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## Countering the Majoritarian Difficulty

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## INTRODUCTION

LIKE it or not, elected judges are here to stay. For over a century, the great majority of states have chosen to select or retain judges through popular elections.<sup>1</sup> The public heartily approves of the practice: eighty percent of those polled favor filling judgeships through elections.<sup>2</sup> Although a number of states that once appointed judges have now switched to selecting judges by ballot, it is extremely rare for a state that elects its judges to revert to selecting judges by appointment. Even the most vociferous opponents of elective judiciaries concede that the thirty-eight states that rely on elections to select or retain some or all of their judges are unlikely to abandon the practice anytime soon.<sup>3</sup>

Nonetheless, legal academics are nearly unanimous in their critique of elective judiciaries.<sup>4</sup> These scholars argue that subjecting judges to peri-

<sup>1</sup> See American Judicature Society, *Methods of Judicial Selection*, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm) (last visited Mar. 15, 2010) (providing a detailed description of each state's method of selecting judges). States employ four primary methods of selecting judges: 1) appointment by a commission or one or both of the state's political branches, either for a life term (usually with a set retirement age) or subject to periodic reappointment; 2) merit-based selection by a commission followed by retention elections in which the incumbent runs unopposed and the voters can only choose to vote "yes" or "no" on whether the incumbent should remain in office (the so-called Missouri plan); 3) partisan elections, in which party affiliation is listed on the ballot; 4) and nonpartisan elections, in which judicial candidates' party affiliations are not listed. It may be difficult to classify states precisely, however, because of differences in how these four basic categories of selection operate across the states. Selection methods also often differ across levels of the judiciary within states, which sometimes use one method of selection for trial judges and another for appellate judges. In this Article, references to "elected judges" include all judges who must undergo an election to remain in office, whether that election is a partisan election, non-partisan election, or retention election.

<sup>2</sup> Kermit L. Hall, *Judicial Independence and the Majoritarian Difficulty*, in *The Judicial Branch* 60, 73 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

<sup>3</sup> See, e.g., Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates are Unconstitutional*, 35 *Ind. L. Rev.* 735, 736 (2002) ("[T]here is no indication that states with such systems for choosing and retaining judges are likely to abandon them."); Aman McLeod, *If at First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 *W. Va. L. Rev.* 499, 523 (2005) (observing that aside from Virginia in 1869, no state that elects its judges has ever entirely abandoned judicial elections); David E. Pozen, *The Irony of Judicial Elections*, 108 *Colum. L. Rev.* 265, 270 (2008) ("No matter what their critics might say, judicial elections are unlikely to be abandoned in the foreseeable future.").

<sup>4</sup> See, e.g., Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 *Ohio St. L.J.* 13, 41 (2003) ("There is widespread dissatisfaction today with the operation of judicial elections."); Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 *S. Cal. L. Rev.* 1985, 1988 (1988) ("I strongly favor the abolition of judicial elections in all states."); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 *Ohio St. L.J.* 43, 44 (2003); Hall, *supra* note 2, at 73 ("There is enormous skepticism among the modern profes-

odic elections raises numerous concerns, ranging from the unseemliness of judicial campaigns to the potential for judicial corruption.<sup>5</sup> The drum-beat of disapproval from the academic community<sup>6</sup>—and now several prominent jurists as well<sup>7</sup>—has reached a crescendo over the past few years, at the same time that judicial elections have morphed from quiet, low-key affairs into competitive, expensive, and high-profile events.

Perhaps the most intractable problem with elected judiciaries is what Professor Steven Croley termed the “majoritarian difficulty”—shorthand for the likelihood that elected judges will apply the law so as to please their constituents, even when doing so may undermine the rule of law and compromise state and federal constitutional rights.<sup>8</sup> At the extreme, some small proportion of elected judges may grossly misapply the law

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sional bar and many court reformers about the wisdom of electing judges.”); Pozen, *supra* note 3, at 278 & n.53 (noting the widespread academic “disdain” for elective judiciaries). Indeed, one expert on judicial elections declared that “more sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of American law.” Roy A. Schotland, Comment, 61 *Law & Contemp. Probs.* 149, 150 (1998).

