, as well as at virtually all other points in history when states considered amending their institutions (*e.g.,* Averill 1995; Brinkley undated; Grimes 1998; Noe 1997/1998; Orth 1992; Pelander 1998; Roll 1990; Smith 1951; Wooster 1975).

And such debates continue today. So, for example, as Champagne (1988) tells us, when the Chief Justice of Texas proposed that his state move from partisan elections toward a merit plan (which would have included Senate confirmation of candidates) opposition came from all quarters, including minorities and women, who thought it would lead to the appointment of white, male judges; plaintiffs' attorneys, who wanted to continue to contribute to the coffers of

[13]For a critique of Hall's argument and yet more conjecture over why the states moved to elections, see Nelson (1993).

judicial candidates; and both political parties, though for different reasons. The proposal, almost needless to write, was a nonstarter.

3.2 Where are the Political Motives?

Champagne's account, along with many others (*e.g.,* Averill 1995; Grimes 1998; Noe 1997/1998; Orth 1992; Pelander 1998; Roll 1990; Smith 1951; Wooster 1975) suggests another, perhaps even more important (though related) weakness in the standard story: It assumes that, at each point in history, the relevant actors all held rather noble goals, whether to create (1) an independent judiciary (our Nation's founders), (2) a more accountable judiciary (Jefferson, Jackson, and state governors and legislators), (3) a less politicized judiciary (the progressives and state governors and legislators), (4) a more meritorious one (Pound and state governors and legislators) or some combination thereof. No one in this story, or so it seems, is out for their own individual political policy preferences.

Again, specific accounts of the various relevant actors work to undermine this rather naive picture. Consider Thomas Jefferson, who, under the standard story, pushes for an elected judiciary (or at least a system in which judges must be reappointed, every 6 years, by the President and both houses of Congress) to further democratic principles. To support this view, standard-story tellers often point to a letter Jefferson 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 maxim is *boni judicis est ampliare jursidctionem*, and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries, to the elective control" (available in Lipscomb 1903, 276). 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: "The judges…should not be dependent upon any man or body of men. To these ends they should hold their estates for life in their offices, or, in other words, their commissions during good behavior" (quoted in Haynes 1944, 93-94). 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) (Haynes 1944; Volcansek and Lafon 1988). 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.

We could go on and offer similar accounts of so many others involved in the choice of judicial selection and retention institutions. For, surely various state legislators, at least when debating elective judiciaries, "had more on their mind than merely applying democratic principles"(Nelson 1993, 192); they were just as, if not more so, interested in packing the bench with partisan supporters (Carrington 1998). So too, progressive groups—what with their contempt for the laissez-faire jurisprudence endorsed by particular political parties—were not merely interested in cleaning up the machines. And, following Hall's (1983) logic, not even Pound was above pursuing policy ends. But it is the more general point that should not be missed: The standard story's failure to recognize political motivations on the part of key actors is near fatal. Not only does it run counter to the historical evidence (not to mention defy good sense and logic); it also is at odds

with virtually every important theoretical account of institutional choice and change in the political science literature (see, *e.g.,* Boix 1999; Knight and Sened 1995).

3.3 Where's the Empirical Support?

Our critique, up to this point, has been primarily theoretical and anecdotal but systematic empirical analysis both is possible and necessary. For, to many scholars, the standard story is on its strongest ground when it is pitted against real-world observations. Often-cited facts and figures are the ones we already have provided in the text—such as, "every new state admitted to the Union between 1846 and 1912 provided for the election of [at least some] judges"— as well as those depicted in Table 1 below. Advocates of the standard account suggest that such data provide conclusive evidence that the design and change of selection and retention systems is primarily a series responses to broad societal concerns.

Table 1. Patterns of State Adoption of the Various Judicial Selection Systems

Selection System	1776-1831	1832-1885	1886-1933	1934-1968
Legislature	48.5%	6.7%	0.0%	0.0%
Governor	42.4	20.0	10.7	5.6
Partisan Election	9.1	73.3	25	11.1
Nonpartisan	---	---	64.3	11.1
Merit	---	---	---	72.2

Source: Glick and Vines (1973, 41.)

Unfortunately, the data in Table 1 are anything but conclusive. Quite the opposite: They suffer from two relatively minor (though irritating) problems and two more important ones. Turning to the former first, we note that so much of the data scholars cite come not from primary sources (*e.g.,* state constitutions, state laws) but rather from secondary fonts (especially *The Book of the States*; Berkson, Beller, and Grimaldi 1980; Haynes 1944)—many of which are imprecise (*e.g.,* they do not always specify whether elections are partisan or not), commit sins of omission (*e.g.,* they do not report all changes in judicial term length) and commission (*e.g.,* they all contain downright errors in dates and facts), or all of the above. But because the errors have gone unnoticed or uncorrected scholars simply transmit them from one piece of research to the next—with the effect of occasionally stating and restating questionable conclusions. So, for example, we are often led to believe, in accord with Chapter 1 of the standard story, that "virtually all" constitutional documents of the 18th century provided life tenure for justices. As Champagne and Haydel (1993, 2-3) put it: "During the Revolutionary War period the colonists…greatly resented King George III's power to appoint and remove judges…Although they resented the King's control over judicial selection, the colonists still believed that judges should be appointed, not elected. They thought lifetime judicial appointments would ensure independence…" Yet, a check of the documents themselves (in Thorpe 1909) and a multitude of

other sources (Dunn 1993; Elliott 1954; Escovitz, Kurland, and Gold 1975; Felice, Kilwein, and Slotnick 1993; Grimes 1998; Haynes 1944; Smith 1976; Taft 1893; Witte 1995; Wooster 1969; Ziskind 1969) reveals that, prior to *Marbury v. Madison* (1803), fully 41% (n=7) of the 17 states did *not* guarantee life tenure to the justices of their highest courts; and one of the 10 that did (New York) qualified the guarantee with the proviso that justices retire at age 60.

A second rather minor concern is that scholars rarely define their selection categories. This is not a serious issue for institutions such as partisan elections, the meaning of which seems clear, but it is for some of the other mechanisms. Does California qualify as a "merit selection" state since it is the governor, not a commission, that nominates candidates? To Abraham (1998) it does indeed; but to Carp and Stidham (1998) it does not. What about New York, where the governor appoints judges (subject to legislative confirmation) from lists provided by judicial commissions but judges do not run for retention; rather they are reappointed by the governor and legislature? Is New York a "merit" state? Tarr (1999) says yes; Carp and Stidham (1998) say no.

