Reconsidering Statutory Interpretive Divergence between Elected and Appointed Judges

A Response to Aaron-Andrew P. Bruhl and Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U Chi L Rev 1215 (2012).

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INTRODUCTION

Should elected judges interpret statutes differently than appointed judges? The implicit answer of statutory interpretive theorists seems to be no. They typically describe their approaches to statutory interpretation in universal terms independent of the form of the institution that is taking on the task. To take two recent theories of statutory interpretation that revolutionized legal and academic thinking, when Professor William N. Eskridge, Jr. called for courts to dynamically interpret statutes to account for evolving public values, he seemed to assume that elected judges and appointed judges were equally competent to do so.[1] When Justice Antonin Scalia advocated in his seminal book, *A Matter of Interpretation*, for judges to place more focus on the text of the statute and less on its legislative history, state judges, and by extension the institution of elected judges, seemed to be entirely invisible.[2] These omissions are surprising

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1 See William N. Eskridge Jr, *Public Values in Statutory Interpretation*, 137 U Pa L Rev 1007, 1009 n 4 (1989) (noting that the observations about the current use of public values in statutory interpretation apply to both state and federal courts). See generally William N. Eskridge Jr, *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479, 1482–97 (1987) (describing the theory of dynamic statutory interpretation, which calls for statutes to be interpreted "in light of their present societal, political, and legal context").

2 See generally Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton 1997) (advocating against judicial discretion in the application of the law). Justice Scalia's exclusive focus on federal appointed judges is reflected in the book's subtitle.

once one considers that elected judges decide the vast majority of all cases nationwide.

Professors Aaron-Andrew P. Bruhl and Ethan J. Leib in their article, *Elected Judges and Statutory Interpretation*, make visible what was previously invisible: the institutional difference between elected judges and appointed judges.[3] And they assess what this difference might mean for the interpretation of statutes. The mere introduction of this issue is worthy of praise as it opens up a promising new area for scholarly exploration. Bruhl and Leib, however, do not stop there. They also offer a balanced case for two potential views of statutory interpretation by elected judges: first, the conventional view that elected judges should interpret statutes in the same way as appointed judges—a case for interpretive convergence—and second, a case for the novel view that elected judges should interpret statutes differently from appointed judges—a case for interpretive divergence.[4] While Bruhl and Leib are openly agnostic about the choice between interpretive convergence and divergence, their analysis suggests that if pushed to choose a side, they might side with a theory of interpretive divergence. For this reason, and because of the novelty of an argument for interpretive divergence, this Essay focuses on the case for interpretive divergence.

In this Essay, I argue that the case for interpretive divergence is weaker than Bruhl and Leib suggest. While election and appointment are quite distinct ways of selecting judges, this difference in institutional form may ultimately mean less than they think. First, as a historical matter, the case for interpretive divergence relies on an oversimplification about the reasons underlying the choice of the two selection methods. While the authors explore some of the history of state decisions to adopt judicial elections, they ignore the history underlying the federal constitutional Framers' choice to adopt judicial appointments with permanent tenure. Paradoxically, what the two histories

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[3] Aaron-Andrew P. Bruhl and Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U Chi L Rev 1215 (2012). Consistent with Bruhl and Leib, the focus of the Essay here is on federal appointed judges as opposed to state appointed judges. It is important to recognize that eight states maintain systems of appointing judges to office without subjecting them to popular retention elections. See Neil Devins and Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U Pa J Const L 455, 463–64 (2010) (noting that Connecticut, Delaware, Hawaii, Maine, New York, South Carolina, Vermont, and Virginia have such systems). The arguments that apply here should be applicable to state appointed judges as well, but proof of that hypothesis is beyond the scope of this Essay.

[4] For a discussion of the cases for interpretive convergence and interpretive divergence, see Part I.

show is that the federal government and the states adopted two seemingly diametrically opposed selection models for essentially the same reasons: to reinforce the separation of powers between the judicial, legislative, and executive branches and to allow courts to retain decisional independence from popular pressures.

Second, the case for interpretive divergence is weaker than suggested because it essentializes accountability. It assumes that judges are accountable to the people for the same things as other elected officials. Specifically, it assumes that voters hold judges accountable for how well they represent the immediate interests of the people, assessing judges in exactly the same way that they do legislators. The contrast between how states have designed judicial elections as compared to other elections suggests that this is not the case. Since their adoption in the mid-nineteenth century, states have designed judicial elections to maintain the decisional independence of judges from popular pressures. They have done so by limiting voters' access to the information necessary to hold judges accountable for how well their decisions represent the interests of the people. In the place of accountability to popular preferences, states have tried to sustain, through the design of judicial elections, a different form of accountability: judges' accountability to the people for their fairness and impartiality in administering and interpreting the laws. This form of accountability is not any different from that expected of judges appointed with life tenure.

As Bruhl and Leib and other scholars have noted, however, judicial elections are changing. They have been transformed from low-key, low-information affairs into competitive contests in which voters choose judges on the basis of highly salient issues that come before the courts. Bruhl and Leib argue that this evolution in the form of judicial elections supports the case for interpretive divergence. However, this claim depends on three assumptions about the changing form of elections. Bruhl and Leib assume, first, that the increase in "meaningful judicial elections" has led to greater judicial responsiveness to the people.[5] Second, that meaningful elections provide state judges with guidance on statutory interpretive questions that tend not to be particularly salient. Third, that appointed judges are insulated and unresponsive to public opinion. All three assumptions lack empirical support. Even in the context of what Bruhl and Leib describe as meaningful judicial elections, federal appointed and

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[5] Bruhl and Leib, 79 U Chi L Rev at 1234 (cited in note 3).

state elected judges are similarly competent to draw on public opinion in their interpretation of statutes.

This Essay proceeds in two parts. In the first Part, I describe the authors' case for interpretive convergence and divergence, spending much of the space on the case for the latter. In the second Part, I elaborate on the three reasons why we should reconsider the case for interpretive divergence.

I. THE CASE FOR INTERPRETIVE DIVERGENCE

In exploring whether elected judges should interpret statutes differently from appointed judges, Bruhl and Leib offer a balanced case for interpretive convergence and for interpretive divergence. The case for interpretive convergence, or an approach in which elected and appointed judges interpret statutes similarly, is premised on the conventional view that the judicial role in a system of separated powers is to serve as a faithful agent of the legislature.[6] According to this faithful-agent account, the role of the legislature is to make law and the role of judges is to interpret the law consistent with the legislature's preferences.[7] Since the states, including those with judicial elections, have adopted a similar understanding of separated powers in their constitutions, the role of the judge as a faithful agent of the legislature is universal and supports interpretive convergence between appointed and elected judges.[8] In addition, rule of law considerations bolster the case for interpretive convergence. Judicial impartiality might be threatened if individual legal outcomes varied depending on a judge's electoral considerations.[9] Further, elections seem unlikely to provide judges with consistent, reliable information about preferences that they could use to craft coherent approaches to statutory interpretation.[10]

The authors contrast this case for interpretive convergence with a case for interpretive divergence. Since it is the focus of this Essay, I describe the latter case in a little more detail. Professors Cass Sunstein and Adrian Vermeule's institutionalist framework for statutory interpretation animates the case for divergence. This statutory interpretation framework seeks to

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6 Id at 1229–30 (cited in note 3) ("If the principal inquiry in statutory cases is discovery of the will of the legislature, the status of the judge herself—whether elected or appointed—does not change" the way she should interpret the law).

