JUDICIAL INDEPENDENCE AT THE CROSSROADS

An Interdisciplinary Approach

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Chapter 9

Selecting Selection Systems

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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 ought those jurists serve? Indeed, some of the most fervent constitutional debates—whether they transpired in Philadelphia in 1787 (Epstein & Walker, 2000; Farber & Sherry, 1990) or in Moscow in 1993 to 1994 (Blankenagel, 1994; Hausmaninger,

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1995)—over the institutional design of the judicial branch implicated 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.[2] 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 will serve and, in turn, the choices they, as judges, will make (e.g., Brace & Hall, 1993; Bright & Kennan, 1995; Goldman, 1997; Gryski, Main, & Dixon, 1986; Hall, 1984a; Hall, 1987; Hall & Brace, 1992; Langer, 1998; Levin, 1977; Peltason, 1955; Pinello, 1995; Sheldon & Maule, 1997; Tabarrok & Helland, 1999; Vines, 1962; Volcansek & 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 & Spaeth, 1993; Stevens, 1995; Wiener, 1996)—whereas those subjecting justices to periodic checks conducted by the public or its elected officials leads to a more accountable one. Seen in this way, not only are institutions governing the selection of judges fundamental to discussions of judicial independence, they also convey important information about the values societies wish to foster (Gavison, 1988; Grossman & Sarat, 1971; Haynes, 1944).

And possibilities for choice abound. 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 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 both Korean Republics, justices serve for a set, albeit renewable, term.

Variation is even present in societies that grew out of similar legal traditions and created their court structures at roughly the same historical moment. Table 9.1, which depicts the *formal* institutions governing the selection of constitutional court judges in the former republics of the Soviet Union, makes this clear: The republics took at least 5 different approaches: (a) executive-legislative parity (each able to appoint a specified number of judges); (b) executive-judicial (along with, in some instances, legislative) parity; (c) executive nomination (usually) with legislative confirmation; (d) executive-legislative-judicial parity in nomination with parliamentary confirmation; (e) judicial appointment.

Variation is not, of course, limited to societies elsewhere. Although 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

TABLE 9.1. Selection Systems Used in the Former Republics of the Soviet Union

Lithuania	*Latvia*	*Estonia*
Parity in nomination: president, the chairs of Parliament and Supreme Court. Appointed by Parliament. * * * * Nonrenewable 9-year term	3 nominated by Parliament; two each by the Cabinet of Ministers and Supreme Court. Appointed by Parliament. * * * * Nonrenewable 10-year term	Nominated by the chief justice of Supreme Court. Appointed by Parliament. * * * * Life tenure
Russia	*Belorussia*	*Ukraine*
Nominated by president. Appointed by upper chamber of Parliament. * * * * Was life tenure; changed to nonrenewable 12-year term	Parity in appointment. President and upper chamber of Parliament. * * * * 11-year renewable terms	Parity in appointment: Parliament, the president, an assembly of judges. * * * * Nonrenewable 9-year term
Georgia	*Armenia*	*Azerbaijan*
Parity in appointment. President, Parliament, Supreme Court. * * * * Nonrenewable 10-year term	Parity in appointment. Parliament and president. * * * * Life tenure	Nominated by president. Appointed by Parliament. * * * * 10-year renewable terms (a)
Moldova	*Kazakhstan*	*Uzbekistan*
Parity in appointment. Parliament, the president, and Magistracy. * * * * 6-year renewable terms (a)	Parity in appointment. President, chairs of Upper and Lower Houses. * * * * Nonrenewable 6-year term but half members must be renewed every 3 years	Nominated by president. Appointed by Parliament. * * * * Nonrenewable 5-year term
Tajikistan	*Turkmenistan*	*Kyrgyzstan*
Nominated by president. Appointed by Parliament. * * * * Nonrenewable 5-year term	Nominated and appointed by president. * * * * 5-year term but president can remove before completion	Nominated by president. Appointed by Parliament. * * * * Nonrenewable 15-year term

NOTES: This table displays countries via a (very rough) geographical mapping.
(a) Different procedures may be used for nomination and appointment of the chief justice.