Many judges have also criticized the practice. See, e.g., Justice John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida, Aug. 3, 1996, 12 *St. John’s J. Legal Comment.* 21, 30–31 (1996) (criticizing the practice of electing judges); Justice Sandra Day O’Connor, How to Save Our Courts, *Parade*, Feb. 24, 2008, available at [http://www.parade.com/articles/editions/2008/edition\\_02-24-2008/Courts\\_O\\_Connor](http://www.parade.com/articles/editions/2008/edition_02-24-2008/Courts_O_Connor) (criticizing judicial elections as undermining judicial independence); Chief Justice Margaret H. Marshall, President of the Conference of Chief Justices, Remarks to the American Bar Association House of Delegates 5–6 (Feb. 16, 2009) (transcript available at <http://archives.lib.state.ma.us/bitstream/handle/2452/37538/ocn294909900-2009.pdf?sequence=1>) (referring to judicial elections as the “single greatest threat to judicial independence”). At least a couple of political scientists, however, have written in favor of judicial elections. See, e.g., Chris W. Bonneau & Melinda Gann Hall, *In Defense of Judicial Elections* (2009).

<sup>5</sup> See *supra* note 4.

<sup>6</sup> See *infra* notes 35–41 and accompanying text.

<sup>7</sup> Several of these issues were on full display in *Caperton v. A.T. Massey Coal Co.*, a case before the United States Supreme Court during the 2008 term, in which the Court held that due process required an elected West Virginia Supreme Court justice to recuse himself from a case involving a company whose Chief Executive Officer (“CEO”) had raised millions of dollars to support the justice’s election. 129 S. Ct. 2252, 2257, 2262–65 (2009). The majority opinion declared that in light of the “extraordinary” facts of the case—the CEO’s role in raising \$3 million to aid in the justice’s election while the CEO’s company was appealing its case to the West Virginia Supreme Court and the newly-elected justice’s deciding vote in the company’s favor—the public could reasonably doubt the justice’s ability to serve as an impartial decision maker in the case. *Id.* at 2265.

<sup>8</sup> Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. Chi. L. Rev.* 689, 694 (1995). As evident from its name, the “majoritarian difficulty” is the flipside of the “countermajoritarian difficulty” that has so deeply occupied scholars of the federal courts. See *infra* notes 16–18 and accompanying text (contrasting the majoritarian and countermajoritarian difficulties).

to benefit friends and disadvantage foes. The more likely eventuality is that elected judges will succumb to the pressure to decide close cases as the majority of the electorate would prefer, rather than as the law requires. For example, they might impose an undeservedly harsh sentence on a criminal defendant or find an out-of-state corporation liable to a class of state citizens, despite weak evidence of wrongdoing. The prospect of an upcoming election is bound to affect a judge choosing between two plausible readings of an ambiguous statute, or deciding whether to apply a constitutional right to novel circumstances, or determining whether a common law claim should be expanded beyond its previously established parameters—especially when one of the two possible outcomes would be unpopular with the electorate.<sup>9</sup>

This Article does not seek to join in the longstanding debate over whether there is parity between federal and state courts. The parity issue is usually framed as whether “state courts are equal to federal courts in their ability and willingness to protect federal rights”<sup>10</sup>—a question that is likely unanswerable<sup>11</sup> and is, in any case, only indirectly related to the majoritarian difficulty. It is certainly true that majoritarian pressures may influence elected judges to underprotect claims of federal rights, and thus are a factor often discussed in the parity debates. At other times, however, the same pressures might push states to *overprotect* certain federal rights, at least for some groups, some of the time. For example, an elected judge might feel pressure to expand First Amendment protection when applying it to the speech of a popular public figure. Moreover, majoritarian pressures may affect state judges in cases that

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<sup>9</sup> See Chemerinsky, *supra* note 4, at 1988 (“The paramount function of courts is to protect social minorities and individual rights. But judges cannot be expected to perform this counter-majoritarian function if their ability to keep their prestigious, highly sought after positions depends on popular approval of their rulings.”); Vicki C. Jackson, Packages of Judicial Independence: The Selection and Tenure of Article III Judges, 95 Geo. L.J. 965, 967 (2007) (“Judges who must stand for frequent election or reappointment have more reason to be concerned that making an unpopular decision will harm their livelihood than do judges appointed under Article III.”); Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1127–28 (1977) (describing how majoritarian pressures prevent elected state judges from vindicating constitutional rights). For a discussion of the empirical evidence supporting the conclusion that elections affect judicial decision-making, see *infra* notes 16–18 and accompanying text.