While some may see these as minor categorical differences, little doubt exists that they ways in which scholars categorize state institutions significantly affect the conclusions they reach; for example, many point to the states' initial refusal to give governors the power of appointment as Exhibit #1 in their defense of the standard story. To be sure, prior to *Marbury,* 9 of the 17 states gave exclusive power to the legislature but in the remaining 8 the governor, other members of the executive branch, or both played a significant role—either as the nominator or appointer. Indeed, today most scholars would classify all, if not most, of the 8 as "gubernatorial" states.

Now let us consider the more serious problems. The first centers on the literature's insistence on categorizing states by their *selection* system and, then, lumping into one category all states that use a particular system (*e.g.,* all those that invoke partisan elections, legislative selection, and so on; see Table 1). This procedure ignores two facts. First, even under the standard story (that is, even putting aside political motivations), *reformers were generally less interested in how judges got to the bench than they were in how they retained their seats* (Carpenter 1918; Hasen 1997). Second, when states adopted even a particular kind of selection and retention system, say, partisan elections, they did not do so *homogeneously*; rather some specified renewable terms of, say, 6 or 10 years, while others, non-renewable terms.

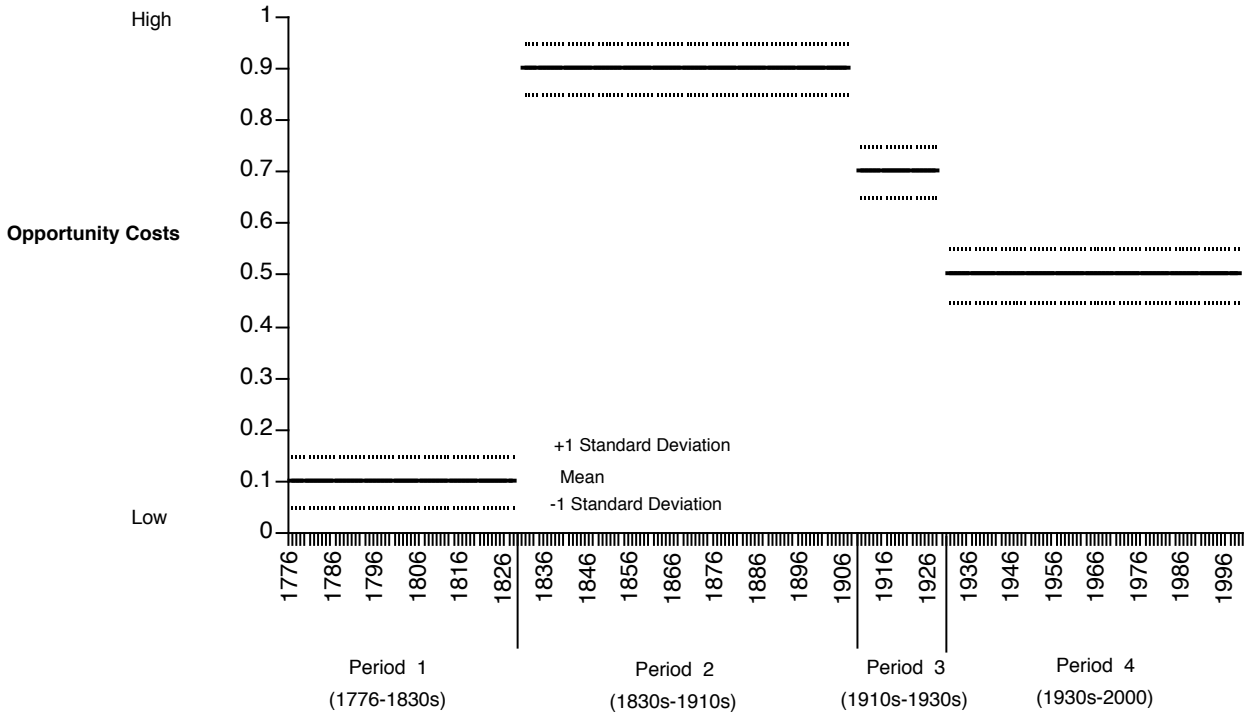
If we believe that the choice of judicial selection/retention mechanism affects the choices justices make—again, as even the standard account suggests—then these gross categorizations are a mistake. To see why, assume, as the extant literature suggests, that elections increase the opportunity costs for justices to act sincerely (or, in the parlance of the existing literature, that elections will induce greater accountability) (Brace and Hall 1993; Vines 1962; Watson and Downing 1969) and lead them to reach decisions that reflect popular sentiment (Croly 1995; Gryski, Main, and Dixon 1986; Hall 1987; Pinello 1995; Stevens 1995; Tabarrok and Helland 1999). If elections are held on a regular basis, we would agree. But what about states that adopt 20+ year terms? Is it sensible to equate partisan elections every 20 years with those held every two? Surely not. Rather, we must be attentive both to selection/retention mechanisms *and* the terms of office.

Finally, the sorts of data typically invoked (*e.g.,* the data displayed in Table 1) are insufficiently developed and too gross to assess what we take to be the standard story's central propositions; namely, (1) societies (*e.g.,* the U.S. states) adopt selection/retention mechanisms in response to "popular ideas at different historical periods" (Glick and Vines 1973, 40) and (2)

entities within a society (*e.g.,* the U.S. states), because they are responding to the same pressures, should possess roughly the same selection/retention systems at any given historical moment.

To see why existing data are not particularly useful in assessing these propositions, consider Figure 1. There we provide a visual depiction of the propositions, along with the specific form the standard story takes. Assume that the Y-axis represents a scale of the opportunity costs that the various selection/retention mechanisms (including whatever term length they specify) exact on justices, such that institutions on the very low end—say appointment with life tenure—provide justices with the highest degree of independence to act on their sincere preferences—and those on the very high end—say partisan elections every two year—with the lowest. What the standard story suggests is that the mean of this opportunity cost measure, across all the entities in a given society (*e.g.,* the mean score of all U.S. states), should stay constant until the entities respond to the next change in societal sentiment. What is more, since all entities are responding at roughly the same time, the standard deviation from that mean should be relatively low.