judges differ from each other and usually from those for federal jurists. Today, the states follow one of five basic plans—partisan elections, nonpartisan elections, gubernatorial appointment, legislative appointment, the merit plan[3]—though the intraplan 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 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 (with the critical exception noted in the section dealing with the current literature below) devoted almost no time to addressing questions associated with institutional choice: Why do societies choose particular selection and retention institutions? Why do they formally alter those choices? Rather, literature on judicial selection is "imbalanced"—and, interestingly enough, in much the same way as is scholarship on electoral rules (Boix, 1999). Just as research on electoral laws tends to focus on their impact on political stability, voting behavior, and party systems (e.g., Duverger, 1954; Hermens, 1941; Rae, 1971), analyses of judicial selection systems center on whether the various institutions produce different kinds of judges (e.g., Alozie, 1990; Berg, Green, Schmidhauser, & Schneider, 1975; Canon, 1972; Champagne, 1986; Dubois, 1983; Flango & Ducat, 1979; Fund for Modern Courts, 1985; Glick, 1978; Glick & Emmert, 1987; Graham, 1990; Hall, 1984b; Jacob, 1964; Lanford, 1992; Nagel, 1973; O'Callaghan, 1991; Scheb, 1988; Tokarz ,1986; Watson & Downing, 1969) or lead judges to behave in different ways (e.g., Atkins & Glick, 1974; Brace & Hall, 1993; Bright & Kennan, 1995; Canon & Jaros, 1970; Domino, 1988; Gryski et al., 1986; Hall, 1984a; Hall, 1987, 1992; Hall & Brace, 1989, 1992; Langer, 1998; Lee, 1970; Levin, 1977; Nagel, 1973; O'Callaghan, 1991; Pinello, 1995; Schneider & Maughan, 1979; Stevens, 1995; Tabarrok & Helland, 1999; Vines, 1962). In other words, scholarship both on electoral laws and judicial selection mechanisms usually focuses on effects of the institution and not on the processes and causes of institutional creation and change.

To be sure, we understand the importance of investigating institutional effects; indeed, just as literature on electoral laws has uncovered regularities

of consequence, so has scholarship on selection systems. In the case of electoral rules, as Boix (1999) writes, "the higher the entry barrier (or threshold) set by the electoral law, the more extensive strategic (or, more precisely, sophisticated) behavior will be" among voters and elites (p. 609). In the case of judicial selection and retention institutions, the greater the accountability established in the institution, the higher the opportunity costs for judges to act sincerely and thus, the more extensive strategic behavior will be (see, generally, Brace & Hall, 1993, 1997; Bright & Kennan, 1995; Croly, 1995; Gryski et al., 1986; Hall, 1984a; Levin, 1977; Pinello, 1995; Stevens, 1995; Tabarrok & Helland, 1999).[5]

But it is exactly these sorts of findings that underscore the need to address questions associated with the causes of institutional choice and change. For if social scientists and legal academics believe that institutions affect the behavior of actors, then surely the designers of those institutions believe the same. More to the point, they anticipate institutional effects and adopt those rules that conform best with their preferences.

In this chapter, we attempt to give these questions the attention they merit, first by evaluating what we take to be the primary reason why this research area has lain 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 chapter, 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 between 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.

Current State of the Literature: The Standard Story of Judicial Selection Systems

Although the notion that institutional designers anticipate the effect of various rules and adopt those that serve their goals seems patently obvious, scholars have all but ignored it. In fact, as we suggest above, they have all but ignored virtually every important question associated with the choice of judicial selection and retention systems. Explaining this void is not difficult. For decades now, scholars—at least those studying practices in the United States[6]—have accepted 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" (Glick & Vines, 1973, p. 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 selection system with another with the supposed goal of creating a "better" judiciary (e.g., Berkson, 1980; Berkson, Beller, & Grimaldi, 1980; Brown, 1998; Bryce, 1921; Carbon & Berkson, 1980; Carrington, 1998; Champagne & Haydel, 1993; Elliott, 1954; Escovitz, Kurland, & Gold, 1975; Friedman, 1973; Glick & Vines, 1973; Goldschmidt, 1994; Grimes, 1998; Haynes, 1944; Hurst, 1950; Noe, 1997/1998; Roll, 1990; Scheuerman, 1993; Sheldon & Maule, 1997; Shuman & Champagne, 1997; Stumpf & Culver, 1992; Volcansek & Lafon, 1988; Watson & Downing, 1969; Webster, 1995; Winters, 1966, 1968; Witte, 1995)—with the term "better," although defined differently across time, always standing for some general societal benefit.