<sup>10</sup> Erwin Chemerinsky, *Federal Jurisdiction* 36 (5th ed. 2007).

<sup>11</sup> See, e.g., Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 256 (1988) (“[F]ocusing on parity is futile because ultimately the issue of parity is an empirical question for which no empirical measure is possible.”).

have no bearing on either federal law or individual rights. Thus, while the majoritarian difficulty undoubtedly is relevant to the parity debate, it does not go directly to the question whether state courts are less protective of federal rights than federal courts.

Allowing judicial decisions to be governed by public opinion strikes many as the very antithesis of judging, yet it is the inevitable result of selecting and retaining judges by popular vote. The majoritarian difficulty is not simply an unfortunate byproduct of judicial elections; it is intrinsic to voting judges into office.<sup>12</sup> Elected judges are *supposed* to keep constituent preferences in mind, for why else would they be required to obtain periodic approval from the majority of the electorate? Campaign finance reform could minimize the potential for judicial corruption, and codes of conduct could help to enforce civility in campaigning, but no change to the electoral process could alter the very purpose of elections: to hold judges accountable to the voters for their decisions. Thus, critics of elected judiciaries conclude that the only way to eliminate the majoritarian difficulty is to do away with elections themselves.<sup>13</sup>

This Article posits a third way. Majoritarian pressures on elected state court judges can be checked, or at least tempered, by appointed federal judges who exercise oversight, supply guidance, and provide political cover for their elected state court counterparts. Federal courts have a long tradition of protecting federal rights from unfriendly state courts, but the role this Article suggests for them is somewhat different, and arguably more effective. When state judges openly flout federal law, the only remedy is outright reversal by a federal court. Elected state court judges, however, are not necessarily hostile to federal claims of right; rather, they are under constant pressure to avoid issuing rulings that may be used against them in future campaigns. Some of these elected judges might even welcome federal judicial oversight because the existence of federal precedent and the threat of reversal provide good reason for them to avoid succumbing to majoritarian pressures to reach specific outcomes in specific cases. Furthermore, the federal courts provide another forum for those litigants who can frame their cases to access federal courts (including cases raising federal questions, involving state law claims that are supplemental to a federal claim, or arising between par-

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<sup>12</sup> Pozen, *supra* note 3, at 292 (stating that the majoritarian difficulty “seems inherent to, if not the purpose of, an elective judiciary”).

<sup>13</sup> See *supra* note 4.

ties of diverse citizenship) and thus provide an escape route for those who no longer trust state judiciaries to interpret federal or state law fairly. Through this extensive interaction, federal courts are in a position to counteract majoritarian influences on state courts, and thereby mitigate the most troubling aspects of the majoritarian difficulty.

Academics typically discuss the influence of elections on judicial outcomes as if state courts operated in a vacuum, without acknowledging the jurisdictional redundancies and cooperation between state and federal judicial systems that affect all state court decision-making. Although a few scholars have noted that these dual court systems have the potential to offset each other's weaknesses,<sup>14</sup> none have engaged in a detailed analysis of how federal courts might counter majoritarian pressures on elected state court judges. This Article fills that gap by describing how jurisdictional redundancy, fear of reversal, and a culture of deference to federal judicial pronouncements on questions of federal law can all serve to diminish the influence of popular opinion on elected judges' decision-making.

This Article approaches the issue from three perspectives: theoretical, empirical, and prescriptive. In theory, the regular interactions between an elected judiciary and an appointed judiciary should moderate the majoritarian difficulty by affecting the choices judges and litigants will make. Elected judges will alter their decisions in anticipation of direct federal review, and will be influenced by federal courts' views on federal and state law. Significantly, litigants themselves can also frame cases so as to get into federal court, and they are likely to do so when involved in a case in which majority preferences might influence an elected state judge to rule against them.