Figure 1. Visual Depiction of the Standard Story's Propositions (I)

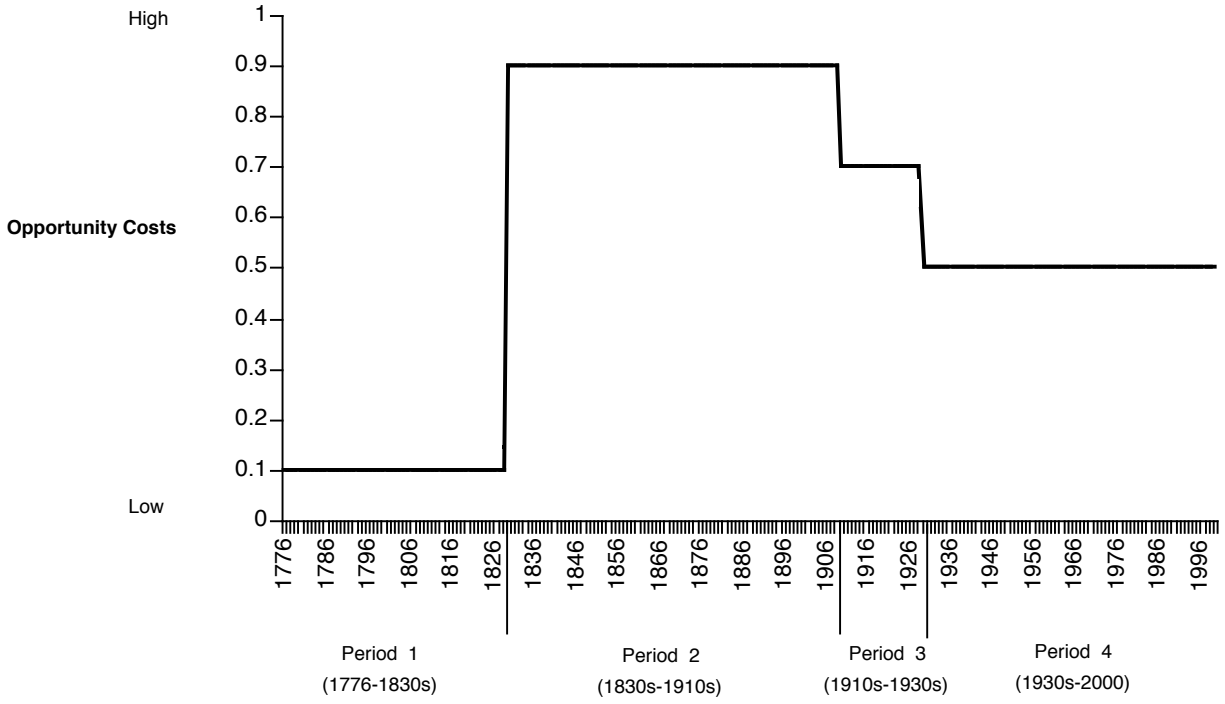


In other words and to be more concrete, if we were able to create a measure of costs—one based on the dimensions of retention and the terms of office—we would expect very low mean scores across all existing states during period 1 (Chapter 1 of the standard story) (see Figure 1). That is because state constitution drafters, in response to English practice sought to create independent judiciaries, those in which judges would enjoy life tenure and thus, presumably pay the lowest opportunity costs for acting sincerely. As we move toward the Jacksonian era, we would expect to see a dramatic increase in the opportunity cost measure, what with states moving toward partisan elections and shorter terms of office. Finally, Chapters 3 and 4 of the

standard story suggest that opportunity costs will decrease as states began to invoke non-partisan and retention elections.[14]

Putting this together into one cohesive story (that is, connecting the lines in Figure 1) suggests the intriguing pattern depicted in Figure 2: a near quadratic **GK says that this is not a quadratic**, with low opportunity costs at the onset, far higher ones during most of the 1800s, and lower costs yet again during the 20th century. And though we do not depict the standard deviations here, we would, once again, anticipate rather low ones as states move together in response to societal forces.

Figure 2. Visual Depiction of the Standard Story's Propositions (II)



Assessing these propositions obviously requires much finer (and more reliable) data than scholars typically invoke. Moreover, data-collection efforts must be attentive to critiques we offer above, especially to the need to emphasize retention mechanisms and the terms of office.

3.3.1 Developing a Measure to Assess Empirically the Standard Story

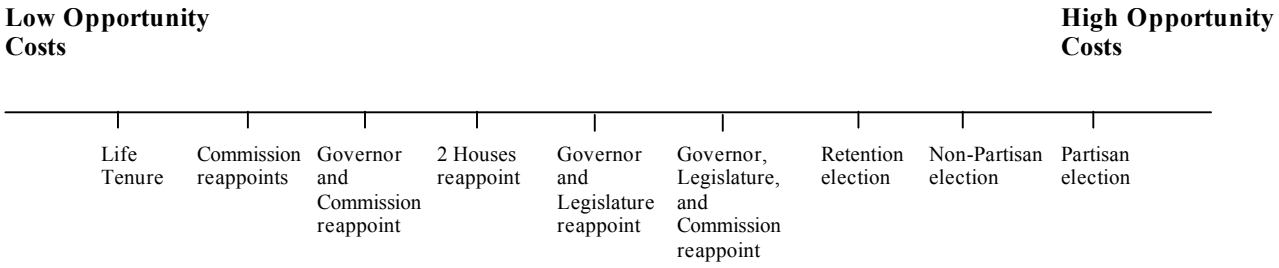
It is with these points in mind that we approach the task of testing the standard story's core propositions. The most important part of that task entails developing a measure of opportunity costs—one that incorporates the two dimensions of retention and the length of tenure. Let us begin with retention, and note that previous efforts have attempted to place *selection* systems on

[14]The literature would justify this claim by pointing to lower levels of competition (or no competition at all) in these sorts of elections. Such, in turn, results in less threat to incumbent justices and, thus, lowers judicial accountability. We offer a somewhat different justification in the next section.

an ordinal scale tapping judicial independence (accountability) (see, *e.g.,* Sheldon and Lovrich 1991). Typically such scales move from partisan elections [highest accountability] to judicial appointment by the governor [lowest accountability] (*e.g.,* Champagne and Haydel 1993). We prefer, first, to reconceptualize the underlying scale as one of opportunity costs, that is, the costs that judges will incur if they always act sincerely (see note 5) and, second, to focus on retention, rather than selection.[15]

These preferences lead us to the scale depicted in Figure 3, which arrays all retention mechanisms used in the U.S. states between 1776 and 2000. Underlying it is a straightforward-enough assumption: the more players involved in reappointment, the higher the opportunity costs (see, generally, Sheldon and Lovrich 1991; Sheldon and Maule 1997).[16]