7 Id.

8 Id.

9 Bruhl and Leib, 79 U Chi L Rev at 1226–27 (cited in note 3).

10 Id at 1225–26, 1231–32.

move the scholarly discussion beyond the question of how text should be interpreted to the question of how institutions, given their capabilities and limitations, should interpret text.[11] Applying this framework, Bruhl and Leib argue that because of differences in the means of selection, elected judges have different competencies and relationships with the other parts of the government than appointed judges and should therefore interpret statutes differently. As an initial matter, the authors explain, "The institution of judicial elections undermines the democracy-based rationale for the faithful-agent account."[12] Since elected judges are selected by and directly accountable to the people, it is not clear why they should be subordinate to the legislature in their interpretation of statutes.[13] In addition, Bruhl and Leib support the case for interpretive divergence from the perspective of relative competence. Because elected judges must secure votes from the people to remain in office while appointed judges have life tenure, the former have an advantage in discerning public opinion. Elected judges have a stronger "degree of political savvy and comprehension" and can better "gaug[e] the most important public reactions."[14] They can also draw on the information of the judicial elections themselves (assuming they are meaningful) as well as "their reading of the community's general sensibilities" to be more responsive to the people in their interpretation of statutes.[15]

The authors support the institutionalist case for divergence with an argument from history. Several states adopted judicial elections to replace the political appointment of judges in the mid-nineteenth century. Relying on recent historical accounts,[16] the authors argue that the shift to judicial elections arose out of growing distrust of corrupt and ineffectual legislatures.[17] This inspired reformers to empower the judicial branch to serve as a counterweight by providing judges with a separate base of power—the

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11 See generally Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 Mich L Rev 885 (2002).

12 Bruhl and Leib, 79 U Chi L Rev at 1244–45 (cited in note 3).

13 See id.

14 Id at 1250–51.

15 Id.

16 Bruhl and Leib, 79 U Chi L Rev at 1242, citing Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv L Rev 1061, 1065–69, 1097 (2010); Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am J Legal Hist 190, 207, 217–19 (1993).

17 See Bruhl and Leib, 79 U Chi L Rev at 1242 (cited in note 3).

people.[18] According to Bruhl and Leib, the reasons for the adoption of judicial elections "support forms of divergence that grant elected judges greater independence from the legislature or requires greater consideration of popular views (or both)."[19] The authors acknowledge that since their adoption, judicial elections have undergone reform in many states. These reforms included the widespread adoption of nonpartisan and merit-selection processes.[20] By 2010, only six states retained partisan elections either at the initial selection stage, the retention stage, or both.[21] Despite these reforms, the authors focus their case for divergence on the partisan election holdovers, arguing that "[i]f a state subjects its judges to partisan elections every four years, that is probably because it does not want its judges to be like federal judges."[22]

II. RECONSIDERING THE CASE FOR DIVERGENCE

How strong is the case for interpretive divergence? In this Part, I address each of the arguments favoring a divergence between how elected and appointed judges interpret statutes. For purposes of organization, I focus first on the argument from history. I introduce a more nuanced account of the historical purpose of the federal model of appointing judges and granting them with life tenure and compare it to the purpose underlying the adoption of partisan elections by a majority of the states in the mid-nineteenth century. I argue that despite the obvious differences in the two selection methods, both were designed to achieve the same result: judicial independence from the political branches and judicial accountability to the federal or state constitution. Second, I engage the interpretive divergence claim that state selection processes were intended to make judges accountable to the immediate interests of the people. I argue states reformed judicial selection methods through the adoption of nonpartisan elections and merit selections, as well as state imposition of limits on the ability of judicial candidates to announce views on disputed legal or political issues, to avoid this very form of accountability. Third, I examine the case for interpretive divergence

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18 Id. See also Part II.A.

19 Bruhl and Leib, 79 U Chi L Rev at 1242 (cited in note 3).

20 See id.

21 See Devins and Mansker, 13 U Pa J Const L at 463–64 (cited in note 3) (noting that only Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia hold partisan elections for the initial selection of judges, the retention of judges, or both).

22 Bruhl and Leib, 79 U Chi L Rev at 1243 (cited in note 3).

from the current baseline of more meaningful judicial elections. On the basis of a more nuanced account about the effect of meaningful elections on state judges and the responsiveness of the decisions of federal judges to public opinion, I argue that the two types of judges are more similar than the case for interpretive divergence suggests.

A. Reconsidering History

An important consideration in the case for interpretive divergence is the historic purpose of the two systems of selection. While they discuss the historical purpose of the state election system, Bruhl and Leib seem to assume that the purpose underlying the adoption of the federal system of appointment with life tenure differs. This assumption provides critical support for the institutionalist argument for divergence. In this Section, I argue that the historic purpose of the adoption of the two selection systems share much more in common than the authors acknowledge.

1. The history of federal adoption of the system of judicial appointment with tenure.

One of the complaints that the Americans made against King George III in the Declaration of Independence was that "[h]e ha[d] made Judges dependent on his Will alone, for their tenure of their office, and the amount and payment of their salaries."[23] Rather than being independent to adjudicate laws and decide cases in an impartial way, the colonists considered Crown judges to be just another instrument of imperial power. This suspicion of judicial power manifested itself in the Articles of Confederation, which established no permanent courts and made limited provision for the exercise of judicial power.[24] As part of the effort to design a federal government that was more effective than the Articles had been in "provid[ing] for the common defence, promot[ing] the general Welfare, and secur[ing] the Blessings of Liberty,"[25] the Framers of the Constitution established a federal system of courts with the judicial power of

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[23] United States Declaration of Independence ¶ 11 (1776).

[24] In Article IX of the Articles of Confederation, most of the power to adjudicate disputes was given to the Congress. Articles of Confederation Art IX, § 2. Congress did have the authority to establish temporary courts "for the trial of piracies and felonies committed on the high seas [and] for receiving and determining finally appeals in all cases of captures." Articles of Confederation Art IX, § 1.

[25] US Const Preamble.

the United States.[26] Judges to these courts were to be nominated by the executive and subject to confirmation in the Senate. Once confirmed, they held "offices during good Behaviour" and "receive[d] for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[27]

Why did the Framers choose this method of selection with indefinite tenure?[28] Alexander Hamilton justified the choice in a critical piece of propaganda to support ratification of the Constitution in the states—the Federalist Papers. In Federalists 78 and 79, Hamilton explained that the goal of the selection process and tenure was to secure judicial independence from the political branches of government.[29] Such branch independence was necessary to ensure that judges had the independence to decide cases impartially—something scholars have described as "decisional independence."[30] As Hamilton famously explained, because the judiciary lacks Force or Will, it "is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; and that as nothing can contribute so much to its fairness and independence, as permanency in office, this quality may therefore be justly regarded . . . as the citadel of the public justice and the public security."[31]

What is often overlooked is that Hamilton also intended for the form of selection and tenure to secure the accountability of federal judges to the interests of the people. He, however, equated the will of the people with the Constitution soon to be ratified by the people while distinguishing the people's will from legislative will. As Hamilton explained, "[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by

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26 US Const Art III, § 1.