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<sup>14</sup> Croley, *supra* note 8, at 781 ("One can always argue that no matter how accountable state judges are, the non-elective federal judiciary is a sufficient ballast for constitutionalism."); Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 629 & n.303 (2004) (questioning the significance of the majoritarian difficulty in light of the fact that elected state court judges are bound by the Supremacy Clause to uphold federal law and are subject to federal court review); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1226–35 (2004) (arguing that cases implicating both state and federal interests should be litigated in both court systems simultaneously through mechanisms such as certification, abstention, and collateral review); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 301 (2005) (noting that if one of the two court systems fails to protect rights, the other can intervene to do so).



Assuming that this theory translates into practice, there should be a measurable difference in the federal courts' interactions with elected judges as compared to appointed judges. For example, citizens in states with elected judiciaries should seek out federal courts more often than citizens in states with appointed judiciaries. The Supreme Court should review and reverse elected judiciaries more often than appointed judiciaries, and federal courts should grant habeas petitions from convictions before elected judges more often than convictions before appointed judges. This Article gathers the available data and finds that federal courts do indeed appear to play a more active role in states that elect their judges but that they are hampered in doing so by the absence of any explicit policy establishing the need for greater scrutiny of these courts.

This Article concludes on a prescriptive note, advocating that federal courts take judicial selection methods into account in their jurisdictional choices so that they can better serve as counterweights to majoritarian pressures on state courts. The Supreme Court has never incorporated state judicial selection methods into its certiorari criteria, nor have the standards for granting habeas relief turned on the elected versus appointed status of state judges. Likewise, federal courts do not take judicial selection into account when deciding whether to abstain and allow the case to be brought in state court, or whether to certify questions of state law to state courts. And even though district courts have considerable discretion about whether to retain supplemental jurisdiction over state law claims, they do not consider the relevant state's method of judicial selection when making that determination. Because states with elected judiciaries pose special problems for certain litigants, particularly in high profile cases arising shortly before the presiding judge's election, federal courts should make themselves more available in such cases through discretionary use of supplemental jurisdiction, habeas review, and Supreme Court oversight. They should also be hesitant to invite elected state judges into such cases through abstention and certification. In short, if states are not interested in addressing the majoritarian difficulty, federal courts have a great deal of leeway to deal with the problem themselves.

This Article proceeds as follows: Part I defines the majoritarian difficulty and describes how heightened public awareness of judicial elections has increased the influence of public opinion on judicial decisions. Part II briefly describes the jurisdictional oversight and redundancy built into the state and federal judicial systems. Part III argues that interac-

tions between the state and federal judiciaries can sometimes negate, and other times moderate, the effects of majoritarian pressures on elected judges. Part IV examines the empirical data, which suggests that federal courts are more involved in overseeing elected state court judges than their appointed counterparts. Part V contends that federal courts should take into account state judicial selection methods when making jurisdictional choices, thereby taking a more active role in mediating the majoritarian difficulty.

This Article concludes by suggesting that the benefits may go both ways. It may be possible to find a more perfect balance between the majoritarian elective judiciaries and the countermajoritarian appointed judiciaries, thereby alleviating the concerns raised by both institutions. Elected state court judges would occupy themselves with what they do best: making common law, developing regulatory policy, interpreting ambiguous state statutes and regulations, and issuing advisory opinions, with majority preferences guiding their choices.<sup>15</sup> At the same time, appointed federal judges would be available to protect unpopular minorities, check the tyranny of the majority, and guard against bias and corruption in the state judiciary. In short, by tinkering with the relationship between federal and state courts, we can arrive at a system in which elected judges serve as primary decision makers in areas where public opinion has a legitimate role to play, while appointed federal judges serve to curb majoritarian excesses in those areas where electoral pressures have the potential to undermine the rule of law.

### I. THE MAJORITARIAN DIFFICULTY

For many years now, legal scholars have struggled to justify the power wielded by unelected federal judges in a democracy—the so-called “countermajoritarian difficulty.”<sup>16</sup> As Professor Steven Croley pointed out, however, the countermajoritarian difficulty is mirrored by the “ma-

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<sup>15</sup> Cf. Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1844–76 (2001) (describing how the judicial practice in some states differs from the federal model in that state courts engage in a range of activities beyond adjudicating “cases” and “controversies”).