Figure 3. Opportunity-Cost Scale: The Retention Dimension



Most of the placements are obvious but those on elections may require some justification. Partisan elections are at the very high end of the scale because voter turnout is greater and roll off is less in those than in judicial retention (Dubois 1979; Dubois 1980; Hall 1999) or in non-partisan elections (Adamany and Dubois 1976; Dubois 1979; Dubois 1980; Hall 1984a; Hall 1999); in other words, more players participate in the reappointment decision when ballots list the party affiliation of judges. The distinction between retention and non-partisan elections is finer. Though Hall (1999) finds virtually no difference in voter participation between the two, Dubois (1979; 1980) demonstrates monotonic declines in turnout and monotonic increases in roll off from partisan to non-partisan to retention elections (see Table 2). Given that Dubois's research covers a longer time span than Hall's (1948-1974 versus 1980-1995) and that his results sit comfortably with other studies (*e.g.,* Aspin 1999; Griffin and Horan 1979; Griffin and Horan 1982; Jenkins 1977; Luskin et al. 1994) and with conventional wisdom (*e.g.,* Webster 1995, 34 noting "voter drop-off has been more significant in retention elections than in either partisan or

[15]In addition to the reasons already offered, focusing on retention eliminates a problem inherent in many studies of judicial selection: Perhaps as many as 60% of all "elected" state supreme court justices were not initially elected but rather appointed to office (as interim appointees) (see, *e.g.,* Herndon 1962).

[16]We acknowledge a potential problem with this assumption; namely, the converse is possible: the fewer the actors monitoring the justices, the higher the opportunity costs. This possibility flows from principal-agent models, which suggest that as the number of principals increase, the opportunity costs for the agent decrease because she can play the principals off one another—if those principals have homogeneous preferences. We plan to consider this possibility in future work.

non-partisan judicial elections;" see also Slotnick 1988), we place retention elections to the left of non-partisan contests.[17]

Table 2. Mean Turnout and Mean Roll-Off in State Judicial Elections

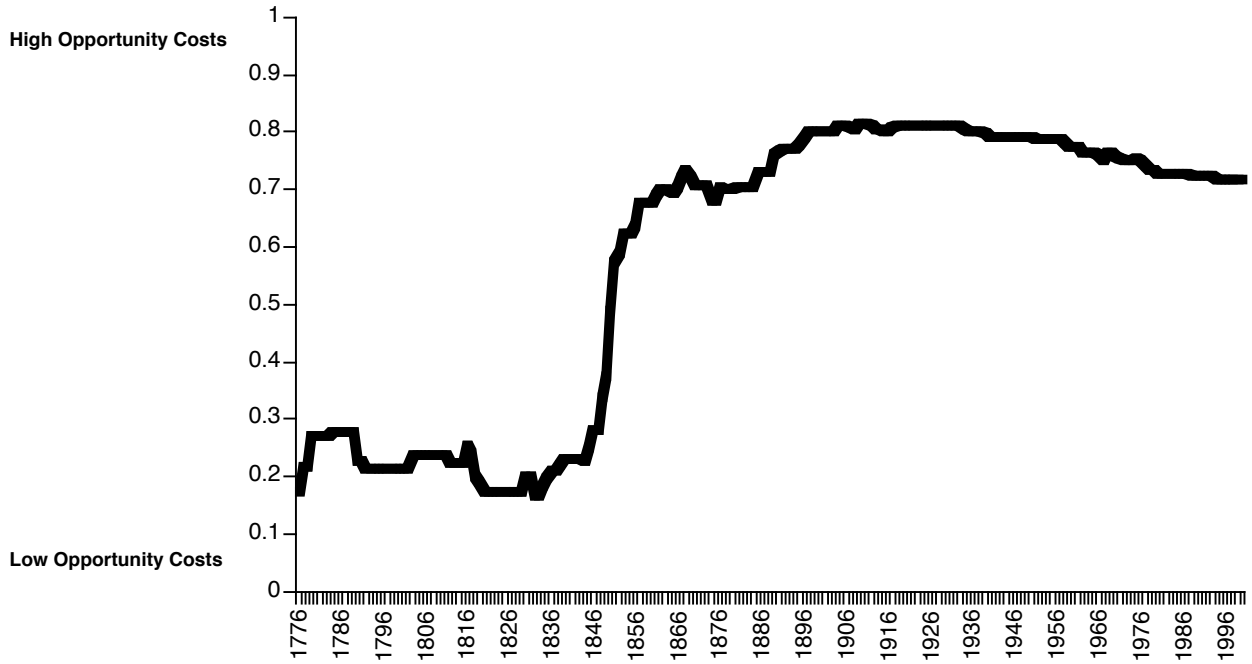
Election Type	Presidential Election Years		Mid-Term Election Years	
	Mean Turnout	*Mean Roll-Off*	*Mean Turnout*	*Mean Roll-Off*
Partisan Ballot	62.4%	8.5%	50.3%	8.4%
Non-Partisan Ballot	45.0	32.4	38.7	28.3
Merit Retention Ballot	38.2	40.2	32.4	36.1

Source: Dubois (1980, 46, 48).

To animate this retention dimension, we collected data on the institutions used in the states to retain justices serving on courts of last resort since 1776 (for our sources, see Figure 4) and coded them from 1 (life tenure) through 9 (Partisan Elections) (see Figure 3). We then standardized the codes on a 0 to 1 scale, such that scores closer to 0 represent low-opportunity cost retention systems (*e.g.,* life tenure) and those moving towards 1, high-cost systems (*e.g.,* partisan elections). Figure 4 depicts the mean of these standardized scores over time. **Put numbers on the figure on the 0 to 1 scale, no reason to have the extra step of going from 0 to 9 then 0 to 1. Also explain how we standardized. Then we don't need title of figure to be mean standardized—just retention scores.**

Figure 4 Mean (Standardized) Retention Scores in the U.S. States, 1776-2000

[17]We can, of course, empirically assess the degree to which this decision (along with all other placements) affects the resulting measure. We do not do so in the paper but will as the project develops.



