ARTICLE

Constitutional borrowing and nonborrowing

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Constitutional borrowing comes in different forms. Judges may consider decisions reached by their counterparts in other societies when resolving disputes; constitutional framers may look abroad when considering what provisions to etch into their documents; even citizens may be attentive to practices elsewhere when formulating opinions over constitutional change.[1]

Perhaps not so surprisingly, the scholarly literature reflects this variation. Numerous studies have focused on borrowing as it pertains to constitutional design;[2] others have set their sights on the export and import of decisions (or their underlying rationale) rendered by courts,[3] or what some scholars and judges are now deeming, more broadly, an international judicial "dialogue" or "conversation."[4] A handful are empirical efforts, not so much geared at explaining borrowings but rather at describing when and where they have

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[1] *See* Matthew D. Adler, *Can Constitutional Borrowing be Justified: A Comment on Tushnet*, 1 U. PA. J. CONST. L. 350, 351 (1998). Adler notes, what is borrowed "could be any part, large or small, of the constitutional regime: a single sentence in the text of the constitution, a whole article in the constitution, a judicial doctrine interpreting some part of the constitution's text, a set of formal or informal understandings among legislators, the executive branch, or even among the population at large as to what the constitution requires."

[2] *See, e.g.*, A. E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1996); Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WIS. L. REV. 597; RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE (Duke Univ. Press 1996).

[3] *See, e.g.*, Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

[4] *See, e.g.*, *Developments in the Law—The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049 (2001) [hereinafter *Developments in the Law*]; Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998).

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occurred.[5] Others are largely or mostly normative in nature, asking whether courts should canvass international and comparative law when interpreting their society's constitutional documents,[6] how to judge "when a borrowing or importation is successful,"[7] or "whether American democracy [can] be exported to [particular] societies,"[8] among others. The bulk of the essays, though, are a combination, invoking empirical arguments to shore up their normative points—such as offering the positive empirical implications of adopting their preferred position (e.g., either for or against borrowing).[9]

While we appreciate all these distinctions, in our view they underappreciate a key point; namely, that constitutional borrowing is "a case of" a larger phenomenon: institutional design. When constitutional courts choose (*or do not chose*) to engage in dialogues with other tribunals, or when the framers of constitutions "borrow" (*or not*) provisions from documents elsewhere, they are, to be sure, engaging (*or not*) in "constitutional borrowing," but their task—to design institutions to govern their societies—is far larger than most scholars have taken that term to mean.

We understand why this point remains underdeveloped in existing literature. The problem, as our emphasis above on *or not* implies, is that many studies of constitutional borrowing (especially the great many that rely on, in part or in full, empirical evidence) "select on the dependent variable," that is, they typically focus on when the phenomenon *occurs*—when and why society B "borrows" a formal constitutional provision, a court precedent, and so on from society A—and ignore when and why it does *not occur*—when and why society

[5] *See, e.g.*, Imre Vörös, *Contextuality and Universality: Constitutional Borrowings on the Global Stage—The Hungarian View*, 1 U. Pa. J. Const. L. 651 (1999).

[6] *See, e.g.*, Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. Pa. J. Const. L. 284 (1998); Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. Pa. J. Const. L. 205 (1998).

[7] *See, e.g.*, Mark Tushnet, *Returning With Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. Pa. J. Const. L. 325 (1998).

[8] *See, e.g.*, Azizah Y. al-Hibri, *Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?* 1 U. Pa. J. Const. L. 492 (1999).

[9] *See, e.g.*, Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771 (1997); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819 (1999); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539 (2001); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. Pa. J. Const. L. 583 (1999); Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. Pa. J. Const. L. 640 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225 (1999).

B does *not* borrow a formal constitutional provision, a court precedent, and so on from society A.[10]

This practice is problematic for many reasons but most relevant here is that it moves us away from a crucial feature of the phenomenon we are seeking to describe or explain: that societies are making (or have made) choices about whether to borrow (or not borrow) institutions from other societies. They are not merely reflexively or always "borrowing," as the practice of selecting on the dependent variable might lead us to conclude; they are rather engaged in the task of designing institutions. Sometimes, in undertaking that task, they borrow from society B; sometimes, they borrow from society C; sometimes they do not borrow at all.[11]

Table 1, which depicts the *formal* institutions governing the selection of constitutional court judges in the former republics of the Soviet Union, underscores this point with some force. While these republics devised their institutions at roughly the same time, shared a common political tradition, and are geograpically close—all factors scholars say induce "borrowing"—they took at least five different approaches to judicial selection: (1) executive/legislative parity (with each able to appoint a specified number of judges); (2) executive/judicial (along with, in some instances, legislative) parity; (3) executive nomination (usually) with legislative confirmation; (4) executive/legislative/judicial parity in nomination with parliamentary confirmation; and (5) judicial appointment.

Some of these choices reflect practices in Western Europe; others come from the United States; and still a third set seems quite unique. Taken collectively, though, they raise many questions: Why did states borrow from one society but not another or from each other? Why, in some instances, did borrowing not occur? Why did the former republics, to put it more broadly, make the distinct institutional choices that they did?

Addressing these sorts of questions, as even this brief introduction makes clear, requires us to deselect on the dependent variable, to move beyond simple accountings of what society B borrowed from society A, and when. It forces us,

[10] *See, e.g.,* Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. Pa. J. Const. L. 176 (1998); Somek, *supra* note 6; Vörös, *supra* note 5; Webb, *supra* note 6. Possible exceptions here, interestingly enough, are studies that ask why the U.S. Supreme Court does not borrow or, at least, seems "ambivalent" about borrowing constitutional decisions from other societies. *See* Ackerman, *supra* note 9; *Developments in the Law*, *supra* note 4; Jackson, *supra* note 9; Vernon Valentine Palmer, *Insularity and Leadership in American Comparative Law: The Past One Hundred Years*, 75 Tul. L. Rev. 1093 (2001). Then again, because at least some of these studies focus exclusively on nonborrowing, they too select on the dependent variable—especially in light of evidence that, in fact, the U.S. high court does borrow (meaning that variation exists). *See* Fontana, *supra* note 9.

[11] In making this specific claim, we assume that actors canvass practices elsewhere when making their choices—an assumption that has an abundance of support. *See* Choudhry, *supra* note 9; Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. Chi. L. Rev. 447 (1991); Tushnet, *supra* note 9.