27 US Const Art III, § 1.

28 In certain respects, the method of selection was not that different from that which existed in England before, where judges held office during good behavior. See Irving R. Kaufman, *Chilling Judicial Independence*, 88 Yale L J 681, 700 (1979). According to Professor Irving R. Kaufman, the "[d]enial to the colonies of the benefits of an independent judiciary enjoyed in England was one of the grievances that led to the Revolution." Id (noting that this denial naturally led to the adoption of England's version of life tenure).

29 Federalist 78 (Hamilton), in *The Federalist* 521, 522–30 (Wesleyan 1961) (Jacob E. Cooke, ed) (advocating for the life tenure of federal judges); Federalist 79 (Hamilton), in *The Federalist* 531, 531–34 (cited in note 29) (advocating for "a fixed provision" for the support of federal judges).

30 See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 Ohio St L J 43, 51 (2003).

31 Federalist 78 (Hamilton), in *The Federalist* at 523–24 (cited in note 29).

the latter, rather than the former."[32] The Constitution served the people's will by establishing a framework of limited government designed to protect the general liberty of the people by separating executive and legislative powers as well as federal and state power, while designating a set of rights that government could not encroach upon. To the extent judges were independent from the other branches through permanent tenure in office, they could be accountable to the people's will by faithfully defending the Constitution against legislative and executive encroachment.[33]

Importantly, Hamilton distinguished this form of judicial accountability to the people from the form of accountability served by election to political office. Whereas election to political office was designed to ensure accountability to the current popular preference, the appointment of judges with permanent tenure was designed to ensure accountability to the will of the people reflected in the Constitution even when it ran contrary to popular preferences.[34] Judicial independence served the interest of judicial accountability to the people through the Constitution by allowing judges to defend the Constitution against "ill humors" and temporary passions without fear of removal.[35]

The impeachment of Supreme Court Justice Samuel Chase is a key episode that sustained the judicial independence of federal judges, in sharp contrast to many state judicial systems in place after the ratification of the Constitution. According to even his defenders during his House impeachment trial, Justice Chase was not a good judge.[36] He was a Federalist judge who famously exhibited partiality on the bench in the trials of individuals charged with criticizing the Federalist administration of John Adams and for treason.[37] Justice Chase also at one point directly criticized the Republican administration of Thomas Jefferson from the bench

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[32] Id at 525.

[33] See generally Federalist 78 (Hamilton), in *The Federalist* 521 (cited in note 29).

[34] As Alexander Hamilton elaborated:

> This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id at 537.

[35] Id.

[36] See William H. Rehnquist, *Political Battles for Judicial Independence*, 50 Wash L Rev 835, 839 (1975) (describing the views of Justice Chase held by his defenders).

[37] See id at 837.

when reading a grand jury charge.[38] These judicial indiscretions and others were presented in the House as articles of impeachment against Justice Chase in 1804.[39] But ultimately the charges served as a sideshow to the partisan atmosphere that surrounded the decision to impeach.

In the 1800 election, the Republicans led by Thomas Jefferson won the presidency and took control of the House and Senate from the Federalists.[40] The bench remained the final repository of Federalist control.[41] While Justice Chase's actions on the bench were considered deplorable, for many observers the attempt to impeach Justice Chase was a partisan power play by Republicans to gain control of the judiciary.[42] If successful, the impeachment would have had huge repercussions on judicial independence, as it would have set a precedent that lowered the threshold for removal.[43] The "good behavior" requirement of Article III[44] would have no longer been equated with the high crimes and misdemeanor requirement of impeachment[45] but instead could have been employed by congressional majorities as a

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38 There is some dispute about whether Justice Chase actually criticized the Jefferson administration in his charge to the grand jury. Compare id at 838 (explaining that Justice Chase denied he had ever criticized the administration in the grand jury charge), with Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802–1805; Political Forces and Press Reaction*, 14 Am J Legal Hist 55, 63 (1970) (describing the grand jury charge as including "pointed references to Jefferson's administration").

39 See Knudson, 14 Am J Legal Hist at 62–63 (cited in note 38).

40 See Rehnquist, 50 Wash L Rev at 837 (cited in note 36).

41 See id at 838.

42 See Knudson, 14 Am J Legal Hist at 60–61 (cited in note 38) (describing the impeachment of Justice Chase as the culmination of a broader assault on the judiciary that included the repeal of the Judiciary Act of 1801 that created new judgeships and included a measure prohibiting the Supreme Court from meeting for more than a year). See also R.W. Carrington, *The Impeachment Trial of Samuel Chase*, 9 Va L Rev 485, 499 (1923) (arguing that Justice Chase's "acts of indiscretion were hardly of sufficient importance to justify impeachment").

43 See Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 Rutgers L Rev 725, 728–29 (2010) ("Beyond preserving the composition of the Supreme Court as it existed in 1805, Chase's impeachment trial likely did more to define the boundaries of judicial independence and the scope of impeachment than any other single event up to that time.").

44 US Const Art III, § 1.

45 US Const Art II, § 4 ("The President, Vice President, and all civil Officers of the United States, shall be removed from office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."). There has been an academic debate about whether the Article III requirement that federal judges "shall hold their office during good behavior" means that they can only be removed by standard of impeachment or that they can be removed according to a lower threshold. See Kaufman, 88 Yale L J at 691–703 (cited in note 28) (engaging the debate).

political weapon to punish judges that displeased them.[46] The effect would have been a dilution of branch independence, a corresponding diminution of decisional independence, and greater judicial accountability for their decisions to Congress rather than to the people's will as embodied in the Constitution.[47] The House without any debate voted along party lines to impeach Justice Chase.[48] In the Senate where Republicans had the numbers to convict, Justice Chase was nonetheless acquitted.[49] And with the acquittal, legislative restraint preserved the independence of the federal judiciary.

2. The history of state adoption of partisan elections: a story of convergence to the federal model.

State legislatures were not similarly restrained in their uses of the tools of removal of state judges in the period before and after the ratification of the federal Constitution. State constitutions generally provided for the political appointment of judges and for continued tenure in office during "good behavior."[50] But despite facial similarities in the form of selection, the relationship between the state judiciaries and the political branches was one of dependence rather than the independence of the federal model.

Early Americans considered the legislatures to be the heroes of the colonial period, and the Revolution was considered "the

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46 See Carrington, 9 Va L Rev at 499 (cited in note 42) ("A conviction of Chase might well have had a bad influence, and would have encouraged the Republicans in their assaults upon the power of the judiciary.").

47 Charles Warren explained that the gravest aspect of the impeachment was

> the theory which the Republican leaders in the House had adopted. . . . They contended that impeachment must be considered a means of keeping the Courts in reasonable harmony with the will of the Nation, as expressed through Congress and the Executive, and that a judicial decision declaring an Act of Congress unconstitutional would support an impeachment and the removal of a Judge, who thus constituted himself an instrument of opposition to the course of government.

Charles Warren, 1 *The Supreme Court in United States History* 293 (Little, Brown 1947), quoting Rehnquist, 50 Wash L Rev at 840 (cited in note 36).

48 Knudson, 14 Am J Legal Hist at 62 (cited in note 38).

49 Conviction on the articles of impeachment required a two-thirds super-majority and Republicans held twenty-five of the thirty-four seats in the Senate, two seats more than the two-thirds majority required to convict. See Rehnquist, 50 Wash L Rev at 839 (cited in note 36). The highest vote that any of the articles of impeachment received was nineteen votes for Justice Chase's charge to the grand jury in Baltimore. See id.