Chapter 1: The Revolutionary Period and Appointed Judiciaries

The standard story begins with the Revolutionary period, when—in response to a call in 1776 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 on 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 & Haydel, 1993; Goldschmidt, 1994; Sheldon & Maule, 1997; Smith, 1976; Webster, 1995). Following this predilection could have led the states to adopt provisions calling for the election of 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] 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 & Maule, 1997; Volcansek & 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.

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 runaway, 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 et al., 1975; Webster, 1995), or both (Haynes, 1944; Hurst, 1950; Volcansek & 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, p. 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, p. 140), it indeed seems to have engulfed the country. As standard-story chroniclers like to point out, (a) 19 of the 21 constitutional conventions held between 1846 and 1860 approved documents that adopted popular election for (at least some of) their judges; (b) by the time of the Civil War, 19 of the 34 states (Carpenter, 1918, p. 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 et al., 1975; also see Note 8) had adopted elections (though not necessarily for all judges); and (c) every new state admitted to the Union between 1846 and 1912 provided for the election of (again, at least some) judges (Roll, 1990).

Chapter 3: Machine Politics and the Move to Nonpartisan Elections

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 et al., 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 because 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, p. 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 nonpartisan 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 & Berkson, 1980).

Chapter 4: Legal Progressives and the Merit Plan

Although some reformers continued to push states to adopt nonpartisan 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 nonpartisan elections satisfactorily removed judges from politics because they still had to campaign to attain and retain office. Others, too, became disenchanted with nonpartisan elections but for a different reason; namely, "candidates for judgeships [continued to be] regularly selected by party leaders and thrust upon an unknowledgeable electorate which, unguided by party labels, was not able to make reasoned choices" (Berkson et al., 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 & Haydel, 1993; Sheldon & Lovrich, 1991). Under Kales's proposal, states create a judicial commission that nominates candidates solely on the basis of merit. From the commission's list, the state's chief justice (the only elected judicial office under the plan) selects judges, who later run in noncompetitive, nonpartisan retention elections (Belknap, 1992; Carbon & 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 California's adaptation, judges were to be appointed by the governor with the consent of a three-person commission (consisting of the chief justice, the presiding judge of a district court of appeal, and 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 seven-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 nonpartisan 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, p. 780).[12]

∞ 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 sociolegal literature. It appears, in one version or another, in virtually every scholarly study of judicial selection (e.g., Brown, 1998; Carrington, 1998; Champagne & Haydel, 1993; Glick & Vines, 1973; Goldschmidt, 1994; Grimes, 1998; Haynes, 1944; Noe, 1997/1998; Roll, 1990; Scheuerman, 1993; Sheldon & Maule, 1997; Shuman & Champagne, 1997; Volcansek & Lafon, 1988; Watson & Downing, 1969; Webster, 1995; Witte, 1995); it forms the centerpiece of discussions of selection in nearly all contemporary judicial process texts (e.g., Carp & 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 particular chapters in the story. Hall (1984a), 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 (p. 347; 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 between 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 nonprofessional 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.

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) 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" (p. 124)—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, 2000; 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 judicial candidates; and both political parties, though for different reasons. The proposal, almost needless to write, was a nonstarter.

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 (a) an independent judiciary (our nation's founders), (b) a more accountable judiciary (Jefferson, Jackson, and state governors and legislators), (c) a less politicized judiciary (the Progressives and state governors and legislators), (d) a more meritorious one (Pound and state governors and legislators), or (e) some combination thereof. No one in this story, or so it seems, is out for their own individual political gain.