Table 1 Judicial selection systems used in the former Republics of the Soviet Union

Lithuania	*Latvia*	*Estonia*
Parity in nomination: president, the chairs of parliament and Constitutional Court. Appointed by parliament.	Three nominated by parliament; two each by the cabinet of ministers and Constitutional Court. Appointed by parliament.	Nominated by the chief justice of Constitutional Court. Appointed by parliament.
****	****	****
Nonrenewable nine-year term	Nonrenewable ten-year term	Life tenure
Russia	*Belarus*	*Ukraine*
Nominated by president. Appointed by upper chamber of parliament.	Parity in appointment: president and upper chamber of parliament.	Parity in appointment: parliament, the president, assembly of judges.
****	****	****
Was life tenure; changed to nonrenewable twelve-year term.	Eleven-year renewable terms	Nonrenewable nine-year term
Georgia	*Armenia*	*Azerbaijan*
Parity in appointment: president, parliament, Constitutional Court.	Parity in appointment: parliament and president.	Nominated by president. Appointed by parliament.
****	****	****
Nonrenewable ten-year term	Life tenure	Two ten-year renewable terms
Moldova	*Kazakhstan*	*Uzbekistan*
Parity in appointment: parliament, the president, and magistracy	Parity in appointment: president, chairs of upper and lower houses	Nominated by president. Appointed by parliament.
****	****	****
Two six-year renewable terms	Nonrenewable six-year term but half of the members must be renewed every three years.	Nonrenewable five-year term
Tajikistan	*Turkmenistan*	*Kyrgyzstan*
Nominated by president. Appointed by parliament.	Nominated and appointed by president.	Nominated by president. Appointed by parliament.
****	****	****
Nonrenewable five-year term	Five-year term but president can remove before completion.	Nonrenewable fifteen-year term

Notes: (1) This table displays countries according to a very rough geographical mapping; (2) Different procedures may be used for the nomination and appointment of the chief justice.

first, to think theoretically about matters of institutional design, about the circumstances that lead societies to borrow *and* not borrow; and, second, to assess the implications of the theory against evidence drawn from the world.

These are the twin tasks that we take up in this article. On our theoretical account, decisions over whether to borrow or not, and from where—at least with regard to mechanisms governing the selection and retention of justices serving on (constitutional) courts—are decisions about institutional design. Such decisions, as we suggest above, are not a function of societies that are always, or merely, or reflexively borrowing from one another. Rather we must analyze borrowing—institutional choices, really—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 predictions our account yields is the following, which centers on the relationship between uncertainty and the institutional preferences of the dominant political actors in a society. As uncertainty about future political prospects increases, preferences for institutional rules governing judicial selection that lower the opportunity costs of justices (the political and other costs justices may incur when they act sincerely) also increase. In other words, political uncertainty will lead dominant political actors to prefer selection and retention 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, dominant political actors may be more inclined to create institutions that increase opportunity costs. This follows from the intuition that designers who believe they will remain in power will also hope to inculcate a beholden judiciary.

In the second part of the article we explore these predictions with observations gathered from the American states and the former republics of the Soviet Union.[12] While our analyses are far from comprehensive, they are suggestive: just as our account anticipates, choices regarding institutions are not merely reflexive but reflect the preferences and beliefs of the actors making the choices.

1. An account of constitutional borrowing and nonborrowing: The case of judicial selection and retention

Studies of constitutional borrowing, as we noted at the outset, are not monolithic. They raise empirical and normative questions and do so about a range of actors at work on diverse substantive problems. What unites these analyses is a

[12] In so doing, we make the important assumption that the preferences of the dominant political actors at the time of the creation of the judicial selection rules will be the ones most likely to institutionalize those rules.

concern, however implicit and underdeveloped, with institutional design. When scholars say that the Hungarian Constitutional Court adopted the German approach to the constitutional right of property,[13] they realize (again, however implicitly) that the Court was not just "borrowing"; it was establishing an institution to govern its society as well. When they note that the framers of the Argentine Constitution decided to incorporate provisions from U.S. documents, analysts recognize that the Argentines were not simply "importing"; they also were creating formal rules with which they expected their citizens to comply.

We, too, are interested in constitutional borrowing as a case of institutional design and devote the balance of this section to laying out an account of why actors make the choices that they do. Before turning to that account, though, we take a brief detour—one designed to highlight the reasons why we chose to focus our inquiry on provisions governing the selection and retention of justices serving on constitutional tribunals. This discussion is important, not because we believe our study applies only to these institutions or to the actors designing them (in fact, we think it is generalizable to many other institutions and actors) but rather because, in the course of explaining our choice, we introduce several concepts that are critical to the theoretical and empirical work that follows.

1.1 Judicial selection and retention

Why focus a study of constitutional borrowing and, more broadly, of institutional design on judicial selection and retention systems? We have two chief reasons.

First, because we are interested in understanding why political and legal actors make the institutional choices they do, we require a phenomenon that admits of choice and over which choice occurs. If, for example, all societies modeled their judicial selection and retention system after, say, America's, then we would have no variations to explain; we would simply conclude that countries borrow from the United States. But, as even the limited data depicted in table 1 indicate, that is not the case for the former republics of the Soviet Union; nor does it hold more broadly. While many nations, typically those using the civil law system, have developed similar methods for training and choosing ordinary judges, they depart from one another rather dramatically when it comes to the selection of constitutional court justices.[14] In Germany, for example, justices are selected by parliament, though six of the sixteen 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 many countries with constitutional tribunals justices serve for a limited period of time. Table 2, which depicts the mechanisms used in twenty-seven European countries to retain

[13] Vörös, *supra* note 5.

[14] Lee Epstein, et al., *Comparing Judicial Selection Systems*, 10 Wm. & Mary Bill Rts. J. 7 (2002) [hereinafter *Comparing Judicial Selection Systems*].

Table 2 Retention mechanisms for justices serving on constitutional courts in twenty-seven European Nations[17]

Mechanism	Number of Countries	Percent
Life tenure[18]	6	22.2
Renewable terms	7	25.9
Nonrenewable terms	14	51.9

constitutional court justices,[15] makes this clear: only six guarantee life tenure; the other twenty-one opted for limited terms of two varieties: renewable and nonrenewable.[16] And this holds beyond Europe, as well. In South Africa, for instance, justices hold office for a single twelve-year term; in the Korean Republic, justices serve for a set, albeit renewable, term.

Variation is not the only reason for our focus on choices of judicial selection and retention systems. Another centers on the importance of those choices. While we do not believe that these institutions completely determine the types of men and women who will serve on constitutional tribunals and, in turn, the choices they, as justices, will make, we—as well as many other scholars—do believe they help structure both.[19] 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[20]—while those systems

[15] The twenty-seven countries are Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Czech Republic, Croatia, Estonia, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Macedonia, Malta, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, and Ukraine. For more details, see *Comparing Judicial Selection Systems, supra* note 14.

[16] Under the former, a justice is able to serve one or more additional terms if she attains approval, typically from whatever bodies appointed her in the first instance. Under nonrenewable tenure systems, once the justice completes his term, he may not be reappointed.

[17] Source: *Comparing Judicial Selection Systems, supra* note 14.

[18] Counts all countries with life tenure, including those with compulsory retirement provisions.

[19] Paul Brace & Melinda Gann Hall, *Integrated Models of Dissent*, 55 J. Pol. 914 (1993); Stephen B. Bright & Patrick J. Kennan, *Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759 (1995); Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan (Yale Univ. Press 1997); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. Pol. 1117 (1987) [hereinafter *Constituent Influence*]; Daniel R. Pinello, The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy (Greenwood Press 1995); Charles H. Sheldon & Linda S. Maule, Choosing Justice: The Recruitment of State and Federal Judges (W.S.U. Press 1997); Mary L. Volcansek & Jacqueline Lucienne Lafon, Judicial Selection: The Cross-Evolution of French and American Practices (Greenwood Press 1988).