50 See, for example, Delaware Const of 1776 Art 12 (superseded 1792); South Carolina Const of 1776 Art XX (superseded 1778); Maryland Const of 1776 Art XXX (superseded 1851).

authentic expression of the public voice."[51] At the same time, the examples of arbitrary power by the king and the partial administration of laws by Crown judges contributed to a general distrust of executive and judicial authority in the former colonies.[52] Unsurprisingly, state legislatures retained substantial power in the selection of judges.[53] The legislatures also had the power to subject judicial decisions to scrutiny. Through the exercise of this power, legislatures provided parties to a case with the opportunity to appeal to the legislature, which had the authority to order "new trials or pass private bills that provided them with compensation denied them at trial."[54] In addition, whenever a judge issued an unpopular decision, he could be called to explain the decision before the legislature.[55]

But state legislatures did not simply override or criticize judges' decisions; sometimes they removed the judges themselves or legislated particular judgeships or entire courts out of existence.[56]State legislatures also applied a lower threshold for judicial "good behavior" than that maintained in the federal system after the Justice Chase impeachment. As one scholar explained, "good behavior was understood as a standard of conduct enforceable by the legislature."[57] This combination of legislative dominance over judicial selection, legislatures' frequent scrutiny of judicial decisions, and their active removal of judges meant that the principle of judicial branch independence was much weaker than in the federal context. By the early nineteenth century, the two judicial systems diverged. State judges tended to have less decisional independence from legislative influence and greater accountability to the legislature than federal judges.

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51 F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J Legal Stud 431, 445 (2004).

52 See id at 444.

53 See G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 Harv J L & Pub Pol 643, 645–46 (2012) (describing legislative dominance over judicial appointments as "a response to Americans' suspicion of executive power in general and of the executive appointment power in particular"). Early Americans also sought legislative control over the judiciary because of their suspicion of judicial power. See Hanssen, 33 J Legal Stud at 440–41 (cited in note 51) ("In the nation's early years, state legislators . . . were regarded as more reliable representatives of 'the people' than were state judges (colonial judges had been faithful servants of the English Crown).").

54 Tarr, 35 Harv J L & Pub Pol at 646–47 (cited in note 53).

55 See id at 647 (describing the summoning of justices in Rhode Island in response to a ruling invalidating a law).

56 See id at 647–48 (describing "ripper bills" that eliminated judges' positions or courts).

57 Id at 648.

Paradoxically, it was the adoption of partisan elections to replace the system of appointment that moved states closer to the federal model of judicial branch independence and accountability to the people's will as embodied in state constitutions. The conventional historical account of the shift from appointments to partisan elections is that it was designed to weaken the power of judges in the era of President Andrew Jackson, during which distrust of unaccountable exercises of power was particularly strong.[58] But given the highly dependent position of state judges prior to the Jacksonian era, that interpretation is not particularly plausible.

Instead, as recent scholars have shown, the purpose underlying the adoption of partisan elections was the exact opposite of that suggested by the conventional account: they were intended to strengthen rather than weaken judges.[59] Partisan elections were adopted in the period after the Jacksonian era when popular distrust was directed toward legislatures who were seen as corrupt and the source of bad policies that led to two economic panics in a three-year period in the 1840s.[60] Members of state constitutional conventions sought to establish the courts as a check on legislative behavior.[61] The system of legislative appointment and exercises of removal authority had prevented the court from checking legislative actions even when these actions ran afoul of state constitutions.[62] Reformers therefore adopted

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[58] See Shugerman, 123 Harv L Rev at 1065–66 (cited in note 16) (describing the conventional historical account).

[59] See, for example, id at 1066 (noting that the adoption of judicial elections from 1846 to 1853 was part of a movement to strengthen judges); Hannsen, 33 J Legal Stud at 447–48 (cited in note 16) ("In brief, what was desired by the reformers was an independent court."); Nelson, 37 Am J Legal Hist at 203 (cited in note 16) ("[R]eformers wanted to curtail the powers of legislatures."); Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 1984 Am Bar Found Rsrch J 345, 348 ("[J]udicial reformers believed that the democratic goal of popular accountability and the professional goal of an able, powerful judiciary were reciprocal and reinforcing.").

[60] See Shugerman, 123 Harv L Rev at 1076–80 (cited in note 16) (describing how attitudes toward the legislatures changed in response to economic crises in the late 1830s that led to fiscal crises in the 1840s); Hanssen, 33 J Legal Stud at 448 (cited in note 51) ("[W]idespread replacement of legislative and gubernatorial appointment of state judges by partisan judicial elections was motivated by the rising perception of a need for an effective third-party enforcer to monitor the actions of state legislatures—elected representatives had been shown to be less faithful agents than anticipated.").

[61] See Shugerman, 123 Harv L Rev at 1085–90 (cited in note 16); Hanssen, 33 J Legal Stud at 446 (cited in note 51).

[62] See Shugerman, 123 Harv L Rev at 1068 (cited in note 16) ("[T]he explicit purpose of judicial elections was to bolster judicial power and to propel the courts toward voiding more statutes [as inconsistent with the state constitution]."). See also Nelson, 37

partisan judicial elections to give courts independence from the legislature.

Contrary to the suggestion of Bruhl and Leib, partisan judicial elections, unlike elections to other political offices, were not adopted to make judges accountable to current popular preferences but instead to insulate judges from legislative power. This conclusion is supported by the legislative histories underlying the adoption of partisan elections and the way that the elections were structured.[63] It is also supported by the logic that the judiciary would have been entirely redundant to the executive and legislative branches. The adopters of partisan elections intended for state judges, like their federal appointed counterpart, to be accountable to the people's will as embodied in state constitutions, and to use those constitutions to check legislative power. Judicial independence from the legislature through a separate base of power in the people provided state judges with the means to be accountable to the people in this way.[64]

From the perspective of judicial branch independence and accountability to the long-term will of the people, the state adoption of partisan elections marked a convergence with the federal model. A reasonable question raised by this account is why the states did not simply adopt the federal model. The answer is simple: most of the states already had been working from something analogous to the federal model of selection.[65] Prior to the shift to partisan elections, most states maintained systems of appointment with tenure for "good behavior." But there is quite a bit of flexibility in how political actors can interpret "good behavior."

Am J Legal Hist at 203 (cited in note 16) (arguing that reformers "wanted to check legislatures precisely because the legislatures were *not* reliably majoritarian").

63 See Shugerman, 123 Harv L Rev at 1088–91 (cited in note 16) (describing the concerns of some opponents that judicial elections would lead judges to be responsive to temporary passions and the response of proponents of judicial elections who "did not envision a passive judiciary that would defer to 'the people' "); Hanssen, 33 J Legal Stud at 446 (cited in note 51) ("[W]hile Jacksonian reformers wished to make policy more responsive to the public will, court reformers were primarily intersted in protecting courts from legislatures."); Nelson, 37 Am J Legal Hist at 224 (cited in note 16) ("[T]he judiciary became elective not so much to permit the people to choose honest judges as to keep judges honest once they reached the bench."); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L J 623, 634 (2009) (describing the careful structuring to insulate state elected judges from excessive popular preference, including long terms in office, the staggering of elections, the prohibition on judges running for other elected offices, and holding elections by districts rather than statewide).