Again, specific accounts of the various relevant actors work to undermine this rather naïve 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 six 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" (Lipscomb, 1903, p. 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, pp. 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 & 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.

TABLE 9.2. 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	25.0	11.1
Nonpartisan	—	—	64.3	11.1
Merit	—	—	—	72.2

SOURCE: Glick & Vines (1973, p. 41).

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, p. 192); they were just as interested, if not more so, 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, 1992; Knight & Sened, 1995).

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 9.2. 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 of responses to broad societal concerns.

Unfortunately, the data in Table 9.2 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*, 1937-present; Berkson et al., 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) 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" (pp. 2-3). Yet, a check of the documents themselves (in Thorpe, 1909) and a multitude of other sources (Dunn, 1993; Elliott, 1954; Escovitz et al., 1975; Felice, Kilwein, & 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 1 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 because it is the governor, not a commission, who 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.

Although some may see these as minor categorical differences, little doubt exists that the 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

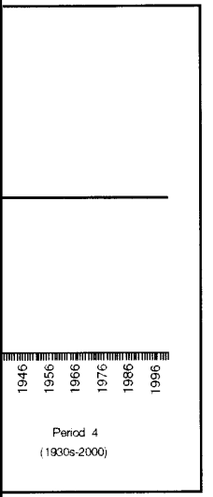
of the standard story. To be sure, prior to *Marbury*, 9 of the 17 states gave exclusive power to the legislature but in the remaining eight the governor, other members of the executive branch, or both played a significant role—either as the nominator or appointer. Indeed, today most scholars would classify all, if not most, of the eight 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 9.2). This procedure ignores two facts. First, even under the standard story (i.e., 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, whereas others were nonrenewable terms.

If we believe that the choice of judicial-selection/retention mechanism affects the choices justices make—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 & Hall, 1993; Vines, 1962; Watson & Downing, 1969) and lead them to reach decisions that reflect popular sentiment (Croly, 1995; Gryski et al., 1986; Hall, 1987; Pinello, 1995; Stevens, 1995; Tabarrok & Helland, 1999). If elections are held on a regular basis, we would agree. But what about states that adopt 20-plus-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 9.2) are insufficiently developed and too gross to assess what we take to be the standard story's central propositions; namely, (a) societies (e.g., the U.S. states) adopt selection-retention mechanisms in response to "popular ideas at different historical periods" (Glick & Vines, 1973, p. 40) and (b) 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 9.1. 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



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than selection.[15]

Low Opportunity Costs					*High Opportunity Costs*
Life Retention Tenure	commission Non-partisan reappoints	Governor Partisan and Commission reappoint	2 Houses reappoint election	Governor and election Legislature reappoint	Governor, Legislature, election and Commission reappoint

Figure 9.3. Opportunity-Cost Scale: The Retention Dimension

These preferences lead us to the scale depicted in Figure 9.3, 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 & Lovrich, 1991; Sheldon & Maule, 1997).[16]

Most of the placements are obvious, but those on elections may require some justification. Partisan races 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, 1980; Hall, 1999) or in nonpartisan elections (Adamany & Dubois, 1976; Dubois, 1979, 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 nonpartisan 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 nonpartisan to retention elections (see Table 9.3). Given that Dubois's research covers a longer time span than Hall's (1948 to 1974 vs. 1980 to 1995) and that his results sit comfortably with other studies (e.g., Aspin, 1999; Griffin & Horan, 1979, 1982; Jenkins, 1977; Luskin, Bratcher, Renner, Seago, & Jordan, 1994) and with conventional wisdom (e.g., Webster, 1995, p. 34, noting "voter drop-off has been more significant in retention elections than in either partisan or non-partisan judicial elections"; see also Slotnick, 1988), we place retention elections to the left of nonpartisan contests.[17]

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 9.4) and coded them from 1 (life tenure) through 9 (partisan elections) (see Figure 9.3). 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 toward 1, high-cost systems (e.g., partisan elections).

TABLE 9.3. Mean Turnout and Mean Roll-Off in State Judicial Elections

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

SOURCE: Dubois (1980, pp. 46, 48).

Finally, we generated the yearly mean of the retention scores across states.[18] Figure 9.4 plots this measure over time.