[20] Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689 (1995); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (Cambridge Univ. Press 1993); Harris v. Alabama, 513 U.S. 504, 515 (1995) (Stevens J., dissenting); Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harv. C.R.-C.L. L. Rev. 187 (1996).

that subject justices to periodic checks conducted by the public or its elected officials, may create a more accountable judiciary. And ample empirical evidence exists to support at least some of these beliefs, including data showing that popularly elected justices are more likely to suppress dissents[21] and reach decisions that reflect popular sentiment[22] than are their appointed counterparts.

To us, though, these are merely examples of a more general phenomenon: particular types of institutions governing judicial retention are more likely than certain others to induce sophisticated behavior (that is, behavior that is not in line with their sincere preferences) on the part of actors—such that the greater the accountability established in the institution, the higher the opportunity costs for justices to act sincerely, and, thus, the more extensive sophisticated behavior will be.[23]

1.2 Theoretical account

Given the role selection and retention mechanisms play in structuring judicial choices, it is hardly surprising that those mechanisms generate substantial debate. Indeed, we might go so far as to assert that of all the difficult choices confronting societies when they go about designing legal systems, among the most controversial are those pertaining to how a nation ought to select its judges and for how long should those jurists serve. To see this, we need only consider that some of the most fervent constitutional debates—whether they transpired in Philadelphia in 1787[24] or in Moscow in 1993–94[25]—over the institutional design of the judicial branch implicate not its power or competencies; they involved who would select and retain its members.[26]

[21] Brace & Hall, *supra* note 19; Richard A. Watson & Rondal G. Downing, The Politics of the Bench and the Bar: Judicial Selection under the Missouri Nonpartisan Court Plan (Wiley 1969).

[22] Croley, *supra* note 20; *Constituent Influence, supra* note 19; Pinello, *supra* note 19.

[23] *See, e.g.*, Brace & Hall, *supra* note 19; Paul Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. Pol. 1206 (1997); Croley, *supra* note 20; Pinello, *supra* note 19.

[24] Lee Epstein & Thomas G. Walker, Constitutional Law for a Changing America: Rights, Liberties, and Justice (CQ Press 4th ed. 2001); Daniel A. Farber & Suzanna Sherry, A History of the American Constitution (West Pub. Co. 1990).

[25] Alexander Blankenagel, *The Court Writes its Own Law*, 3 E. Eur. Const. Rev. 74 (1994); Herbert Hausmaninger, *Towards a "New" Russian Constitutional Court*, 28 Cornell Int'l L.J. 349 (1995).

[26] *See* Evan Haynes, The Selection and Tenure of Judges (The National Conference of Judicial Councils 1944), which actually traces controversies over judicial selection and tenure back to the fourth century B.C. For examples and discussions of particular debates, see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 L. & Contemp. Probs. 79 (1998); Lawrence M. Friedman, A History of American Law (Simon & Schuster 1973); Samuel Latham Grimes, "*Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?* 76 N.C. L. Rev. 2266 (1998); John M. Roll, *Merit Selection: The Arizona Experience*, 22 Ariz. St. L.J. 837 (1990); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. Pa. L. Rev. 1104 (1976); Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 Sup. Ct. Rev. 135.

But how do designers resolve these debates? Under what circumstances will they "borrow" institutions—whether constitutional provisions over, say, judicial selection or legal reasoning over, say, hate speech—from one society but not another or chose not to borrow at all? Ultimately, what determines their institutional choice?

Existing studies of constitutional borrowing offer a great variety of responses to these questions, ranging from a practical need to look elsewhere (owing to a lack of existing legal resources, for example, or of clarity in those resources); to a normative belief in the inherent value of canvassing other jurisdictions; to a concern with legitimizing particular decisions; to a yearning to follow constitutional dictates;[27] to seeking a way to assess a means-end fit; to an "accident"; or even to a "natural," perhaps "unconscious," desire to borrow.[28] But underlying these responses are two common themes. First, the scholarly literature typically grounds its responses, empirically speaking, on observations of borrowing done by courts *or* by constitutional framers, but not both. This seems to reflect a view, expressed by Justice Antonin Scalia, among others, that these are distinct activities. As Scalia wrote in *Printz v. United States*,[29] in which the American Supreme Court considered whether Congress can compel local officials to carry out federal legislation, "comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."[30]

While we venture no opinion on Scalia's normative position, we—along with others[31]—take issue with the distinction he draws. If we conceptualize borrowing (whether done by courts or framers) as part of a larger activity—designing institutions to govern society—then, at least for purposes of explanation, we need not differentiate between the two: any theory of institutional design ought be able to account for both. The one we offer below attempts to do so.

[27] According to Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 820 (2000), the South African Constitutional Court "has consistently taken [section 36.1 of the South African Constitution] *to require it* to canvas[s] the work of constitutional courts in other countries which meet the criteria of 'open and democratic societies.' " (Our emphasis; *see also* Webb, *supra* note 6). The relevant portion of 36.1 reads: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. . . ." Nonetheless, at least in its now-famous decision on capital punishment, S. v. Makwanyane 1995 (3) SALR 391, para. 34 (CC), the justices said that they would have consulted such sources, absent the constitutional provision, because of their "value." *See also Developments in the Law, supra* note 4.

[28] Fontana, *supra* note 9; *Developments in the Law, supra* note 4; Kim Lane Scheppele, The Accidental Constitution, Paper presented at Contextuality and Universality: Constitutional Borrowings on the Global Stage, at the University of Pennsylvania Law School (1998); Tushnet, *supra* note 9.

[29] Printz v. United States, 521 U.S. 898 (1997).

[30] *Id.* at 921; *see also* Choudhry, *supra* note 9.

[31] *See*, *e.g.*, Fontana, *supra* note 9; *Developments in the Law, supra* note 4; Klug, *supra* note 2.

A second common feature of existing explanations of borrowing centers not on what they incorporate as much as what they fail to incorporate: politics and political motivations.[32] Consider but one example, the "standard story" of why the U.S. states made the initial choices (and alterations in those choices) that they did regarding judicial selection and retention. Since we have much to say about this story in section 2.1 below, suffice it to note here that this story characterizes the states' choices (and historical changes in those choices) as simple, nearly reflexive, responses to the ideas of "popular" reformers—reformers who sought to supplant one selection system with another with the supposed goal of creating a "better" judiciary (with the term "better," while defined differently across time, always standing for some general societal benefit).[33] So, for example, when Thomas Jefferson pushed for an elected judiciary he did so—according to standard chroniclers—to further democratic principles. Neither Jefferson, nor, for that matter, any other reformer in the standard story, is out for his or her own individual political gain (or so it seems), even though we know from specific accounts that this was emphatically not the case;[34] nowhere does partisan politics enter into the story, even

[32] A few limited (though underdeveloped) exceptions exist. *See Developments in the Law, supra* note 4, at 2061, which claims:

> Many countries have significant political reasons for incorporating outside legal norms. Some countries with unfortunate international reputations join the international judicial dialogue to improve their status in the world community. For example, South Africa, which once permitted apartheid, has relied on the jurisprudence of its Constitutional Court to help demonstrate the nation's renewed commitment to civil rights. Other nations enter the international judicial dialogue to increase their influence over the creation of international norms. A desire for an authoritative role in the formation of international legal rules and standards seems to have motivated the participation of the Canadian Supreme Court and some European constitutional courts.