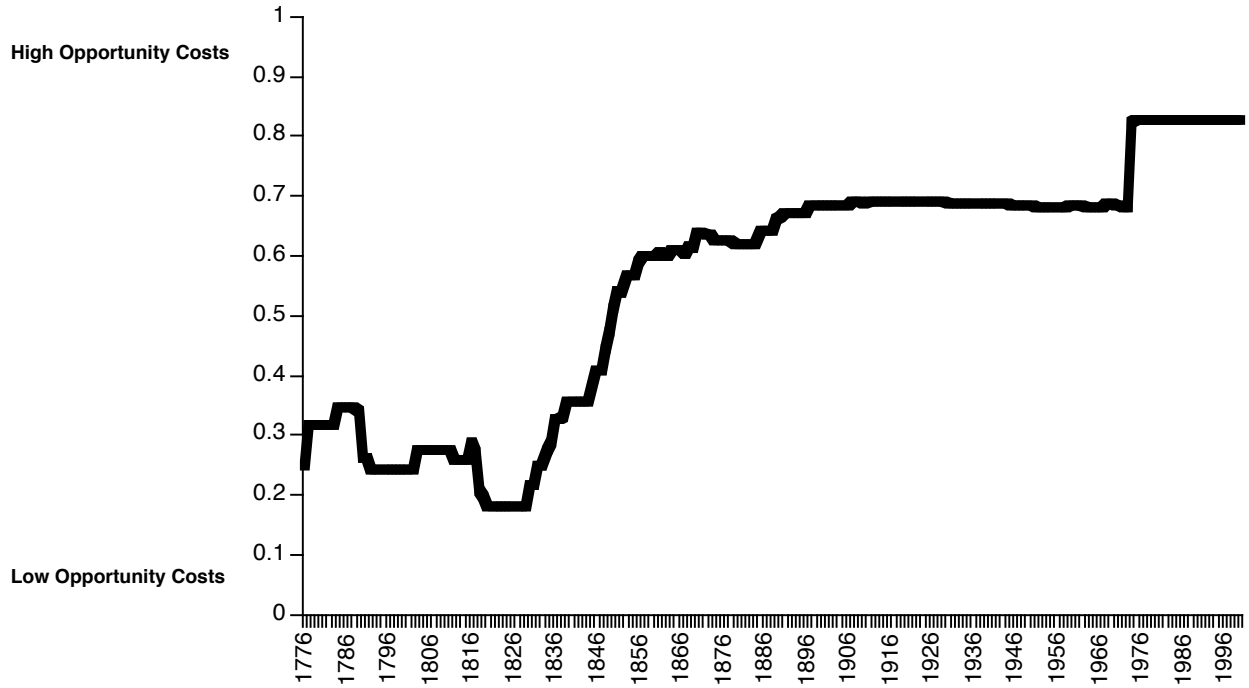
Sources: State codes, state constitutions available in, among other places, Thorpe (1909); *The Book of the State*s (various years); Official Manual of the State of [Name of State] (various years); e-mail correspondence with various experts (state officials and scholars); official court web sites; American Judicature Society (1995); Atkins and Gertz (1982); Aumann and Walker (1956); Benson (1993); Berkson et al. (1980); Brown (1998); Carbon and Berkson (1980); Cooper (1995); Coyle (1972); Dealey (1915); Diggers (1998); Dubois (1980); Dunn (1993); Elliott (1954); Escovitz et al. (1975); Felice (1993); Friedman (1999); Goldschmidt (1994); Hall (1983); Hall (1999); Haynes (1944); Heffernan (1997); Herndon (1962); May (1996); Pelander (1998); Pinello (1995); Puro et al. (1985); Richman (1998); Robinson (1941); Roll (1990); Sacks (1956); Sait (1927); Sheldon and Maule (1997); Smith (1951); Smith (1976); Smith (1998); Stephens (1989); Swackhamer (1974); Taft (1893); Vaughan (1917); Webster (1995); Winslow (1912); Winters (1966); Witte (1995); Wooster (1969); Ziskind (1969).

Quite clearly, state retention systems have, over time, increased the opportunity costs for justices. But such data tell only half the story: Because "term length is a key component in determining the balance between judicial independence and judicial accountability" (See 1998; see also Smithey and Ishiyama 1999), we also must be attentive to judicial tenure—that is, our ultimate measure of opportunity costs ought take account of the length of the terms of office (with the primary assumption being that as the length increases, opportunity costs decrease).

To incorporate this dimension, we standardized judicial terms (which have ranged in the U.S. states from life tenure to reappointment every year) to fall along a 0 to 1 scale such that scores closer to 0 represent life tenure or very long terms and those closer to 1, very short terms.[18] Figure 5 displays the results of this transformation.

Figure 5 Mean (Standardized) Term-Length Scores in the U.S. States, 1776-2000

[18]For purposes of animating this measure, life terms are the equivalent of 25 years. We base this on (the admittedly unverified) assumption that the average age of appointment is about 50.

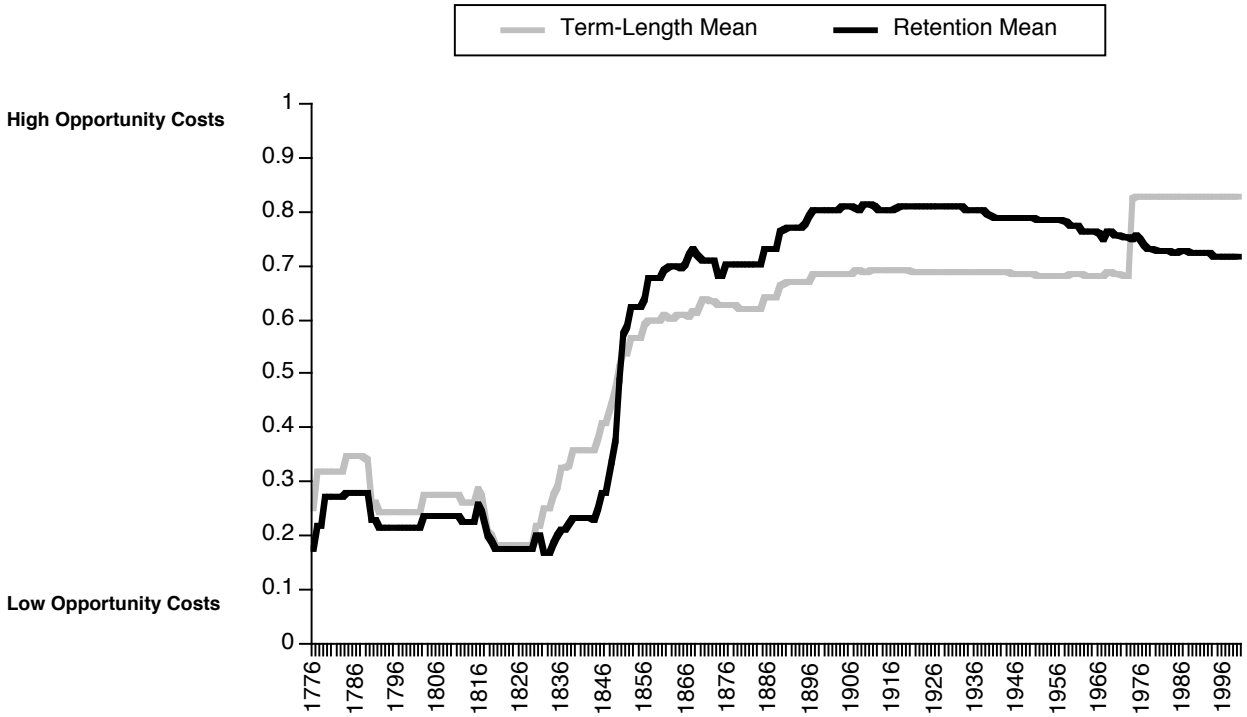


Sources: See Figure 4.