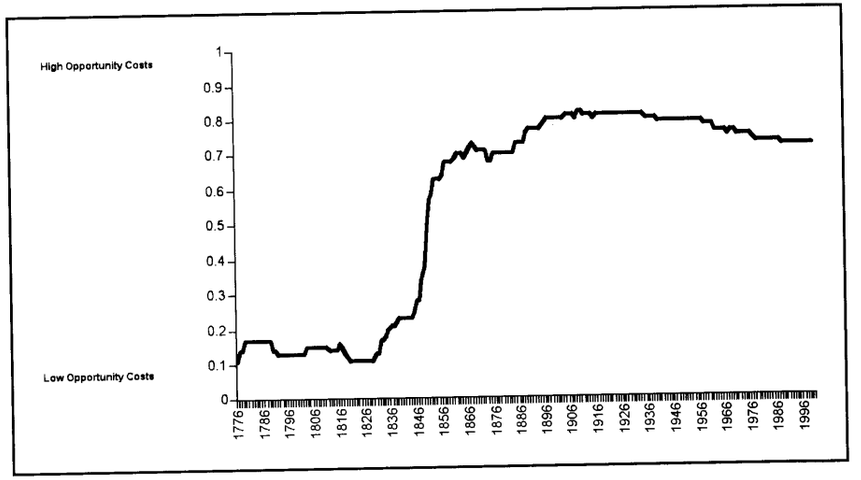

Figure 9.4. Mean (Standardized) Retention Scores in the U.S. States, 1776-2000

SOURCES: State codes, state constitutions available in, among other places, Thorpe (1909); *The Book of the States* (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 & Berkson (1980); Cooper (1995); Coyle (1972); Dealey (1915); Diggers (1998); Dubois (1980); Dunn (1993); Elliott (1954); Escovitz et al., (1975); Felice et al., (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 & 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).

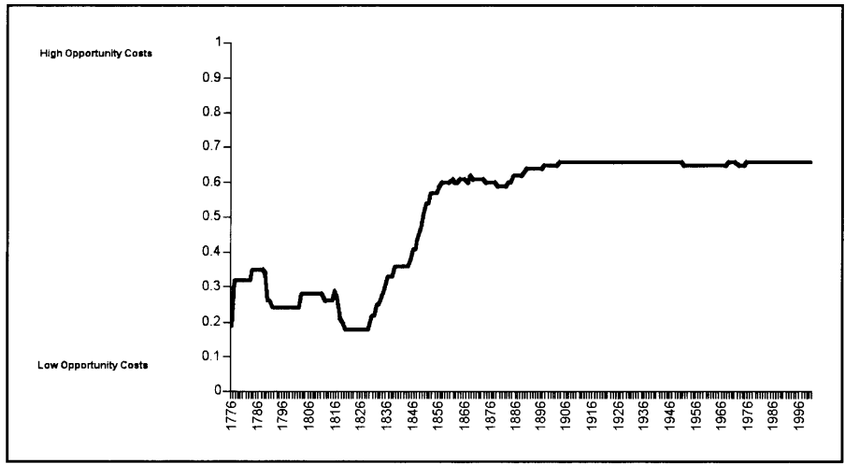

Figure 9.5. Mean (Standardized) Term-Length Scores in the U.S. States, 1776-2000
SOURCES: See Figure 9.4.

Quite clearly, state retention systems have, over time, increased the opportunity costs for justices.[19] 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 & 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.[20] Figure 9.5 displays the results of this transformation.

Given that the means displayed in Figures 9.4 and 9.5 seem to move together (see Figure 9.6), we added the two scores to arrive at a final measure of opportunity costs. Figure 9.7 depicts the results of this set of calculations.