This is an interesting point but it is not clear what is actually motivating the courts: politics or other factors.

[33] Larry C. Berkson et al., Judicial Selection in the United States: A Compendium of Proposals (American Judicature Society 1980); Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 Judicature 176 (1980); James Bryce, Modern Democracies (Macmillan 1921); Sheldon D. Elliott, Safeguards of Judicial Independence, Paper presented at the Fourth International Congress of Comparative Law, Paris, France (1954); Sari S. Escovitz et al., Judicial Selection and Tenure (American Judicature Society 1975); Friedman, *supra* note 26; Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 Psychol. Pub. Pol'y & L. 242 (1997); Harry P. Stumpf & John H. Culver, The Politics of State Courts (Longman 1992); Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 Tex. L. Rev. 1081 (1966).

[34] Take the example of Jefferson, who, under the standard story, pushed 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 their belief that Jefferson pushed for an elected judiciary to further democratic principles standard storytellers often point to a letter he wrote in 1820: "Our judges are as honest as other men, and not more so. They have, with

though many scholars acknowledge that the choice of judicial selection and retention mechanisms is inherently a political choice with political implications—or as Friedman 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 or since."[35]

We could make the same critique of explanations of borrowing or nonborrowing on the part of constitutional court justices. Take the case of Justice Scalia. What prompted him to offer the remark we quote above[36] was the following claim made by Justice Breyer, writing in dissent in *Printz*:

> [T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well. Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to

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," *quoted in* The Writings of Thomas Jefferson 276 (Andrew A. Lipscomb ed., Thomas Jefferson Memorial Association of the United States 1905). 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, *supra* note 26, at 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 5 U.S. (1 Cranch) 137 (1803). According to Haynes, *supra* note 26, and Volcansek & Lafon, *supra* note 19, 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.

[35] Lawrence M. Friedman, A History of American Law 124–25 (Simon & Schuster 1985).

[36] *See* text accompanying note 30.

> preserve the liberty-enhancing autonomy of a smaller constituent governmental entity. And that experience here offers empirical confirmation of the implied answer to a question Justice Stevens asks: Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty?[37]

Why does Justice Breyer want to borrow and Justice Scalia to not do so (or at least not in this case)?[38] More generally, why do some courts accept imports and others only desire to export? To most scholars writing in this area the answers are those of the sort we identified at the outset of this section (e.g., a practical need to look elsewhere, a normative belief in the inherent value of canvassing other jurisdictions, and so on). Never is it even a possibility that, say, Breyer, apparently no great fan of states' rights and Scalia, apparently no great fan of central authority, might have taken precisely the opposite positions on the use of comparative materials had their counterparts elsewhere taken precisely the opposite positions. Exactly the same could be said of the debate over the use of comparative materials occurring in *Stanford v. Kentucky*.[39] In his writing for the Court, Scalia once again rejected the relevance of constitutional practices abroad:

> We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* that the sentencing practices of other countries are relevant. While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," [quoting *Thompson v. Oklahoma*[40]] they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.[41]

Justice Brennan, in dissent, accepted precisely the sort of analysis Scalia discarded:

> Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to

[37] Printz, 521 U.S. at 976–77 (citations omitted).

[38] For a nuanced interpretation of the differences between Scalia and Breyer in *Printz*, see Tushnet, *supra* note 7.

[39] 492 U.S. 361 (1989) (involving the constitutionality of the death penalty for minors).

[40] 487 U.S. 815, 868–69 n.4 (Scalia J., dissenting).

[41] 492 U.S. at 369.

> Eighth Amendment analysis. Many countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. Twenty-seven others do not in practice impose the penalty. Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles. Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles. Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados. In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.[42]

Is it really any great surprise—given their political preferences regarding the death penalty—that Brennan would invoke comparative material and Scalia would reject it? Would Scalia be such "an ardent opponent of the use of outside jurisprudence,"[43] if, say, practices abroad weighed in favor of the death penalty for minors? Would Brennan have invoked comparative materials if they worked against his preferred position? We doubt it, and Chief Justice Rehnquist's behavior provides some evidence of our position. In the same year the Court handed down its decision in *Stanford*, Rehnquist expressed his support for constitutional borrowing:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process. The United States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving

[42] 492 U.S. at 389–90 (Brennan J., dissenting).

[43] *Developments in the Law, supra* note 4, at 2067.

> constitutional courts in the world today . . . that approach will be changed in the near future.[44]

But, in *Stanford*, Rehnquist—another supporter of the death penalty—joined Scalia's judgment and, thus, his refusal to canvass other jurisdictions.

Examples drawn from the U.S. Supreme Court obviously differ in some important respects from the first one we offer, on the American states, but, again, scholarly explanations of them do not—at least not in the sense of their failure to take into account politics and political preferences. In these instances, and in many other illustrations we could offer, actors make their institutional choices supposedly and typically on the basis of some normative belief of what is good and not good for their societies or their political organization. Even when designers import or, more accurately, "appropriate" institutions simply because those institutions were at hand and, thus, easily discoverable,[45] the actors seem to hold rather noble goals—whether to create an independent judiciary, to act in the best interest of their society, or to reflect the wishes of the people. Or so many scholars argue.[46]

Believing that any explanation of constitutional borrowing (as a case of institutional design) that neglects politics fails to capture crucial features of that phenomenon, we take a different approach. To us, the creation of and changes in institutions comes about through a process of political bargaining that occurs within a preexisting political or legal system.[47] Decisions are the strategic choices of the relevant 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 actors to borrow or not from one or another society;[48] it is this variation that results

[44] William Rehnquist, *Constitutional Courts, Comparative Remarks* (1989), *reprinted in* Germany and its Basic Law: Past, Present, and Future: a German-American Symposium 411, 412 (Paul Kirchhof & Donald P. Kommers eds., Nomos 1993).

[45] Tushnet, *supra* note 9.

[46] There are hints in this literature that more is at issue, that internal politics may have a role to play in constitutional borrowing but they are typically under- or undeveloped. *See, e.g.*, Sarkin, *supra* note 10, who asserts at the beginning of his article: "One can only understand the extent and effect of constitutional borrowing in a particular state if the historical and socio-legal context of that country is understood," *id.* at 176, and in the conclusion: "At the same time, when predicting the outcome of a decision, one cannot ignore the South African policy factors which will play their part. Thus, the context within which a matter is adjudicated, the politics of the country, as well as such factors as judicial appointment procedures, must be examined," *id.* at 204. But the balance of the piece is devoted to a description of constitutional borrowings without a deep consideration of the role these forces might play.

[47] We sketched a slightly different version of this theory in previous work. *See* Lee Epstein et al., *Selecting Selection Systems, in* Judicial Independence at the Crossroads: An Interdisciplinary Approach 191 (Stephen B. Burbank & Barry Friedman eds., Sage Publications 2002) [hereinafter *Selecting Selection Systems*].