Given that the means displayed in Figures 4 and 5 seem to move together (see Figure 6), we added the two scores and standardized on a 0-1 scale to arrive at a final measure of opportunity costs.[19] Figure 7 depicts the results of this set of calculations.

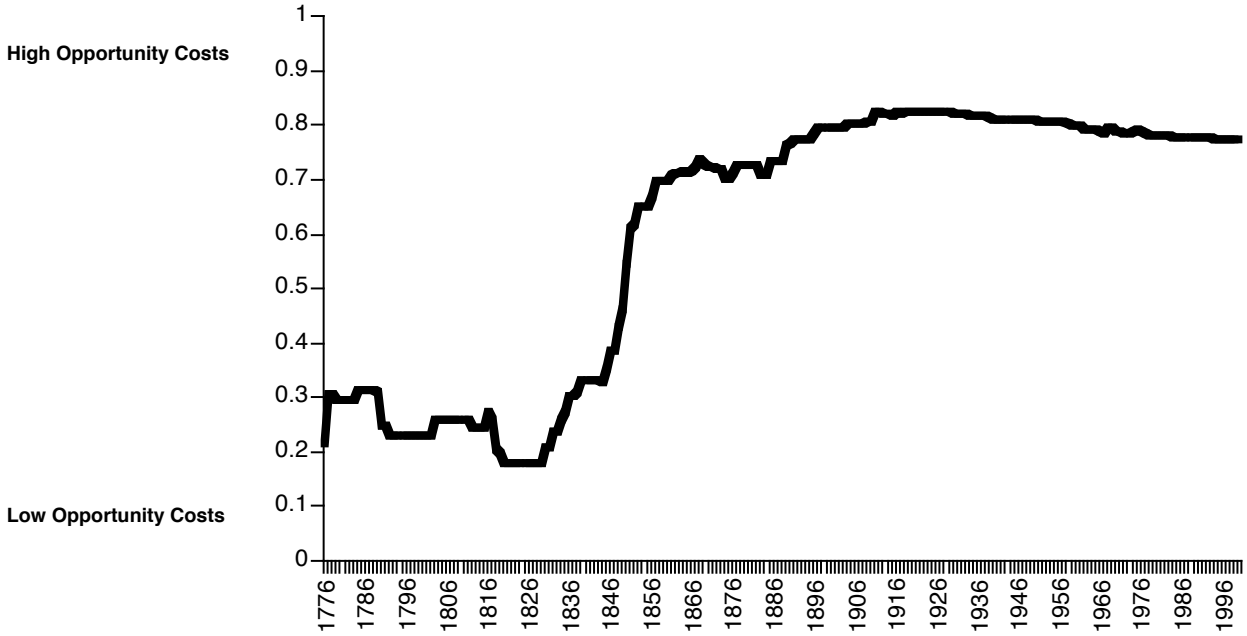
[19]We realize that various diagnostic assessments are necessary before we can be completely comfortable with the resulting measure. We plan to conduct these tests in future work.

Figure 6 Mean (Standardized) Term-Length and Retention Scores in the U.S. States, 1776-2000



Sources: See Figure 4.

Figure 7 A Measure of Opportunity Costs Associated with State Retention Mechanisms and Term Lengths, 1776-2000



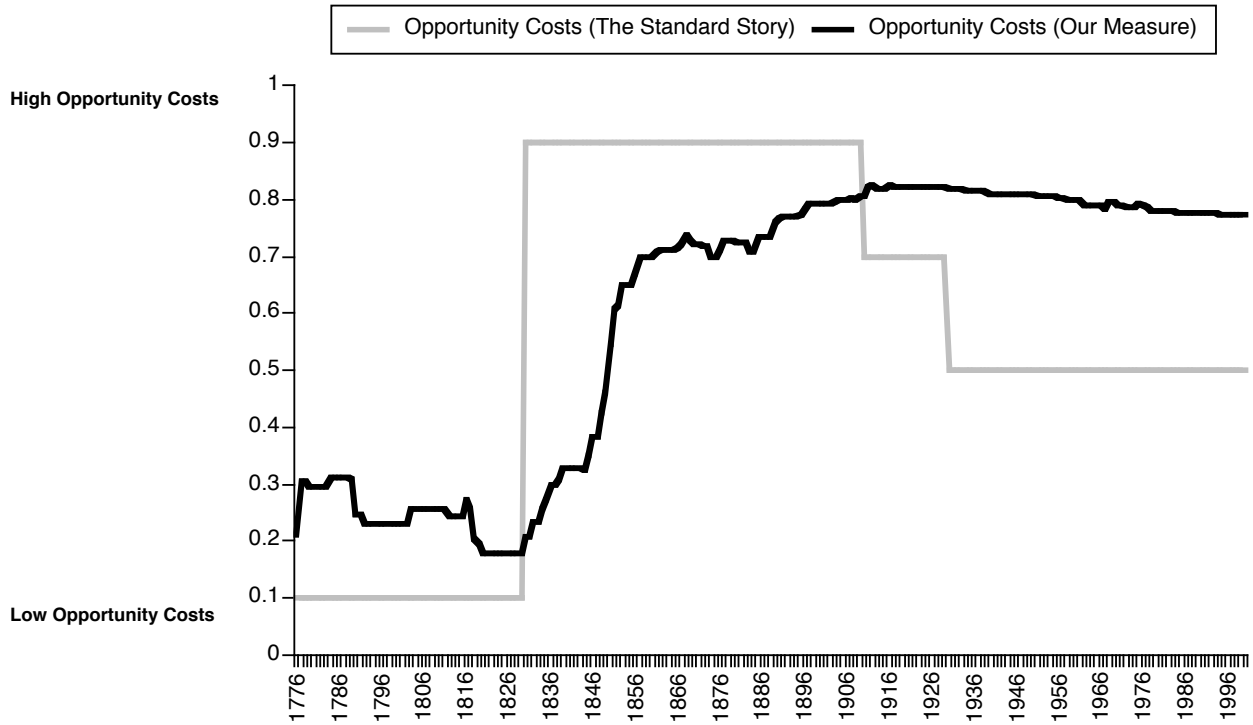
Sources: See Figure 4.