64 See Hannsen, 33 J Legal Stud at 447 (cited in note 16) ("Judicial elections were intended, first and foremost, to provide judges with an independent base of power that would enable them to stand up to the legislative pressure.").

65 See, for example, Nelson, 37 Am J Legal Hist at 190 (cited in note 16).

Very few state legislatures had followed the stringent definition of "good behavior" as violable only through an impeachable offense that was represented in the federal precedent of Justice Chase's impeachment. The dilution of "good behavior" and the use and abuse of other means of removal meant that these states no longer saw an appointment system as a viable way to ensure judicial independence and accountability to the state constitution; they turned instead to partisan elections.

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In sum, the history behind the adoption of the federal and state selection models undermines the case for statutory interpretive divergence between federal appointed and state elected judges. The differences between the two selection processes mask important similarities in the principles of judicial branch independence and decisional independence from popular pressure the two systems were trying to achieve. States did not choose to elect judges to make judges' decisions more directly reflective of popular preferences, or to make them more like legislators. Rather, they merely wanted judges to have the institutional security necessary to enforce the constitution against the legislature. There is little reason in the historical record to think that elected judges should interpret statutes any differently than appointed judges.

In the next Section, I argue that subsequent state reforms of judicial elections further undermine the case for interpretive divergence. These reform efforts provide further proof that the system of electing judges was not intended to make state judiciaries accountable to the current and temporary passions of the people.

B. Reconsidering Accountability

Despite the historical purpose underlying the adoption of judicial elections, the case for interpretive divergence continues to be intuitively appealing. Subjecting judges to elections coheres with a basic understanding of the function of elections as ensuring accountability to the people's current preferences. This appears to be a clearly different form of accountability than that secured through the political appointment of judges and permanent tenure. However, this understanding essentializes accountability by assuming the answer to the question: What are elected judges accountable for?

The context surrounding the adoption of partisan elections and subsequent judicial reforms suggests that states sought to maintain a different form of accountability for judges than that premised on our conventional understanding of elections. In particular, the design choices of many states that maintained judicial elections demonstrate that the reformers did not intend for judges to be accountable to the current preferences of the people. Instead, state judicial reformers throughout the twentieth century designed state judicial elections to keep state judges accountable to the people through enforcement of state constitutions—a form of accountability consistent with the federal model.

Changes to the judicial selection process that occurred over the course of the twentieth century were implemented as a response to evolving conceptions of the judicial role from legal formalism to legal realism. These changes to the understanding of what judges do required reforms to the selection process to ensure that judges continued to be accountable for impartiality, fairness, and defense of their constitutions rather than to the interests represented in the cases they decided.

Opponents of the adoption of partisan judicial elections in the mid-nineteenth century expressed concern that partisan elections would make judges the tools of the people and would undermine impartiality and fairness as well as fidelity to the state constitution.[66] Despite these dissents, proponents of partisan judicial elections were confident that partisan elections would not have any of these effects. They believed that these elections would, in fact, secure better judges because they would be more independent from the political branches than they were under the system of appointments and tenure during good behavior.[67] This confidence arose from the leading view of the law and judging at the time many states switched from appointment processes to partisan elections in the mid-nineteenth century—legal formalism.[68]

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66 See Shugerman, 123 Harv L Rev at 1088 (cited in note 16) (describing opposition to judicial elections).

67 See Hall, 1984 Am Bar Found Rsrch J at 348 (cited in note 59) (describing the elimination of party patronage, which undermined the legitimacy of the courts, as one of the justifications for the popular election of judges).

68 See Brian Z. Tamahana, *Beyond the Formalist-Realist Divide* 1 (2009) (describing the heyday of formalism as the period from the mid-nineteenth century to the early twentieth century).

According to legal formalism, the law was "autonomous, comprehensive, logically ordered, and determinate."[69] Judges therefore "engaged in pure mechanical deduction from this body of law to produce single correct outcomes."[70] The role of judges, in other words, was to mechanically apply the law to the facts of cases and decide them accordingly, without recourse to their personal ideologies or policy preferences. Influenced by the legal formalism of the time, the predominant concern of many of the participants in the state constitutional conventions was not that the ordinary case lent itself to a partisan outcome. But instead, the predominant worry was that fear of legislative removal had led judges to be derelict in their duty to mechanically apply the state constitution when the legislature overreached.[71] Partisan elections did not promise to correct this defect through the provision of judges responsive to the evolving preferences of the people, since that had nothing to do with judging under the formalist jurisprudential model. Rather, the assumption was that this form of selection would produce better quality judges who would not fear removal for simply doing their job—even presumably when case outcomes ran counter to current public preferences.

This formalist view of judging came under attack at the turn of the twentieth century from the school of sociological jurisprudence that served as the precursor to the legal realism school of the 1920s and 1930s. According to legal realists, the law was indeterminate and dependent for its application to certain facts on external influences such as the judge's personal values and ideology.[72] As elite acceptance of the legal realist conception of judging grew, reformers necessarily concluded that having politically accountable courts undermined judicial independence from popular pressure. Elected judges seen as influenced in their decisions by values external to the law would be expected to be accountable to the people in their exercise of discretion or face the possibility of removal in the next election.[73]

Thus, in the early twentieth century, legal realism implied a state model of a judge selected through partisan elections that

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69 Id.

70 Id. See also Kathryn Abrams, *Some Realism about Electoralism: Rethinking Judicial Campaign Finance*, 72 S Cal L Rev 505, 507 (describing legal formalism as "the notion that law operates as a complete and discrete system of rules from which the answers capable of resolving particular conflicts can be logically deduced").

71 See, for example, Nelson, 37 Am J Legal Hist at 196 (cited in note 16).

72 See Tamahana, *Beyond the Formalist-Realist Divide* at 3 (cited in note 68); Abrams, 72 S Cal L Rev at 507 (cited in note 70).

73 Hanssen, 33 J Legal Stud at 448–51 (cited in note 51).

demanded accountability to the current preferences of the people. At the federal level, in contrast, legal realism entailed a model of a federal judge appointed with permanent tenure who, for the most part, remained insulated from these types of political pressures. But rather than accept this apparent divergence between state and federal judges' structural incentives, state judicial reformers sought to readapt the state system and to maintain judicial independence and accountability to state constitutions, re-aligning it with the goals of the federal model—albeit using different means than the federal model. While the state judicial reformers were unable to reinstitute a system of political appointments with permanent tenure, over the course of the twentieth century they did enact reforms designed to insulate elected state judges from popular encroachments on their independence.

One such reform was the shift from partisan to nonpartisan elections in several states.[74] By removing partisan labels from judicial candidates during elections, the reformers deprived voters of the key piece of information that allowed voters to hold judges accountable for their decisions.[75] As a result, nonpartisan elections evolved into low-key, low-information, uncompetitive affairs that presumably lessened the pressure on judges to decide cases in accordance with current popular preferences.[76]

A second reform designed to insulate elected judges from popular pressures was the adoption of systems of merit selection of judges accompanied by subsequent retention elections.[77] In merit selection systems, a nominating commission identifies qualified judges and submits a list of candidates to the chief executive who chooses a nominee from the list.[78] After the judge has served for a certain period of time, usually less than five years, the voters are presented with a referendum on whether to

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74 See Hanssen, 33 J Legal Stud at 448–51 (cited in note 51).