[48] *See supra* note 11.

in formal institutional distinctions that can influence the performance of the society or the political organization in the long run.

This is a general proposition—one that pertains to all institutional design, whether undertaken by legal or political actors. To apply it, for the sake of explaining the choice of selection and retention systems for justices, 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 regarding 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 prefer to constrain the court and, thus, the greater the independence the institutional rules will provide the justices.

The effect of this uncertainty 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 increase the preferences for 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 ongoing 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 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 sizable groups with

Table 3 Summary of predicted preferences[49]

Dimension 1 Personal political future	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)*
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)

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, representing graphically the two dimensions and the outcomes particular combinations yield.

Each of the predicted outcomes requires a few words of explanation. At least on our account, designers will prefer to "borrow" or select institutions meant to induce a high degree of independence when their uncertainty levels are the highest in 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 in both dimensions will lead to a preference for 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

[49] Adapted from *Selecting Selection Systems, supra* note 47.

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 2 that uncertainty in the "polity" dimension will have a greater effect on the independence of courts than will uncertainty in 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 background, 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.

2. Empirical sketches

Assessing rigorously these hypotheses is a challenging task. It requires us to collect data on judicial selection and retention systems and to assess the opportunity costs associated with them. We also need to develop measures for the concepts contained in our independent variables, the two dimensions of political uncertainty ("personal political future" and "polity"). And, finally we ought take into account rival hypotheses found in the literature on constitutional borrowing.

In a future project we intend to undertake these chores. For this preliminary attempt to assess our hypotheses, however, we provide only empirical sketches of the choices regarding judicial selection and retention mechanisms made by two societies operating in distinct political and social contexts: the American states and the former republics of the Soviet Union.[50] These sketches, by definition, do not provide conclusive support for our propositions but they do, as we shall see, provide evidence consistent with them.

[50] Our selection of these cases was no accident. We hope to demonstrate that our account—in a nutshell, that greater political uncertainty leads to mechanisms of greater judicial independence, and vice versa—not only operates in the American context (as many might suspect) but also applies to democratic systems abroad. Of course, it is true that courts in other systems have varying degrees of power in areas of interest to their creators, raising questions about how those creators' interests may be tied to their constitutional courts. While this is beyond the scope of our immediate concerns, suffice it to note that we believe our general account of institutional design could address why these differences emerge.

2.1 Empirical sketch No. 1: The American states[51]

In section 1.2, we made mention of the "standard story" of judicial selection and retention in the American states. On this account, to reiterate and expand the earlier discussion, 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 reacting to popularly held beliefs at particular points in time. The story itself unfolds as follows, in four chapters or phases of change, with the choice of selection and retention systems in each involving little more than common applications of procedures about which the designers believed they had knowledge of institutional effects.

In chapter 1 of the story—"The Revolutionary Period and Appointed Judiciaries"—we learn that when the states turned to the task of drafting constitutions (in response to a 1776 call issued by the Continental Congress), a hostility toward any system enabling one individual to select and retain judges permeated their drafting sessions.[52] Acting on this predilection could have led the states to adopt provisions calling for the election of judges. But none did[53]—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 the standard-story chroniclers, they attempted to diffuse power by giving legislatures either sole responsibility for judicial appointments (seven or eight of the original thirteen states)[54] or some role in them (five or six of the

[51] We adopt and adapt some of the material in this section from *Selecting Selection Systems*, *supra* note 47.

[52] Sheldon & Maule, *supra* note 19; Smith, *supra* note 26.

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." The Declaration of Independence para. 11 (U.S. 1776).

[53] And not because "direct election of judges was unknown." John V. Orth, *Tuesday, February 11, 1968: The Day North Carolina Chose Direct Election of Judges: A Transcript of the Debates from the 1868 Constitutional Convention*, 70 N.C. L. Rev. 1825, 1826 (1992). Indeed quite early on, Vermont (1777), Georgia (1812), and Indiana (1816) provided for the election of some lower court judges. Most states probably eschewed elections out of a belief that "the electorate was not capable of evaluating the professional qualities of judicial candidates," Grimes, *supra* note 26, at 2272.

As an aside, here and throughout this section, 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 our account of judicial selection is aimed directly at (constitutional) courts of last resort, here and abroad.

[54] Which figure is used depends on who is doing the chronicling. Elliott, *supra* note 33, and Volcansek & Lafon, *supra* note 19, use the seven, while Grimes, *supra* note 26, and Sheldon & Maule, *supra* note 19, use the eight. That scholars disagree on even basic facts about judicial selection systems only confirms a problem that plagues much of this research: analysts tend to rely on a few (flawed) secondary sources—especially The Book of the States (Council of State Governments, 1935–) (an annual publication)—and thus transmit errors from one piece of

thirteen); "most" also attempted to ensure judicial independence by guaranteeing judges virtual life tenure.[55]

Similarly, in chapter 2 of the story (sometimes labeled "Jacksonian Democracy and Elected Judiciaries") and depending on the particular version, the first change in the selection of judges—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,[56] Andrew 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),[57] or both.[58] 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"[59]—one designed to force greater accountability of judges by broadening the base from which they would have to garner support.

Finally, in chapters 3 ("Machine Politics and the Move to Nonpartisan Elections") and 4 ("Legal Progressives and the Merit Plan") of the story, new calls for change emerged—calls that took the form of a growing disdain for partisan judicial campaigns and all the politics those entailed. Especially distasteful to reformers and members of newly emerging local bar associations was the control political machines in many major cities exerted over the judicial selection process. Machine politics, they alleged, was causing citizens to view the judiciary as "corrupt, incompetent, and controlled by special interests."[60] States were quick to respond to this latest selection-mechanism backlash by, initially, invoking nonpartisan ballots for judges and, later, by moving to merit selection.[61]

This story has been told and retold so many times that to call it conventional wisdom is to understate its place in the sociolegal literature. It appears, in one

research to the next. In this paragraph, we rely on those "flawed" data since they have become a part of the standard story; in those that follow, we present analyses based on "corrected" data.

[55] *See* Elliott, *supra* note 33; Grimes, *supra* note 26; Sheldon & Maule, *supra* note 19; Volcansek & Lafon, *supra* note 19.

[56] *See* Croley, *supra* note 20.

[57] *See* Bryce, *supra* note 33; Escovitz et al., *supra* note 33.

[58] *See* Haynes, *supra* note 26; Volcansek & Lafon, *supra* note 19.

[59] Roll, *supra* note 26, at 841.

[60] Grimes, *supra* note 26, at 2273.

[61] Merit plans differ from state to state but usually 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 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.

version or another, in virtually every scholarly study of judicial selection;[62] it forms the centerpiece of discussions of selection in nearly all contemporary judicial process texts;[63] and it has even been repeated by judges in court opinions.[64]

It also is remarkably thin and, in many ways, remarkably misleading. For one thing and as we mentioned earlier, it suffers from the same problem that plagues many accounts of constitutional borrowing as a case of the more general phenomenon: it neglects the role of politics and political motives.[65] For another, it not only lacks empirical support; available data are actually inconsistent with the story.