<sup>16</sup> Alexander Bickel coined the phrase “countermajoritarian difficulty.” Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (2d ed. 1986). The problem has been thoroughly examined in thousands of books and law review articles. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, Part Five, 112 Yale L.J. 153, 155 & n.5 (2002).

majoritarian difficulty” posed by the power of elected state court judges in a society committed to restricting majority impulses through both a written constitution and adherence to the rule of law.<sup>17</sup> As Croley puts it, the countermajoritarian difficulty asks “how unelected/unaccountable judges can be justified in a regime committed to democracy” while the majoritarian difficulty asks “how elected/accountable judges can be justified in a regime committed to constitutionalism.”<sup>18</sup> Just as the appointed judge’s power to strike down decisions made by democratically elected branches of government is in conflict with the principles of a democracy, so too is the power of the elected judge hard to reconcile with the Constitution’s limits on democracy.

*A. The Uneasy Role of the Judge in a Constitutional Democracy*

Some scholars claim that the term “constitutional democracy” is an oxymoron.<sup>19</sup> In a democracy, the power that the government exercises over its people derives from, and is legitimated by, the fact that a majority of citizens support that government and the actions it takes.<sup>20</sup> Constitutionalism may be viewed as the antithesis of democracy because the very existence of a constitution presumes that some choices are to be withheld from the majority.<sup>21</sup> For example, the U.S. Constitution not only establishes governmental structures, but also defines a set of rights that cannot be taken from the people, and requires that the laws be applied impartially and equally to all citizens. Changing these norms requires changing the text of the Constitution itself, and thus is beyond the control of a simple majority.

Scholars struggling to reconcile democracy with constitutionalism (and with an appointed judiciary) contend that a democracy should not be defined as allowing a fleeting majority to make decisions at any given

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<sup>17</sup> See, e.g., Bickel, *supra* note 16, at 16–23.

<sup>18</sup> Croley, *supra* note 8, at 694.

<sup>19</sup> Stephen Holmes, Precommitments and the Paradox of Democracy, in *Constitutionalism and Democracy* 195, 197 (Jon Elster & Rune Slagstad eds., 1988).

<sup>20</sup> Robert A. Dahl, A Preface to Democratic Theory 34 (1956) (“Running through the whole history of democratic theories is the identification of ‘democracy’ with political equality, popular sovereignty, and rule by majorities.”).

<sup>21</sup> See, e.g., Mark Tushnet, Dialogic Judicial Review, 61 *Ark. L. Rev.* 205, 206 (2008) (describing “the inevitable tension within democratic constitutionalism between its commitment to popular self-government and its commitment to limitations on what popular majorities can do”).

moment in time.<sup>22</sup> Rather, a democratic society can legitimately establish institutional structures that curb the “impassioned majority” in favor of the more thoughtful and longer-lasting “enlightened majority.”<sup>23</sup> By mediating popular preferences through institutional structures, a constitutional democracy ensures that majority preferences are realized, but only after periods of deliberation and reflection. Likewise, constitutional scholars point out that constitutionalism does not require rigid adherence to an ancient text, but rather establishes a set of general principles that can be interpreted and applied to please modern majorities.<sup>24</sup>

Despite these qualifications of both democracy and constitutionalism, the conflict between them remains. The fact that no society is currently governed purely by transitory majorities does not necessarily justify relying on a constitution to bar majorities from altering fundamental norms, such as the structures of government or the substance of rights. And if popular constitutionalists are correct that, as a descriptive matter, the U.S. Constitution is interpreted and applied according to majority preferences, then constitutionalism itself has failed. The whole point of democracy is to allow the majority to control policymaking; one of the primary purposes of a constitution is to take some decisions away from the majority. At bottom, these two basic principles are irreconcilable, even if in practice each is modified in an effort to reconcile it with the other.

The tensions inherent in democratic constitutionalism are at the heart of the disagreements over the judicial role in the United States. The American political system sends mixed messages to its judges. Judges are to be independent of the political branches and popular opinion, yet

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<sup>22</sup> See, e.g., Bruce A. Ackerman, *Neo-Federalism?*, in *Constitutionalism and Democracy*, supra note 19, at 153, 168–74 (rejecting a conception of democracy premised on pure majoritarianism); Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 1–38 (1996) (same).