75 See Richard R. Lau and David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 Am J Pol Sci 951, 953 (2001) (describing a candidate's party affiliation as perhaps "the most important political heuristic").

76 See Brandice Canes-Wrone and Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 Wis L Rev 21, 30 (describing the motivation underlying Progressive advocacy of nonpartisan elections as providing contests in which "professional qualifications, experience, and other merit-based criteria would become central"); Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 Ohio St L J 13, 27–28 (2003) (citing studies showing that prior to 1995, nonpartisan judicial elections were not particularly competitive).

77 See Hanssen, 33 J Legal Stud at 451–52 (cited in note 51) (describing the "merit plan"—appointment followed by a noncompetitive retention election).

78 See id at 452.

keep the judge.[79] This process came as close as any to taking the selection process completely out of the hands of the voters. Similar to nonpartisan elections, retention elections deprive voters of the key piece of information about party affiliation that voters ordinarily use as the most important heuristic to hold judges accountable for their decisions.[80] Going further, retention elections, by depriving the voters of even a choice between candidates, eliminate another mechanism for holding judges accountable to the people: an opponents' campaign that can bring to public light whether a judge's decision accords with popular preferences. Retention elections have therefore tended to be even more low-key, low-information, and uncompetitive than nonpartisan elections.[81]

Finally, state limits on campaign speech represented the final reform that limited the ability of voters to hold elected judges accountable for deciding cases in accord with popular preferences. Promulgated in Canon 7(B) of the American Bar Association Model Code of Judicial Conduct in 1972, candidates for judicial office were prohibited from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and from "announc[ing] [ ] views on disputed legal or political issues."[82] Only eleven states failed to adopt the canon—ten of these states either appointed judges or subjected them to merit selection (Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, and Virginia) while the eleventh state subjected judges to nonpartisan elections (Idaho).[83] Notably, every one of the states that subjected judges to partisan elections adopted Canon 7(B). Through these speech restrictions, states ensured that judges would not have to answer for the substance of their decisions during campaigns.

To summarize, insofar as the institutionalist argument overlooks the actual design of judicial elections, it overstates the case for interpretive divergence. The shift from partisan to nonpartisan elections, the adoption of state merit selection processes, and the limits on campaign speech were all efforts to bring the state judicial systems into line with the federal model in response to the rise of the legal realist views of judging. States sought to

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79 See id.

80 Philip L. Dubois, *The Significance of Voting Cues in State Supreme Court Elections*, 13 L & Socy Rev 757, 757 (1979).

81 See Baum, 64 Ohio St L J at 27–28 (cited in note 76).

82 Code of Judicial Conduct Canon 7(B)(1)(c) (ABA 1972).

83 See James J. Alfini and Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 Ky L J 671, 675 n 14 (1989).

preserve a form of judicial accountability different from that which was expected of other elected officials. Rather than accountability to current popular preferences, states reformed judicial selection processes to ensure independence from these preferences and continued accountability to the state constitutions. The reforms of state judicial selection processes to insulate state judges, like their federal counterparts, from popular pressures thus further undermine the case for interpretive divergence.

C. Reconsidering the Current Effect of Diverging Selection Processes

This reexamination of the history of state judicial selection processes and the form of accountability that states sought to secure through reforms of the process undermines the case for interpretive divergence. However, there is still one remaining aspect of the Bruhl and Leib case for divergence that needs to be considered. A focal point for their institutionalist case for interpretive divergence rests on comparing the extremes from the current context of judicial elections. In particular, their case for divergence is based on a comparison between state judges subject to meaningful partisan elections on the one hand and federal judges appointed to the bench with permanent tenure on the other.[84] For Bruhl and Leib, the difference in the relative competencies of these two types of judges supports the case for interpretive divergence for three reasons. First, since state judges subject to partisan elections must attain the approval of the people to stay in office and federal judges need not, state judges have a much stronger incentive to discern public opinion.[85] These state judges are better able to gauge public opinion and "incorporate the community's current values" into the interpretation of statutes.[86] Second, because many state supreme court justices previously served in other public offices, they tend to have a greater "degree of political savvy and comprehension."[87] Finally, Bruhl and Leib suggest that these state judges are better equipped than their federal counterparts to "draw on other

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84 Bruhl and Leib, 79 U Chi L Rev at 1238 (cited in note 3) ("[T]o see if the argument for divergence works, we [ ] generally take 'unelected judges' to mean life-tenured judges on the federal model and 'elected judges' to mean judges subject to frequent, competitive partisan elections.").

85 Id at 1250 ("[E]lected judges have both more incentive and greater ability to make fruitful use of popular opinion.").

86 Id at 1250–51.

87 Id at 1250.

election results, their readings of the community's general sensibilities, and so forth" to guide their decision making.[88]

In this Part, I argue that although judicial elections have become more meaningful and state judges more responsive to popular preferences in the present, the case for interpretive divergence remains weak. The reasons are threefold. First, the case for interpretive divergence does not adequately account for the effect of special-interest pressure on judicial behavior. Such special-interest pressure is the source and the product of meaningful judicial elections, suggesting that such elections are a distorted way of learning about the people's will. Second, even in the context of meaningful judicial elections, statutory interpretation issues are unlikely to be the salient subject of elections. It is therefore doubtful that even state judges subject to meaningful elections will receive much popular guidance from these elections on how to interpret statutes. Finally, even assuming that state judges are able to tap into public opinion to guide their interpretive choices through means outside of elections, the case for divergence overlooks the empirically demonstrated capacity of federal appointed judges to be guided in their decision-making by popular preferences, even while relying on accepted modes of statutory interpretation.

Prior to 1990, meaningful judicial elections, which Bruhl and Leib define as those in which there are high levels of interest, information, and participation,[89] were extremely rare.[90] As discussed in the prior Section, this was by design. However, this began to change with the inauguration of what scholars describe as "new style" judicial elections that arose out of a confluence of three factors.[91] First, interest groups seeing the stakes in judicial decisions began to spend large sums of money to influence election outcomes. The success of corporate interests in changing the composition of supreme courts from pro-plaintiff to pro-business in states like Texas and Ohio in the 1980s inspired greater interest-group activity in other state judicial campaigns.[92] Second,

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88 Bruhl and Leib, 79 U Chi L Rev at 1251 (cited in note 3).

89 Id at 1252.

90 See Canes-Wrone and Clark, 2009 Wis L Rev at 30 (cited in note 76) (describing judicial elections historically as low information contests in which "voters approach the ballot box without a clear understanding of each candidate's qualifications or policy positions . . . , and media coverage of the contest is low").