Assessing the Standard Story

With our measure now in hand, we can begin to assess the key propositions of the standard story. We start with the account's emphasis on the notion that societies merely respond to "popular ideas at different historical periods" (Glick & Vines, 1973, p. 40)—and, more specifically, that the U.S. states reacted to four such

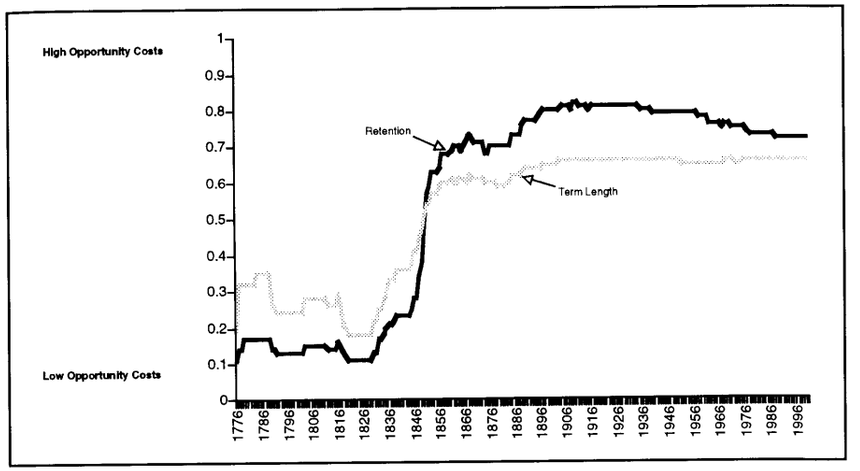

Figure 9.6. Mean (Standardized) Term-Length and Retention Scores in the U.S. States, 1776-2000
SOURCES: See Figure 9.4.

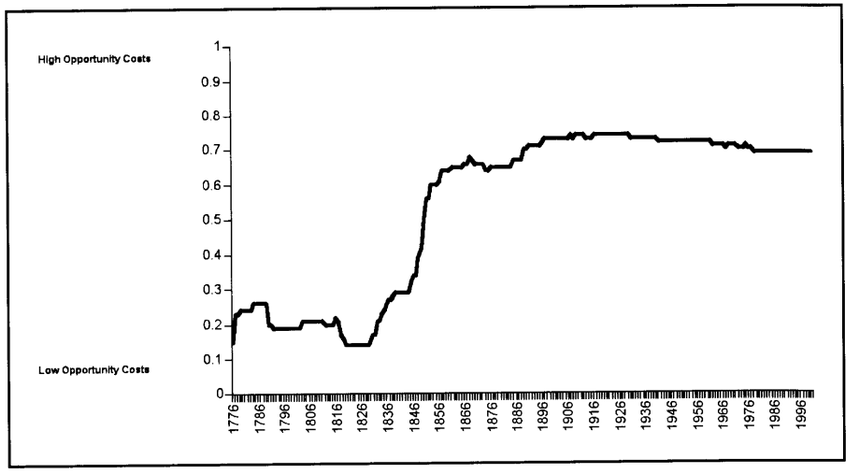

Figure 9.7. A Measure of Opportunity Costs Associated With State Retention Mechanisms and Term Lengths, 1776-2000
SOURCES: See Figure 9.4.

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 9.8, in which we map our measure against a visual depiction of the standard account (initially displayed in Figure 9.2), however, suggests quite a different

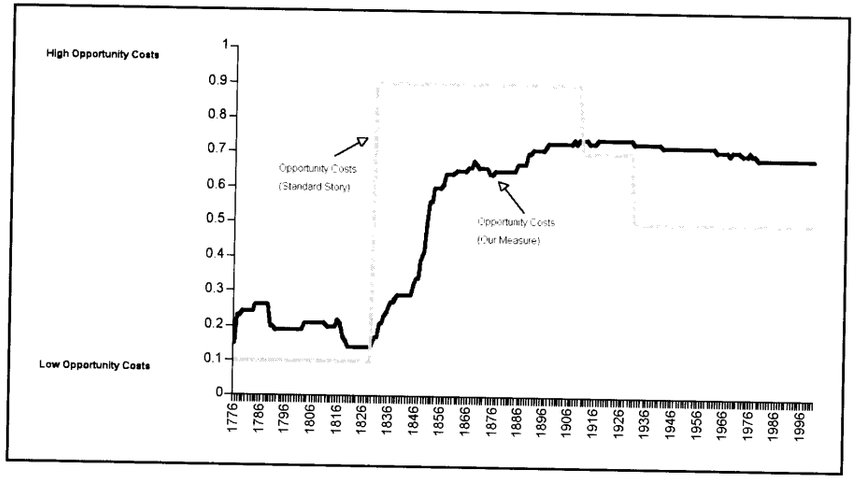

Figure 9.8. Judicial Opportunity Costs and the Standard Story, 1776-2000

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.