<sup>23</sup> Croley, supra note 8, at 705.

<sup>24</sup> See, e.g., Bruce A. Ackerman, *1 We the People: Foundations* 19–22 (1991) (describing how social movements can effectuate constitutional change); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 8 (2004) (“Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution.”); Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 285 (1957) (noting that the Supreme Court’s decisions are never far out of line with the views of the political branches of government); Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, 586 (1993) (asserting that “courts do not trump majority will, or remain unaccountable to majority sentiment, nearly to the extent usually depicted”).

at the same time deferential to democratic institutions and majority preferences. This conflict between judicial independence and accountability, between standing up to the majority and catering to it, is a reflection of the dissonance created by an adherence to constitutionalism in a democratic society.<sup>25</sup>

Speaking of appointed federal judges, Professor Alexander Bickel declared that “judicial review is undemocratic” because “it thwarts the will of representatives of the actual people of the here and now; it exercises control, not [o]n behalf of the prevailing majority, but against it.”<sup>26</sup> Though many have tried, the power of appointed judges to fill gaps in statutes or regulations, reconcile conflicting statutory schemes, interpret ambiguous laws, or strike down legislative enactments is difficult to square with democratic theory.<sup>27</sup> Yet elected judges are equally out of place in a constitutional democracy. When judges are selected by popular vote and must stand periodically for reelection, they will inevitably be responsive to majority preferences to an extent that appointed, life-tenured judges will not.<sup>28</sup> Such judges will no longer serve as a bulwark against the “tyranny of the majority”—a majority that might prefer at any given moment to eliminate constitutionally protected rights, mistreat unpopular groups (and unpopular individuals), and alter the basic constitutionally protected structures of government.<sup>29</sup> Furthermore, elective judiciaries pose a risk to the rule of law, which is compromised whenever a judge’s ruling is influenced by majority preferences. If a statute

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<sup>25</sup> Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. Cal. L. Rev. 1571, 1571–73 (1988). But see Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 Ohio St. L.J. 323, 324–25 (2003) (arguing that judicial independence and accountability need not be viewed as “at war with each other,” but rather as “complementary concepts that can and should be regarded as allies”).

<sup>26</sup> Bickel, *supra* note 16, at 17.

<sup>27</sup> See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 11–12, 41 (1980); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 Cardozo L. Rev. 579, 594 (2005).

<sup>28</sup> See *infra* notes 31–36 for further discussion of the effect of elections on judicial decision-making.

<sup>29</sup> See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 803–04 (2002) (Ginsburg, J., dissenting) (arguing that judges perform a function “fundamentally different” from that of elected officials, because judges must “neutrally apply[] legal principles, and, when necessary, stand[] up to what is generally supreme in a democracy: the popular will”) (internal citation and quotation marks omitted); Schapiro, *supra* note 14, at 315 (noting that state court enforcement of state constitutional rights “has at times proved disappointing” and attributing the problem to the “electoral vulnerability” of state judges that “may distort the interpretive process”).

has two plausible readings, and the judge chooses the interpretation that leads to the result his constituents prefer *because* they would prefer it rather than because he thinks it the best reading, he has undermined the neutral, apolitical application of law that is the essence of impartial judging.<sup>30</sup> This, in a nutshell, is the majoritarian difficulty.

### *B. The Assumptions Underlying the Majoritarian Difficulty*

This Article is premised on the assumption that elected judges are more influenced by majority preferences than appointed judges. Yet some might question both whether elected judges are in fact instruments of majority will and whether appointed judges are truly insulated from public opinion. Judicial elections have historically been low salience events, with voters paying relatively little attention to the candidates and their voting records. Under such circumstances, elected judges may not have strong incentives to tailor their decisions to public opinion.<sup>31</sup> And even if voters are paying attention, they might choose candidates based on their reputation for fairness, impartiality, and willingness to follow the law, rather than on whether the outcome in each case was one the voter supported.<sup>32</sup> Moreover, political scientists have persuasively demonstrated that appointed federal judges are more attentive to public opinion than their insulated positions would seem to warrant.<sup>33</sup> Accordingly, elected and appointed judges might not be so far apart in the degree to which majority preferences affect their decisions.