To begin to see why, consider figure 1. There, we provide a visual depiction of the propositions of the standard story, along with the specific form it 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,

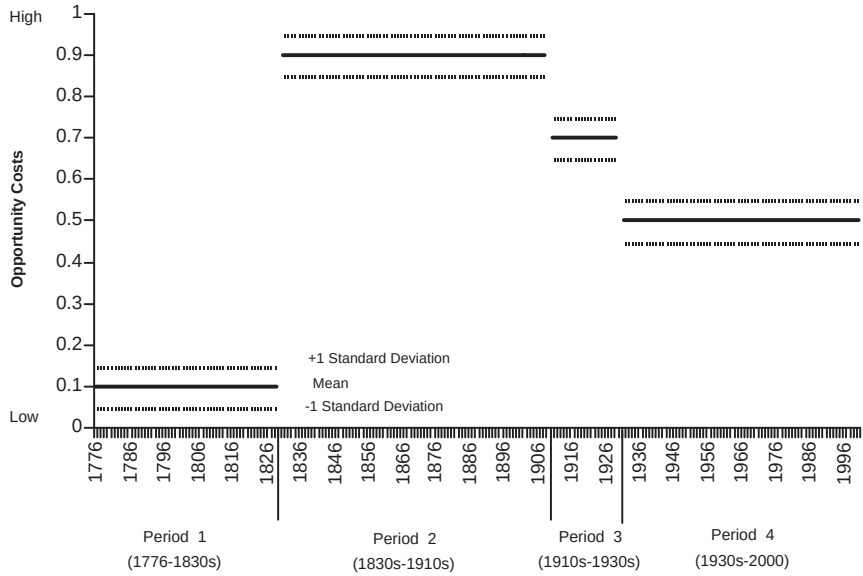


Figure 1 Visual depiction of the standard story's propositions.

[62] *See, e.g.*, Carrington, *supra* note 26; Grimes, *supra* note 26; Haynes, *supra* note 26; Roll, *supra* note 26; Sheldon & Maule, *supra* note 19; Volcansek & Lafon, *supra* note 19; Watson & Downing, *supra* note 21.

[63] *See, e.g.*, Robert A. Carp & Ronald Stidham, Judicial Process in America (CQ Press 5th ed. 1998); Harry P. Stumpf, American Judicial Politics (Prentice Hall 2nd ed. 1998); G. Alan Tarr, Judicial Process and Judicial Policy Making (Wadsworth 3rd ed. 2003).

[64] Smith v. Higinbothom, 48 A.2d 754, 187 Md. 115 (1946).

[65] *See* note 34 for but one example.

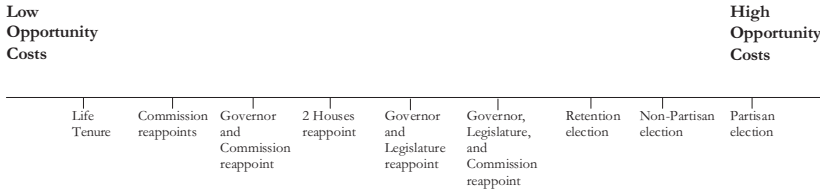
appointment with life tenure—provide justices with the highest degree of independence to act on their sincere preferences, while those on the very high end—partisan elections every two years, for example—with the lowest. What the standard story suggests is that the mean of this opportunity-cost measure, 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.

In other words, 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 practices, 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 nonpartisan and retention elections.[66]

Putting this together into one cohesive story (that is, connecting the lines in figure 1) suggests an intriguing pattern: an inverted U, with low opportunity costs at the onset, far higher ones during most of the 1800s, and lower costs yet again during the twentieth century. Unfortunately, when we map data drawn from the real world against this story,[67] as we do in figure 2, it does not

[66] The literature would justify this claim by pointing to lower levels of competition (or no competition at all) in these sorts of elections. Which, in turn, results in less threat to incumbent justices and, thus, lowers judicial accountability. We offer a somewhat different justification in note 68.

[67] To create the opportunity-cost measure depicted in figure 2, we first arrayed all retention mechanisms used in the American states between 1776 and 2000 on the following scale:



Underlying this scale is a straightforward assumption: the more players involved in reappointment, the higher the opportunity costs. *See generally* Charles H. Sheldon & Nicholas P. Lovrich, *State Judicial Recruitment, in* The American Courts: A Critical Assessment (John B. Gates & Charles A. Johnson eds., CQ Press 1991). For justifications for some of the specific placements, see *Selecting Selection Systems, supra* note 47.

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 and coded them from 1 (life tenure)

hold; in fact, quite a different story emerges. *Judicial opportunity costs induced by the retention and term-length components of selection systems have—nearly monotonically—increased overtime*. In other words, the 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 3 displays the results.

Certainly some of the considerable 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 up to the tail end of the twentieth century.

We are less hard-pressed under our account. At the very least, the data *appear* consistent with it. In the aggregate, as political uncertainty in the United States has declined, selection mechanisms designed to induce greater accountability (that is, to raise judicial opportunity costs) have increased. The states, simply put, *seem* to be coordinating on schemes designed to generate relative judicial (de)independence—an outcome not unexpected on our account.

We stress "appear" and "seem," above, because, almost needless to point out, much work remains before we can fully support this claim. But, to the extent that the data are in line with our account, these preliminary results are promising—as are those we report in the next section, on judicial retention practices in the former republics of the Soviet Union.

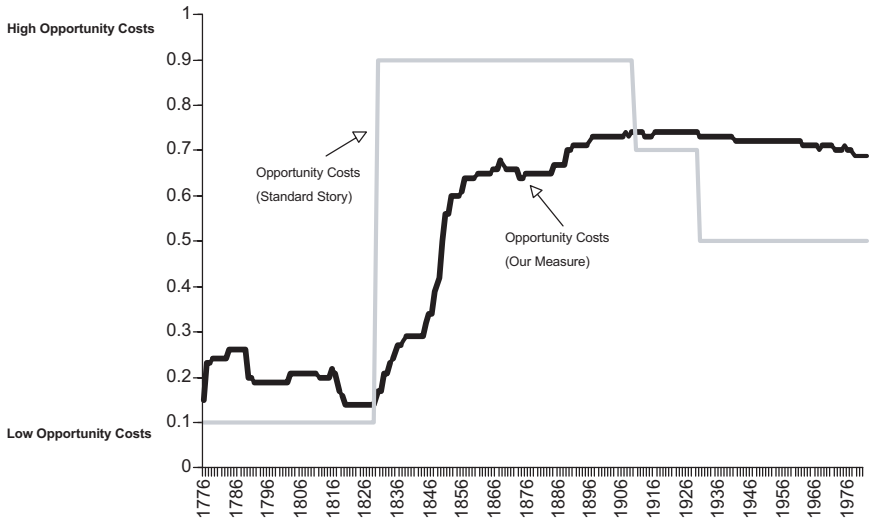
2.2 Empirical sketch No. 2: The former republics of the Soviet Union

The states of the former Soviet Union all designed new constitutional systems in the 1990s. As part of these constitutional schemes, each established institutional procedures for a constitutional court, including mechanisms for

through 9 (partisan elections) (see the above scale). We 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). Finally, we generated the yearly mean of the retention scores across states. *See Selecting Selection Systems, supra* note 47.