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 9.9 displays the results.

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.

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

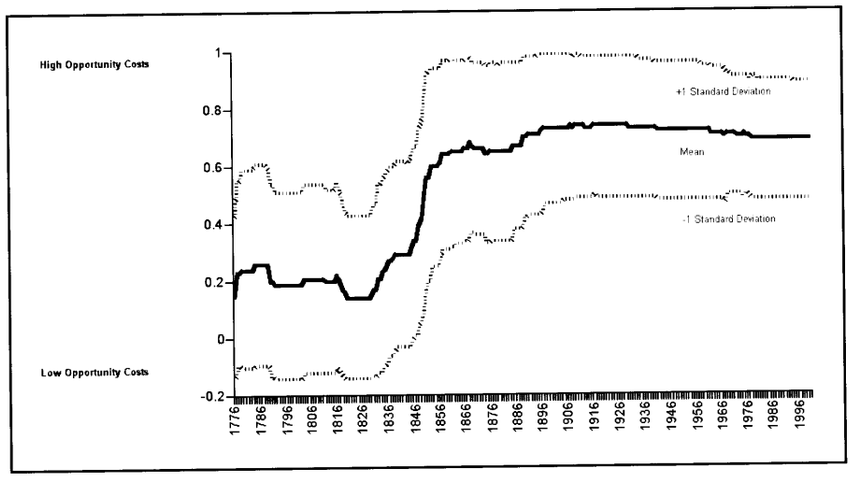

Figure 9.9. Our Opportunity Cost Measure: The Means and Standard Deviations Over Time, 1776-2000

standard story, they might argue, speaks not to specifics but rather to general selection mechanisms.

For the reasons we offer above—for example, institutional designers were equally concerned, if not more so, 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. As Table 9.1 makes clear, the former republics of the Soviet Union that established constitutional courts took at least five different approaches to the appointment of judges. Given that these republics operated under the same "legal" system and, more generally, under the same political regime for nearly eight 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).

∞ 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, we (Epstein, Knight, & Shvetsova, 2001) advance the following proposition, which we believe 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 preexisting 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 leads 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 serve their long-term political goals. 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 their 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: (a) information regarding the designers' personal political futures and (b) 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 (i.e., 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 in which 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 in which 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 makeup 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. Although 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 9.4 summarizes these ideas. There we place the two dimensions and the outcomes particular combinations yield.

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 (dependent) 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

TABLE 9.4. Summary of Predicted Outcomes

		Dimension 2. The Polity	
		High Uncertainty *(e.g., homogeneous polity or divided polity with no predetermined outcome)*	***Low Uncertainty*** *(e.g., polarized polity with predetermined outcome)*
Dimension 1. Personal Political Future	***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)
	Low Uncertainty *(e.g., stable personal political risks)*	Selection-retention is more controlled by the other branches of government or by the electorate (II)	Selection-retention systems are designed for minimal court independence (create highest opportunity costs) (IV)

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 9.4 that uncertainty on the polity dimension will have a greater effect on the independence of courts than 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.

∞ Conclusion

Finding the standard story of judicial selection 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 (i.e., 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. We must consider, for example, whether our opportunity cost measure—the measure that will eventually serve as the key dependent variable in the test of our central hypotheses—and any adjustments necessary to accommodate various nations should include dimensions other than retention and term length. A few (e.g., 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 along these lines but welcome any suggestions readers are able to supply.

∞ Notes

1. Haynes (1944, p. 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 & Haydel, 1993; Friedman, 1973; Grimes, 1998; Noe, 1997/1998; Pelander, 1998; Roll, 1990; Smith, 1951; Smith, 1976; 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, p. 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."