91 See, for example, David E. Pozen, *The Irony of Judicial Elections*, 108 Colum L Rev 265, 267–68 (2008).

92 See David Schultz, Minnesota Republican Party v. White *and the Future of State Judicial Selection*, 69 Alb L Rev 985, 990–91 (describing the politicization of judicial

interest-group activity in the form of campaign expenditures translated into campaign advertisements that exposed voters to judicial candidates in a way not previously seen.[93]

Finally, in 1990 the American Bar Association, fearing a First Amendment challenge to the Model Code of Judicial Conduct prohibition on candidates announcing their views on disputed legal or political issues, replaced it with a weaker prohibition.[94] Shortly thereafter, twenty-five of thirty-four states repealed their prohibitions on candidate announcement of views on political and legal issues. In 2002, the US Supreme Court in *Republican Party of Minnesota v White*[95] held that Minnesota's announcement clause, which mirrored Canon 7(B) of the 1972 ABA Model Judicial Code, violated the First Amendment.[96] The remaining nine states were therefore forced to repeal their prohibitions on candidate announcement of disputed legal or political issues.[97] As one scholar lamented, after *White* candidates were now free "to emulate their counterparts in political branch races by committing themselves to positions on issues they are likely to decide as judges."[98]

Judicial elections, however, have not entirely gone the way of legislative and executive office elections. They still tend to be comparatively low-key, low-information affairs. It is clear, nonetheless, that with every election cycle more and more judicial elections, and particularly more and more partisan judicial elections, are meaningful. This is reflected in the increase in campaign spending, issue-based advertisements, and competitiveness

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contests in several states beginning with the California Supreme Court retention election of 1986); Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 Polit & Pol 315, 319–20 (2003) (describing the influence of interest-group pressure on transforming the Texas Supreme Court from a plaintiff-friendly institution into a probusiness institution); Marie Hojnacki and Lawrence Baum, *"New-Style" Judicial Campaigns and the Voters: Economic Issues and Union Members in Ohio*, 45 W Polit Q 921, 922–23 (1992) (describing the politicization of judicial elections in Ohio in the mid-1980s).

93 James Sample, et al, *The New Politics of Judicial Elections 2000–2009: Decade of Change* 8–9 (Brennan Center 2010), online at http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf (visited May 21, 2013) (describing the massive increase in money spent on television ads for judicial candidates from 2000–2009).

94 The 1990 revisions to the American Bar Associations Code of Judicial Conduct prohibited judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the Court." Model Code of Judicial Conduct, Canon 5A(3)(d)(ii) (ABA 1990).

95 536 US 765 (2002).

96 Id at 788.

97 See id at 774–75.

98 Geyh, 64 Ohio St L J at 64 (cited in note 30).

of judicial races.[99] But even in the context of meaningful judicial elections, the case for interpretive divergence depends on three critical and unfounded assumptions.

The first assumption is that these meaningful elections cause judges to be more responsive to democratic preferences. Bruhl and Leib acknowledge that judicial elections are vulnerable to the pathology of other elections—special-interest influence on election outcomes.[100] And recent studies confirm this concession. These studies show that an important result of the increase in meaningful judicial elections is an increase in cases decided in a way that is favorable to special-interest groups that contribute to judicial campaigns.[101] For example, Professor Joanna Shepherd recently found empirically that "contributions from interest groups are associated with increases in the probability that judges will vote for the litigant favored by those interest groups."[102] Professor Michael Kang and Shepherd later quantified the effect of campaign contributions, finding that a "$1,000,000 contribution [from a business group] would increase the average probability that a judge would vote for a business litigant in any case by 30%."[103] Unless we assume contrary to the teachings of public choice theory that special-interest groups represent the public interest,[104] these findings are troubling. To the extent that such evidence supports a case for interpretive divergence, it supports the imposition of greater constraints on elected judges interpreting statutes responsive to popular pressures since the primary source of these pressures is likely to be special-interest groups.

The second assumption is that meaningful elections provide elected judges with popular guidance on statutory interpretive questions. Leaving aside the influence of special-interest groups, it is not clear that this assumption is supportable even in these new style judicial elections where voters have greater information about judges' stances on the issues. Bruhl and Leib describe one particularly salient statutory interpretive question

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99 See Sample, et al, *The New Politics of Judicial Elections* at 6–8 (cited in note 93).

100 Bruhl and Leib, 79 U Chi L Rev at 1261–62 (cited in note 4).

101 See Shepherd, 58 Duke L J at 669–72 (cited in note 63); Michael S. Kang and Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 NYU L Rev 69, 98–105 (2011).

102 Shepherd, 58 Duke L J at 629 (cited in note 63).

103 Kang and Shepherd, 86 NYU L Rev at 99 (cited in note 101).

104 See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L J. 31, 35–44 (1991).

raised in New York state courts regarding gay adoptions,[105] but this is a bit of an outlier. Most statutory interpretive questions are not particularly salient and judicial elections tend not to focus on the issues that would provide judges with popular guidance. Instead, as one scholar explained, in the standard judicial election campaign "[e]very judge's campaign slogan, in advertising, and on billboards, is some variation of 'Tough on crime.' The liberal candidate is the one who advertises: 'Tough but fair.' "[106] While this is perhaps a slight exaggeration, the fact is that most judicial campaigns focus narrowly on particularly salient issues like crime and abortion.[107] Even economic-interest groups seeking to influence judicial elections tend to focus their advertising on issues like the candidate's record on the death penalty or views on abortion, issues completely unrelated to the interests they seek to advance.[108] While there are surely criminal and abortion cases that raise statutory interpretive questions, it is unlikely that judges obtain much guidance about how to address these questions from elections. Issue-based campaigns tend to rely on over-simplifications in which voters might learn whether a candidate favors the death penalty or not, is pro-life or pro-choice, or even is pro-business or pro-labor, and not much more.[109] The popular preferences derived from these campaigns may provide judges with guidance on capital punishment and sentencing, two areas in which empirical studies have shown elected state judges to be responsive to public opinion.[110] But the guidance that elections provide to judges on popular preferences regarding the interpretation of statutes is likely to be minimal.

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105 Bruhl and Leib, 79 U Chi L Rev at 1263–65 (cited in note 4).

106 Bert Brandenburg and Roy A. Schotland, *Justice in Peril: The Endangered Balance between Impartial Courts and Judicial Election Campaigns*, 21 Georgetown J Legal Ethics 1229, 1236 (2008) (citation omitted) (describing the effects of judicial elections on decision making), quoting Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S Cal L Rev 1985, 2000 (1988).

107 See Canes-Wrone and Clark, 2009 Wis L Rev at 36 (cited in note 76) (noting the growing importance of these issues in judicial campaigns).

108 See Baum, 64 Ohio St L J at 36 (cited in note 76) (noting that some interest groups highlight social issues in their opposition to judicial candidates).

109 See id at 38 (discussing the lack of information available to voters in judicial elections).

110 See Paul Brace and Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am J Polit Sci 360, 370 (2008) (finding "the death penalty and public support for that punishment played a significant role in shaping the overall ideology of state supreme courts that faced elections"); Gregory A. Huber and Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 Am J Polit Sci 247, 248 (2004) (finding "Pennsylvania trial court sentences for aggravated assault, rape, and robbery convictions . . . are significantly longer the closer the sentencing judge is to standing for reelection").

The third assumption is that even putting aside elections as a mechanism for transmitting public opinion, state elected judges are better able to discern popular preferences than federal appointed judges. Bruhl and Leib describe elected state judges as savvy politicians able to tap into broader community sensibilities through means outside of the electoral channels.[111] While the authors do not make the contrast explicit, the case for interpretive divergence would seem to depend on an account of federal appointed judges who are politically insulated and therefore disconnected from evolving public opinion. What this account ignores is the wealth of empirical evidence to the contrary. Rather than being the countermajoritarian institution of legal scholarly lore,[112] empirical social science has consistently shown that there is a statistically significant correlation between federal Supreme Court decisions and public opinion as measured by the preferences of the lawmaking institutions,[113] public opinion polls,[114] and aggregate measures of public mood.[115] How do we

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111 Bruhl and Leib, 79 U Chi L Rev at 1250 (cited in note 3).