3.3.2 Empirically Assessing the Standard Story

With our measure now in hand we can begin to assess the key propositions of the standard story. We begin with the account's emphasis on the notion that societies merely respond to "popular ideas at different historical periods" (Glick and Vines 1973, 40)—and, more specifically, that the U.S. states reacted to four such ideas. Linking those together, the standard story suggests that judicial opportunity costs moved from very low to very high to a more moderate position.

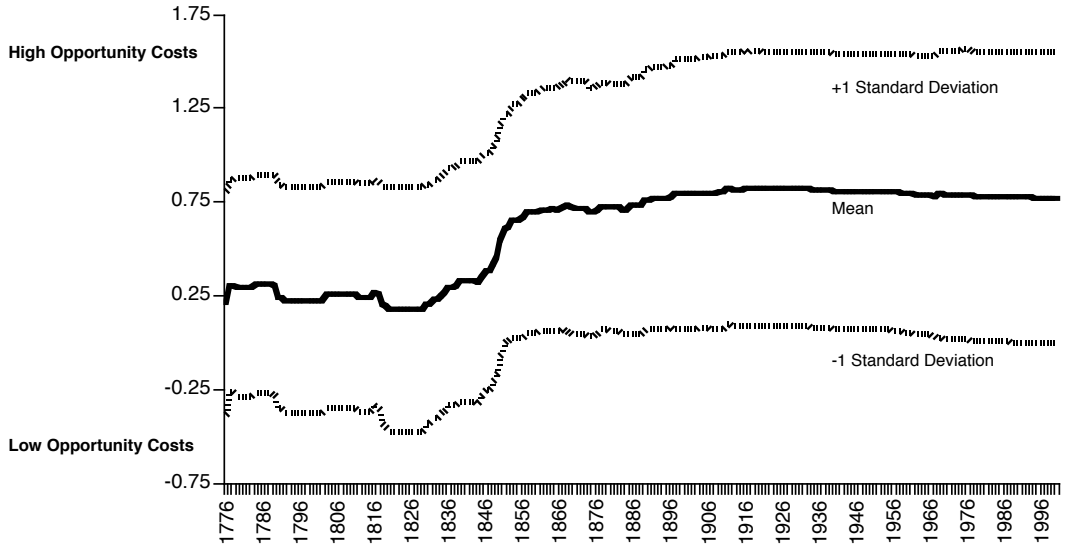
Figure 8, in which we map our measure against a visual depiction of the standard account (initially displayed in Figure 2), however, suggests quite a different story: *Judicial opportunity costs induced by the retention and term-length components of selection systems have—nearly monotonically—increased overtime.* In other words and to use more standard language, states have moved to hold their justices more and more accountable; no downward trend appears to exist.

Figure 8. Judicial Opportunity Costs and the Standard Story, 1776-2000



These data may serve to undermine one aspect of the standard story—the form of changes in U.S. judicial selection systems—but they do not assess its other central proposition: Because states are responding to the same societal pressures, little variation should exist in these systems at any given moment. To consider this, we plot +1 and –1 standard deviations from the mean of our opportunity cost measure. Figure 9 displays the results.

Figure 9. Our Opportunity Cost Measure: The Means and Standard Deviations Over Time, 1776-2000



Don't use standard deviation—use mean and 25th and 75th quartiles. Stand dev don't describe data. Could be that they are fairly narrow at the beginning and wide end.

Certainly some of the (large) observed deviation during the first 100 years or so may be due to the small number of states relative to the contemporary period. But we are hard pressed to explain, at least under the standard story, why deviation remains so high into the tail end of the 20th century.

3.3.3 The Standard Story: One Last Look

Based on logic, history, and empirical evidence, we are now prepared to reject the standard story of judicial selection in the United States. We understand, though, that some may criticize at least our empirical assessment on the grounds that we have distorted the standard story by considering retention mechanisms *and* the terms of office—rather than simply the system for appointing judges. The standard story, they might argue, speaks not to specifics but rather to general selection mechanisms.

For the reasons we offer above—*e.g.,* institutional designers were equally, if not more, concerned with retention than they were with appointment— we disagree. Nonetheless, in the interest of thoroughness, let us write what surely would be the easiest test for the standard story to pass; namely, societies emerging from the same legal, political, and historical experience should adopt, at least at the onset of their development, the same general mechanisms for the selection of judges.

Unfortunately for its proponents the standard story cannot pass even this simple exam. Consider, for example, that the 13 former republics of the Soviet Union that established constitutional courts took at least 5 different approaches to the appointment of judges: (1)

executive/legislative parity (each able to appoint a specified number of judges (n=3); (2) executive/judicial (along with, in some instances, legislative) parity (n=3); (3) executive nomination with legislative confirmation (n=4); (4) executive/legislative/judicial parity in nomination with parliamentary confirmation (n=2); judicial appointment (n=1). Given that these republics operated under the same "legal" system and, more generally, under the same political regime for nearly 8 decades, it is discouraging, to say the least, that they are all over the map with regard to judicial selection systems.

Even more disturbing is that the standard story does not hold up against the cases it was designed to explain: The 17 states creating high courts between 1776 and 1803 also invoked five different appointment mechanisms: legislature alone (n=9), governor alone (n=1), governor and legislature (n=2), governor and council (n=4), and council alone (n=1).

4 An Alternative Account of the Selection of Selection Systems

This last bit of evidence, at least to us, clinches the case: The standard story does not provide a particularly satisfying account of judicial selection systems. So the questions we raised at the onset remain: Why do societies choose particular selection and retention institutions? Why do they formally alter those choices?

In a larger project on constitutional courts (Epstein, Knight, and Shvetsova 1999), we advanced the following proposition, which we believes has bearing on these questions: The creation of and changes in constitutional courts come about through a process of political bargaining that occurs within a pre-existing political system. Decisions about these courts are the strategic choices of the relevant political actors and reflect those actors' relative influence, preferences, and beliefs at the moment when the new institution is introduced. It is the variation in influence, preferences, and beliefs that lead to the creation of distinct courts; and it is these resulting formal institutional distinctions that influence the performance of the judicial branch *and* the level of independence that it can attain in the long run.