2. We adapt some of the language in this and the next paragraph from Murphy, Pritchett, & Epstein (2001).

3. Merit plans differ from state to state but usually they call for a screening committee, which may be comprised 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 typically 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 the section "An Evaluation of the Standard Account" of this chapter, between 1776 and 2000 the average state changed its 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 he or she must stand for reappointment) 4.8 times. Only six states made no changes either in retention or terms.

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 & Hall, 1993; Vines, 1962; Watson & Downing, 1969) and reach decisions that reflect popular sentiment (Croly, 1995; Gryski et al., 1986; Hall, 1987; Pinello, 1995; Stevens, 1995; Tabarrok & 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 about the effect of selection mechanisms than about the impact of electoral rules—with some studies, albeit typically older ones, arguing that selection mechanisms do not affect dissent rates (Canon & Jaros, 1970; Flango & Ducat, 1979; Lee, 1970) or other types of judicial behavior (Atkins & Glick, 1974; Crynes, 1995; Domino, 1988; Schneider & 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, p. 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 & Emmert, 1987; Watson & 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 United States; comparative work is virtually nonexistent. (The exceptions include Anenson, 1997; Atkins, 1989; Bell 1988; Danelski, 1969; Gadbois, 1969; Meador, 1983; Morrison, 1969; Volcansek & Lafon, 1988). Some argue that the near-exclusive focus on the United States is highly problematic because differences between the state judicial selection systems are so trivial as to create 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 between 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, nonpartisan 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 our section "An Evaluation of the Standard Account."

6. U.S. practices are the only ones that have attracted serious scholarly attention. See Note 5.

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, p. 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 chapter, we place emphasis on the selection and retention of judges serving on state courts of last resort (usually called state supreme courts). We highlight 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 & Lafon, 1988) or 8 (e.g., Grimes, 1998; Sheldon & 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 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.

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, p. 289) wrote: "Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. We 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."

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, p. 668).

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

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 text.

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 that suggest that as the number of principals increase, the opportunity costs for the agent decrease because he or she can play the

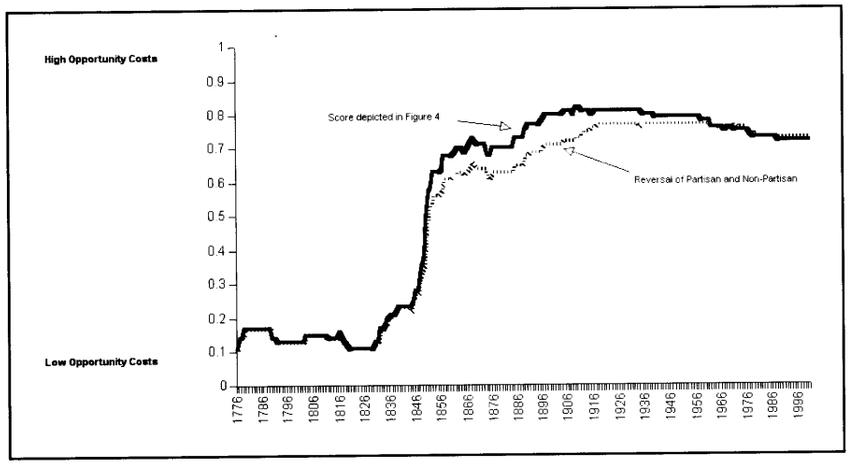

Figure N.1.

principals off one another—if those principals have heterogeneous preferences. We plan to consider this possibility in future work.

17. We have empirically assessed the degree to which this decision affects the resulting measure. Because Note 19 displays the results, suffice it to write here that reversing partisan and nonpartisan elections has no appreciable effect on the measure.

18. All data and documentation necessary to replicate the measures displayed in Figures 9.4 through 9.7 are available at: http://www.artsci.wustl.edu/~polisci/epstein/research.

19. Given potential concerns over the placement of partisan and nonpartisan elections on the retention dimension (see Figure 9.3), we reversed their order. As Figure N.1 shows, so doing leads to no appreciable change in interpretation. Accordingly (and for the reasons described in the text), we stick with our original ordering.

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

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