112 Quite a bit of ink has been spilled advancing, criticizing, and testing Alexander Bickel's contention that because federal judges are unelected and unaccountable, they act in a countermajoritarian way when they invalidate laws enacted by the elected and accountable branches of government. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–23 (Yale 2d ed 1986).

113 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J Pub L 279, 285 (1957) (finding that with the occasional lag, Supreme Court decisions are consistent with the preferences of the lawmaking majority).

114 Thomas R. Marshall, *Public Opinion and the Supreme Court* 78–80 (Unwin Hyman 1988) (finding that a clear majority of Supreme Court decisions decided between 1935 and 1986 were consistent with public opinion as reflected in polling and that there is essentially no difference between the level of judicial and legislative responsiveness to public opinion).

115 Lee Epstein and Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U Pa J Const L 263, 280–81 (2010) (finding an association between the public's mood and the ideological measure of disaggregated Supreme Court decisions); Kevin T. McGuire and James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J Polit 1018, 1021 (2004) (finding that individual justices are responsive to changing patterns in public mood over time); Roy B. Flemming and B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 Am J Polit Sci 468, 485 (1997) (finding that individual justices are responsive to changes in public mood); William Mishler and Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J Polit 169, 189–90 (1996) (finding significant correlation between public mood and the voting records of moderate justices but not liberal and conservative justices); Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 Polit Rsrch Q 61, 72 (1995) (finding strong linkages between public mood and Supreme Court decisions in the areas of criminal procedure and civil rights); James A. Stimson, Michael B. Mackuen, and Robert S. Erikson, *Dynamic Representation*, 89 Am Polit Sci Rev 543, 555 (finding significant movement in court policy in response to changes in public opinion as measured by public

make sense of these findings? Or to frame the question differently, what is the mechanism of transmission for public opinion to appointed judges?

The studies consistently show that one mechanism by which the Supreme Court is kept attuned to popular preferences is the nomination and confirmation process.[116] Like state elections, this used to be low-key, low-information affairs. In fact, it was not until the 1950s that Supreme Court nominees were subject to a Senate hearing.[117] But by the time of Judge Robert Bork's failed nomination to the Supreme Court in 1987, the process turned into a highly politicized affair in which past issue stances of nominees were subject to heavy Senate and media scrutiny.[118] Just as meaningful elections may have contributed to greater responsiveness of state judges to particularly salient issues, there is evidence that the meaningful nomination process has had the same effect.

But it is not only the replacement of justices and changes to the composition of the Court that scholars have determined contribute to the responsiveness of the federal Supreme Court to public opinion. Several studies have shown a direct effect of public opinion on judicial behavior without proving the particular pathway of influence.[119] Judicial political adjustments and attitude changes are currently the leading candidates. According to

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mood); William Mishler and Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 Am Polit Sci Rev 87, 96 (1993) (finding that the aggregate partisan orientation of case outcomes decided each year between 1956 and 1989 is consistent with a measure of public mood over that period of time with a moderate lag of about five years). But see generally Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 Sup Ct Rev 103 (providing a general criticism of what he labels the majoritarian thesis); Helmut Norpoth and Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 Am Polit Sci Rev 711, 716 (1994) (finding that when "the president is elected on the basis of issues orthogonal to those decided by the Court or in the absence of voter concern for ideological issues," the Supreme Court is not responsive to public mood).

116 Robert Dahl first proved the replacement hypothesis, which suggests that Supreme Court responsiveness to the public opinion arises from changes to the composition of the Court. See Dahl, 6 J Pub L at 293 (cited in note 113). There is now a near scholarly consensus that the replacement of justices contributes to the responsiveness of the Court to public opinion. See, for example, Epstein and Martin, 13 U Pa J Const L at 270 (cited in note 115) ("Virtually all the studies demonstrate an *indirect* effect of public opinion via the appointments process.").

117 Vicky C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Georgetown L J 965, 982 (2007).

118 See Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 BU L Rev 273, 311–16 (1989) (describing the politicization nature of Judge Robert Bork's confirmation process).

119 See note 115.

the political adjustment hypothesis, justices recognize that the continued legitimacy and power of the Court are dependent on public approval of its judgments.[120] Accounting for this, justices are "careful not to jeopardize their collective authority or legitimacy by deviating too far or for too long from strongly held views on fundamental issues."[121] Other scholars relying on the attitudinal change hypothesis have argued that the responsiveness of justices to public opinion is a product of changes in public mood that influence the personal views of judges.[122] This argument builds on the early insights of then-Judge Benjamin Cardozo who explained, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by."[123] Judges, in other words, even those who are politically insulated through permanent tenure, are a part of "the people" too. Regardless of the ambiguity about the pathways of influence, the finding that federal judges are directly responsive to public opinion strongly undercuts the case for interpretive divergence based on the supposed relative advantage of state elected judges in discerning this opinion.

Thus, even in the context of the new style of more meaningful judicial elections in the states, the case for statutory interpretive divergence between state elected and federal appointed judges continues to be rather weak. Such elections have made state judges particularly vulnerable to special-interest pressures, thus undermining their democratizing effect. In addition, it is not clear that meaningful judicial elections provide judges with much guidance at all on most statutory interpretive questions. Finally, empirical evidence suggests that despite the lack of an electoral mechanism, federal judges tend to be much more responsive to public opinion than the case for interpretive divergence suggests. While no one has yet conducted an empirical study comparing the relative responsiveness of state elected judges and federal appointed judges, even if a difference in responsiveness were to be

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[120] See, for example, Mishler and Sheehan, 58 J Polit at 173–74 (cited in note 114). See also Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 374–75 (Farrar 2010) (arguing that Supreme Court justices care about public opinion because "they do not have much of a choice . . . if they care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined by politics").

[121] Mishler and Sheehan, 58 J Polit at 174 (cited in note 115).

[122] See Micheal W. Giles, Bethany Blackstone, and Richard L. Vining Jr, *The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making*, 70 J Polit 293, 295 (2008).

[123] Id, quoting Benjamin Cardozo, *The Nature of the Judicial Process* 67–78 (Yale 1921).

found, it is not clear that it would support a case for interpretive divergence.

CONCLUSION

Despite the efforts of Justice Sandra Day O'Connor and other opponents of judicial elections,[124] Bruhl and Leib are right to assert that judicial elections are not going away anytime soon. In 1907, state supreme court justices in only eleven states were insulated from elections. Over a century later, that number has only risen to twelve.[125] Rather than authoring scholarship criticizing and defending judicial elections, we should engage the critical question of what these elections mean for the judicial enterprise. Bruhl and Leib and others have started to lead the way. However, with respect to statutory interpretation, I do not think the existence of judicial elections favors the form of interpretive divergence between state elected and federal appointed judges suggested by Bruhl and Leib. The history, design, and function of state and federal selection processes simply do not support the case.

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[124] See, for example, Sandra Day O'Connor, *Take Justice off the Ballot*, NY Times A9 (May 23, 2010).

[125] See Devins and Mansker, 13 U Pa J Const L at 463–64 (cited in note 3).