Second, believing that any measure of opportunity costs ought also take into account the length of the terms of office (with the primary assumption being that as the length increases, opportunity costs decrease), we collected data on institutions governing judicial tenure in the states since 1776. We standardized judicial terms (which have ranged in the U.S. 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. *Id.*

Finally, given that the means of the retention and term-length scales seem to move together (see the figure below) we added the two scores to arrive at a final measure of opportunity costs—the one depicted in figure 2.



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

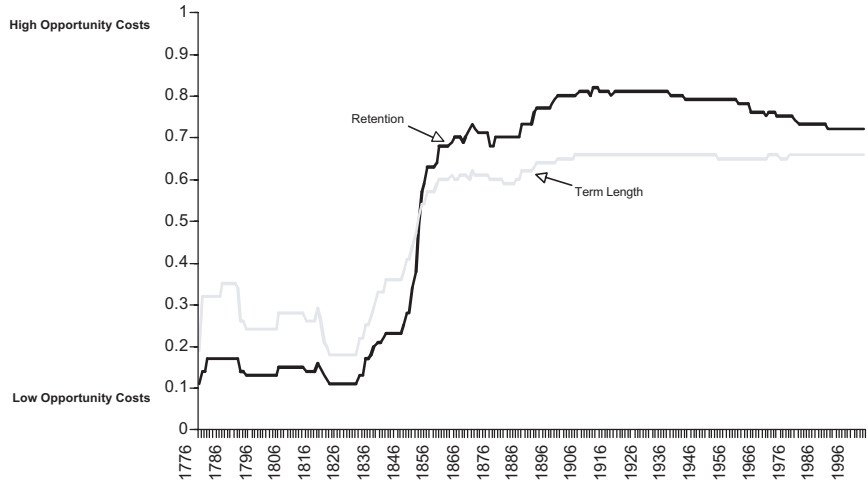


Figure 2 Judicial opportunity costs and the standard story, 1776–2000.[68]

judicial selection and retention. We presented the basic details of these mechanisms in table 1. In this section, we offer a preliminary and tentative sketch of how our theoretical approach to the question of institutional preferences might help to explain the variation in institutional detail that we observe in

[68] The gray line is a depiction of opportunity costs based on the standard story (see figure 1 and the accompanying text). The black line represents our measure of opportunity costs based on data we collected from numerous primary and secondary sources. For more details, see *Selecting Selection Systems, supra* note 47.

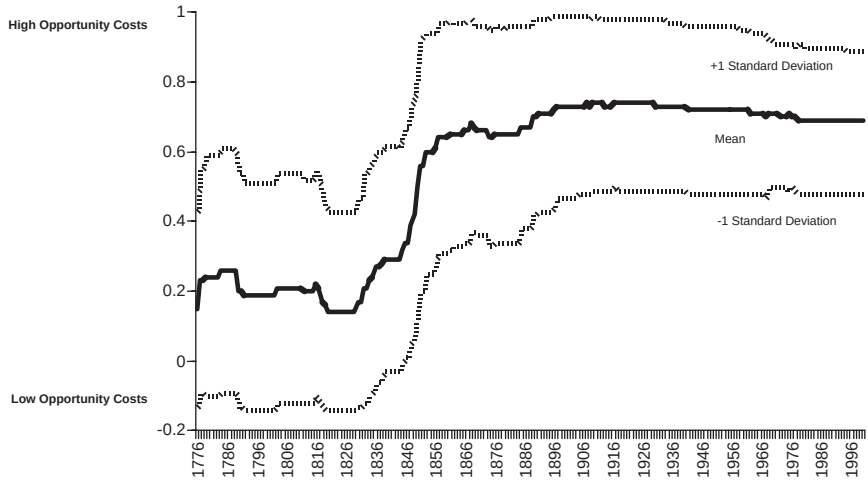


Figure 3 Our opportunity-cost measure: the means and standard deviations over time, 1776–2000.

nine of the fifteen systems—the nine that Freedom House classified, in 2001, as electoral democracies.[69]

As was the case for our analysis of the American states, our first task is to rank the various systems in terms of the relative judicial independence that their selection and retention mechanisms may induce. For the states, we considered both the number of actors involved in judicial retention and the length of the justices' terms of office; for our examination of the former republics we focus primarily on the term-length dimension.[70] (The particulars of the retention process are less relevant for the nine former republics since the possibility of reappointment has been incorporated into only one.) We continue, of course, to equate longer terms with lower opportunity costs and, thus, with greater judicial independence.

[69] *See* Freedom House, Freedom in the World: Table of Electoral Democracies, *available at* http://www.freedomhouse.org/research/freeworld/2000/table7.htm. By omitting societies that, in 2001, did not fall under Freedom House's definition of a democracy, we recognize that we open ourselves up to criticism; namely, that we are not tapping a concept of primary concern: the beliefs of institutional designers at the time they drafted the key provisions of their constitutional documents. This would be a valid critique under some circumstances but not necessarily here. The reason is simple: though in their constitutions the designers (in the excluded countries) may have established democracies, their societies never functioned as such.

[70] We acknowledge that an exclusive focus on term lengths limits our ability to assess fully judicial independence in these societies. Nonetheless (and for the reasons we noted earlier), term lengths are certainly not trivial elements in the institutional design of courts—at least not to their creators. Accordingly, they provide a reasonable focal point for what is, by our own admission, a "sketch," albeit a good starting point for what we hope will be a more comprehensive study in the years to come.

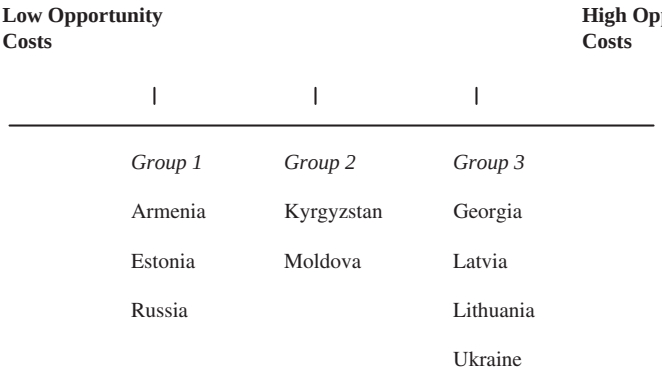


Figure 4 Opportunity costs and term-length in nine of the former Republics of the Soviet Union.

In figure 4, we present an ordinal ranking of the nine constitutional systems in terms of opportunity costs and judicial independence;[71] specifically, we categorize the nine systems into three groups. In group 1 we include the three countries (Armenia, Estonia, and Russia[72]) with the longest potential term of office—life tenure—and, as such, those countries in the comparative set of systems that institutionalize the lowest opportunity costs for their justices. In group 2 we place the systems of two countries, Kyrgyzstan and Moldova, which, while quite different, provide for the possibility of a justice serving on the court for at least twelve years. In group 3 we place four countries (Georgia, Latvia, Lithuania, and Ukraine) with very similar selection and retention systems. All provide for nonrenewable terms of nine or ten years and each involves a selection system that incorporates the participation of representatives of all three branches of government.