To apply this general framework to explain the choice of selection and retention systems for judges, we begin with the basic assumption that designers of constitutional courts prefer institutional rules that will best maximize their long-term political preferences. But, because attaining this goal requires them to determine the relationship between their present political preferences and the long-term effects of the rules governing constitutional courts, their preferences over judicial selection and retention mechanisms will vary depending on her beliefs about present and future political conditions. So, for example, the more uncertain those conditions—in the fundamental sense that the actors do not know the political circumstances they will face in the future—the less the designers of the court will be able to constrain (with confidence) the court and, thus, the greater the independence the institutional rules will provide the justices.

The effect of this uncertainty—and a causal effect at that—necessarily directs our attention to the types of information available to political actors at the time they are establishing beliefs about the long-term effects of institutional rules. Particularly relevant to our analysis are two general types of information: (1) information regarding the designers' personal political futures and (2) information about popular preferences (the polity) that will affect future political

outcomes, such as elections and plebiscites. We would expect an increase in uncertainty along each dimension to affect positively the independence (that is, decrease the opportunity costs) of resulting courts.

As for the first dimension—the personal career expectations of individuals involved in the design of judicial institutions—we can characterize it as a continuum between the following information states. At one extreme is an environment where even the most immediate political outcomes (at least from an individual's point of view) are highly uncertain. This could represent an environment characterized by an on-going constitutional conflict between branches (or levels) of government such that any of the competing groups of actors can hope to prevail; or it may be one where there is the potential for considerable mobility of individual politicians to other branches or levels of government such that it would be difficult for politicians to decide exactly what they wanted with regard to the court. At the other extreme, uncertainty is low. This environment could result either from a complete dominance by one of the government branches or, if separation of powers is preserved, from the absence of an explicit constitutional conflict and, thus, the establishment of fixed institutional identities for the decisive political actors.

We can characterize the second dimension, dealing with the make-up of the electorate, by the following extreme information states. At one extreme, we place conditions creating high uncertainty. These might occur when the electorate is fairly homogenous, making it difficult to identify sizeable groups with clear and conflicting preferences that would present obvious targets for political mobilization. Alternatively, the electorate could be highly fragmented, consisting of numerous small groups. In such circumstances, as long as no clear and fixed lines for coalition-building are observable, the likelihood of success of political mobilization remains unknown. The opposite extreme is one of low uncertainty with regard to the polity, which may occur when the electorate is polarized. While bases for polarization can vary, deep societal cleavages (in particular, those of the ascriptive nature) are the most likely ones to incite political mobilization and shape future policies.

Table 3 summarizes these ideas. There we place the two dimensions and the outcomes particular combinations yield.

Table 3. Summary of Predicted Outcomes

		Dimension 2. The Polity	
		High Uncertainty (*e.g.,* Homogeneous Polity or Divided Polity with No Pre-Determined Outcome)	*Low Uncertainty* (*e.g.,* Polarized Polity with Pre-Determined Outcome)
Dimension 1. Personal Political	*High Uncertainty* (*e.g.,* High Personal Political Risks)	Selection/Retention systems are designed for maximal court independence (create lowest opportunity costs) (I)	Selection/Retention is controlled but not to the extreme (III)
		Selection/Retention is more	Selection/Retention systems are

Future	*Low Uncertainty* (*e.g.,* Stable Personal Political Risks)	controlled by the other branches of government or by the electorate (II)	designed for minimal court independence (create highest opportunity costs) (IV)

Each of the predicted outcomes requires a few words of explanation. At least on our theory, designers will select institutions meant to induce a high degree of independence when their uncertainty levels are the highest on both of the relevant dimensions (Case I). At no other information states would they be willing to devise retention and selection mechanisms that lower the opportunity costs to the same extent. By the same logic, combined low uncertainty on both dimensions will lead to the most accountable courts, with selection/retention systems generating the highest opportunity costs for the judges (Case IV).

The two intermediate cases are those in which there is high uncertainty on one dimension and low uncertainty on the other. If there are differences in the types of courts established in these two cases, they will be a function of how the designers weigh the relative importance of the two dimensions. For purposes of this discussion, we have assumed in Table 3 that uncertainty on the polity dimension will have a greater effect on the independence of courts then will uncertainty on the personal political dimension. If this is the case, then it leads to the following preferences over judicial institutions. In a situation of low uncertainty on the personal dimension but high uncertainty on the polity dimension, relatively independent courts with selection mechanisms bestowing authority on either the other branches of government or the electorate will be preferred (Case II); in a situation of high personal uncertainty but low uncertainty about future politics, greater institutional constraints through intermediate controls on judicial retention will be preferred (Case III).

With this, we can now state our main hypothesis: In general, as the combined index of political uncertainty increases, the likelihood that the design of the court's selection/retention system will lower opportunity costs for judges' also increases. As a secondary hypothesis, we expect that, as the overall level of political uncertainty in a given society and for the relevant actors declines, any changes in selection/retention systems will serve to raise opportunity costs for the judges. We plan to assess both predictions against data collected on selection systems in the U.S. states and those in all countries with constitutional courts.

5 Discussion

In this paper, we detailed the standard story of judicial selection and assessed it, logically, empirically, and historically. Finding it severely wanting, we sketched a new approach—one that we believe provides a more realistic and generalizable picture of institutional development and change.

On the surface, the data we presented on state selection systems *appear* consistent with our account: In the aggregate, as political uncertainty in the United States has declined, selection mechanisms designed to induce greater accountability (that is, raise judicial opportunity costs) have increased.

We stress "appear," because, almost needless to write, much work remains before we can fully support this claim both as it pertains to the U.S. states and to other societies. So, for example, we must conduct a series of diagnostic tests of our opportunity cost measure—the measure that will eventually serve as the key dependent variable in the test of our central hypotheses—before we can be satisfied that it is a valid indicator. We also will need to consider whether the measure, and any adjustments necessary to accommodate various nations, should include dimensions other than retention and term length. A few—mandatory retirement ages or limits on the number of terms— readily come to mind. But there are undoubtedly others. Finally we must develop measures of the concepts contained in our independent variables, the two dimensions of political uncertainty: personal political future and the polity. We have some ideas but could use any suggestions Conference Participants are able to supply.

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