We will not defend at great length this Article's assumption that elected judges are more responsive to majoritarian preferences than are appointed judges. Other scholars have devoted articles and books to

<sup>30</sup> See, e.g., Chemerinsky, *supra* note 4, at 1988 (“[T]he entire concept of the rule of law requires that judges decide cases based on their views of the legal merits, not based on what will please voters.”).

<sup>31</sup> See, e.g., Matthew J. Streb, *Judicial Elections: A Different Standard for the Rulemakers?*, in *Law and Election Politics: The Rules of the Game* 171 (Matthew J. Streb ed., 2005); Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* 185 (2006) (“Prior to the 1970s, judicial elections were sleepy events garnering little attention and involving relatively small sums of money.”); Pozen, *supra* note 3, at 266 (stating that until recently “judicial elections have been sleepy, low key affairs”) (internal quotation marks omitted).

<sup>32</sup> Moreover, public choice theory suggests that well-organized interest groups may have a greater effect on elected officials than diffuse majorities, and thus elected judges might be more attentive to this small subset of the population than to the majority as a whole—still a problem, of course, but not quite the same problem.

<sup>33</sup> See *infra* notes 61–62.

proving that point, and we direct skeptical readers to those sources.<sup>34</sup> Because that is the central assumption of the Article, however, we will briefly lay out the considerable evidence that judges subject to periodic elections decide cases in accordance with majority preferences more often than do judges who are appointed with life tenure.

Although it is true that judicial elections were once “sleepy, low key affairs,” in which the incumbent was rarely challenged and turnout was low, we have entered a “new era” in judicial elections in which voters pay far more attention to incumbents’ voting records.<sup>35</sup> More money is being raised and spent on judicial campaigns than ever before,<sup>36</sup> leading

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<sup>34</sup> See, e.g., Deborah Goldberg, Interest Group Participation in Judicial Elections, *in* *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections* 73, 91 (Matthew J. Streb ed., 2007) (describing the influence of special interest groups on elected judges); Ronald K.L. Collins et al., State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey, *Publius*, Summer 1986, at 141, 150–52 (finding a slower expansion of individual rights litigation in states that elect their judiciaries compared to those that appoint their judiciaries); Burt Neuborne, The Myth of Parity, 90 *Harv. L. Rev.* 1105, 1127–28 (1977) (describing how majoritarian pressures prevent elected state judges from vindicating constitutional rights); see also *id.* at 1116 n.45 (observing that those states that appoint judges and provide them with life tenure have been more “vigorous” protectors of individual rights); Joanna M. Shepherd, The Influence of Retention Politics on Judges’ Voting, 38 *J. Legal Stud.* 169, 169 (2009) (“The evidence supports the widespread belief that judges respond to political pressure in an effort to be reelected . . .”); Alexander Tabarrok & Eric Helland, Court Politics: The Political Economy of Tort Awards, 42 *J.L. & Econ.* 157, 186 (1999) (finding that elected judges are more likely than appointed judges to redistribute wealth from out-of-state businesses to in-state plaintiffs); Robert F. Utter, State Constitutional Law, The United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?, 64 *Wash. L. Rev.* 19, 34 (1989) (commenting that elected judges “are dramatically more vulnerable to democratic influences”).

<sup>35</sup> Baum, *supra* note 4, at 16–17 (“Changes in campaign practices almost surely have increased the number of judges who face opposition based on the content of their decisions. Whether or not the proportion of judges who are actually defeated has increased, the growth in issue-based campaigns against incumbents probably has increased the proportion who are defeated on the basis of their decisions.”); Croley, *supra* note 8, at 734 (“[J]udicial elections have become increasingly salient in recent years, during which time the incidence of judicial incumbent electoral defeats has increased, while the electoral victory margins of judicial winners have decreased.”); Renée Lettow Lerner, From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed’s New York, 15 *Geo. Mason L. Rev.* 109, 111 (2007) (“Since the 1980s, judicial races in many parts of the United States have become increasing[ly] politicized . . .”); Pozen, *supra* note 3, at 267–68 (“[W]e are in a new era of judicial elections. Contributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role; incumbents are facing stiffer competition; salience is at an all-time high.”); *id.* at 296–300.