The approach to institutional preferences that we outlined above seeks to explain the differences in the term length of judicial office in terms of the differences in the levels of political uncertainty faced by the dominant political actors at the time of the drafting of the relevant constitutional documents. On this account, if the level of political uncertainty is high, then the preference will be for greater judicial independence as manifested in longer terms of office. We focus

[71] For our purposes in this article, an ordinal measure is sufficient to demonstrate the differences among the various selection/retention systems and to show how these differences might be explained by our approach to institutional preferences.

[72] A brief explanation is in order concerning our treatment of Russia. The original post-Soviet constitutional system provided for life tenure for justices on the Russian Constitutional Court. After the substantial political conflict that occurred in the middle of the decade the constitutional system was redesigned to bring about several significant changes, including a shift to a twelve-year nonrenewable term. *See* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & Soc'y Rev. 117 (2001). Since our analysis here is a comparative one, we thought it best to compare the initial constitutional choices in the fifteen systems.

theoretically on two dimensions of political uncertainty: the personal political fortunes of the constitutional designers and the future political prospects of those who share the political preferences of those designers. While there are a number of possible measures of these types of uncertainty, the measures most appropriate for this type of analysis are those that are easily comparable across countries and that capture, to the extent possible, general determinants of interest formation and political success. Examples of such measures would also identify the characteristics of an electorate that form the basis of expectations about the future prospects of political parties and organizations.

Our purposes in this paper are modest in the sense that our task is limited to demonstrating how we would assess the effect of uncertainty on institutional preferences and, in turn, institutional design. Therefore we concentrate here on one potential measure of uncertainty—social homogeneity—and focus on the effects of homogeneity on the prospects for political mobilization.[73] Specifically (and as we argued in the previous theoretical discussion), we expect homogeneity to have a negative effect on expectation formation in the sense that a homogeneous electorate may make it more difficult to identify salient dimensions for coalition building and, thus, to establish clear expectations of political success or failure.

There are a number of characteristics of an electorate on which we might focus in developing a measure of social homogeneity. One characteristic that seems particularly relevant in these former Soviet states is ethnicity. To develop a measure of homogeneity based on ethnicity, we collected data on the ethnic composition of the nine countries from the official census of each. From this data we created the following measure of homogeneity: we assigned a homogeneity score for each country equal to the percentage of a country's population attained by the largest ethnic group in that country. These scores are presented in table 4. They range from Armenia, whose largest ethnic group constitutes over 93 percent of the country's population, to Latvia, whose largest ethnic group constitutes only 57.6 percent of the population.

While our analysis remains at this point very preliminary, a comparison of the rankings of judicial independence and the rankings by homogeneity does provide some interesting insights into how our account of institutional preferences might plausibly explain the differences in institutional choice. Although the mapping between the two rankings is far from exact, the comparison does lend support to the basic idea that there is a relationship between political uncertainty (as measured by homogeneity) and judicial independence. The strongest support is associated with the top of the judicial independence scale. Two of the countries in group 1 on the judicial independence ranking constitute the two top

[73] We recognize that for a variety of reasons (e.g., some societies disenfranchise ethnic minorities, thereby effectively preventing them from creating electoral political uncertainty) this is an imperfect measure. Yet, because it has been used in other studies and has some intrinsic merit, we think it satisfactory—especially given the preliminary nature of this analysis.

Table 4 Ethnic homogeneity in nine of the former Republics of the Soviet Union (1990s)

Country	Percentage of country's population represented by largest ethnic group
Armenia	93.3
Russia	82.9
Lithuania	81.5
Ukraine	73.0
Georgia	70.0
Estonia	65.0
Kyrgyzstan	64.9
Moldova	64.5
Latvia	57.6

countries on the homogeneity scale. Only Estonia among the countries in group 1 fails to rank at or near the top of the homogeneity measure.

As we move farther down the rankings on judicial independence, the results are less straightforward, while the implications for the theory of institutional preferences are more ambiguous. So, for example, from among the four countries in group 3, the middle group in terms of the relative measure of judicial independence—only two, Ukraine and Georgia—rank comparably in the middle in terms of homogeneity. The other two, Lithuania and Latvia, rank quite differently, with Lithuania in the upper third and Latvia at the bottom of the homogeneity scale.

Our overall sense of the comparison is that while there is evidence of an association (albeit a relatively weak one) between ethnic homogeneity and judicial independence, there is still much work to be done before we can offer our account of institutional preferences with great confidence. But a brief look at one of the deviant cases, Estonia, suggests that (1) ethnicity may not be the best measure of social homogeneity and political uncertainty for some of these cases, and (2) other measures of political uncertainty may provide better support for the theory. Estonia ranks sixth on the measure of relative homogeneity, suggesting that less political uncertainty exists there than in the other countries in group 1. It also suggests that, on the dimension of political uncertainty, Estonia is more akin to the countries in group 3, which institutionalized less judicial independence than had Estonia. It may be the case, however, that ethnic homogeneity is not the best measure of political uncertainty for Estonia, that in fact, indeed the measure underestimates the level of political uncertainty in the country. Support for this view can be found in the volatility of the Estonia electorate in the three parliamentary elections in the 1990s.[74]

[74] We obtained data on parliamentary elections in Estonia from http://www.parties-and-elections.de/estonia.html and http://www.electionworld.org/.

Each of the three parliamentary elections in this decade, held in 1992, 1995, and 1999, resulted in different parties winning the largest percentage of votes. In 1992, the winner was a conservative party (the Fatherland Union); in 1995, it was a liberal-agrarian coalition (Estonian Coalition/Estonian People's Union); and, in 1999, it was a centrist party (Estonian Center Party). In only one instance, in the three elections combined, did a party receive more than 23.4 percent of the vote—the liberal-agrarian coalition with 32.2 percent of the vote in 1995. These electoral results suggest that if we animate political uncertainty via a measure of electoral volatility (as opposed to ethnic homogeneity), then we might very well find a stronger association between political uncertainty and judicial independence in the Estonian case.

3. Discussion

As we emphasized at the outset, the sketches we have just presented are simply that—sketches designed to provide preliminary, very preliminary, assessments of our theoretical account. To the extent that they are consistent with the basic idea encapsulated in our account—that institutional preferences about judicial independence are a function of the political uncertainty faced by the designers of constitutional systems—we are encouraged. At the same time, we recognize that much work must be done before we can make strong claims about the fit between our data and our theory; in particular, the limited analyses we have thus far conducted suggest that our future research ought to concentrate on developing persuasive measures of political uncertainty that we can use as comparative referents across constitutional cases.

This noted, we do believe that this essay has made some contribution to scholarly thinking about constitutional borrowing. While our empirical work is quite underdeveloped, our theoretical work is less so. Indeed, we hope that first, by conceptualizing borrowing as a case of institutional design and second, by offering an account to explain design choices, we have worked to eliminate some of the weaknesses in previous studies, while, at the same time, have moved forward this fascinating line of inquiry.