<sup>36</sup> Chris W. Bonneau, The Dynamics of Campaign Spending in State Supreme Court Elections, *in* *Running for Judge*, *supra* note 34, at 63 (showing that “campaign spending in state supreme court elections has increased steadily over the period 1990–2004”); Deborah Gold-

to increased advertising, campaign events, and voter canvassing.<sup>37</sup> As a result of the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, which struck down state laws prohibiting judicial candidates from discussing their positions on the issues that might come before them, voters now learn how candidates plan to vote in upcoming cases.<sup>38</sup> Interest groups send judicial candidates questionnaires asking them to state their positions on issues such as abortion, class actions, and the constitutionality of punitive damages, and then publicize the results.<sup>39</sup> One scholar of judicial elections has predicted that soon we will see judges developing campaign platforms in which they will describe how they would rule on key contemporary issues, such as same-sex marriage, abortion, tort reform, the death penalty, school financing, and the like.<sup>40</sup> These developments mean that voters are now paying attention to judicial elections—and specifically to incumbents' voting records—as never before.<sup>41</sup>

Now that judicial elections are capturing the public's attention, judges facing reelection must consider how their decisions will be viewed in the next election cycle. Rival candidates and opposition groups comb through voting records for ammunition to use against incumbents, and even a single politically unpopular decision can derail a bid for reelection.

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berg, Interest Group Participation in Judicial Elections, in *Running for Judge*, supra note 34, at 77 (stating that total candidate fundraising in 2000 was sixty-one percent higher than in the previous election cycle); James Sample et al., *The New Politics of Judicial Elections 2006* (Jesse Rutledge ed., 2007), <http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf>.

<sup>37</sup> In 2000, candidates for state supreme court elections raised over \$45 million in fundraising, double the amount raised in 1994. Deborah Goldberg et al., *Justice at Stake Campaign, The New Politics of Judicial Elections: How 2000 Was a Watershed Year for Big Money, Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns*, 7 (2002). Cf. Remarks of Chief Justice Margaret H. Marshall, supra note 4, at 5 ("This trio of developments—special interest money, attack ads, the loosening of ethical strictures on judicial campaign speech—has transformed the nature of judicial elections.").

<sup>38</sup> 536 U.S. 765, 788 (2002); see Michelle T. Friedland, supra note 14, at 620 (commenting that as a result of the decision in *White*, "[j]udicial campaigns will more closely resemble campaigns for other offices").

<sup>39</sup> See Mike France & Lorraine Woellert, *The Battle Over the Courts: How Politics, Ideology, and Special Interests are Compromising the U.S. Justice System*, *Bus. Wk.*, Sept. 27, 2004, at 38.

<sup>40</sup> Pozen, supra note 3, at 297; see also France & Woellert, supra note 39 (describing how Gordon E. Maag, a candidate for the Illinois State Supreme Court, held campaign events at which he "declar[ed] that he's both pro-gun and anti-abortion").

<sup>41</sup> See Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *Running for Judge*, supra note 34, at 140, 143.



tion.<sup>42</sup> In a number of recent elections, incumbents lost their seats after campaigns highly critical of their votes in specific cases.<sup>43</sup> To list just a few prominent examples:

In 1986, California Supreme Court Justice Rose Bird was voted out of office after opponents launched a campaign against her based on her refusal to impose the death sentence in a series of criminal cases.<sup>44</sup>

In 1996, Tennessee Supreme Court Justice Penny White was defeated after the Tennessee Conservative Union, along with victims' rights groups and law enforcement organizations, opposed her reelection because she voted to reverse a defendant's death sentence.<sup>45</sup>

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<sup>42</sup> See, e.g., Deborah Goldberg, Interest Group Participation in Judicial Elections, *in* Running for Judge, *supra* note 34, at 73, 75 ("Sitting judges facing an imminent election, whether a contested election or a retention election, know that every decision is potentially fodder for the opposition. When well-heeled or well-organized interest groups can seize on isolated opinions—even well-reasoned decisions that have been joined by a majority of other judges on the court—as the basis for attack ads in the next campaign, it takes extraordinary integrity and real courage for a judge facing reelection to support a ruling that plainly will be unpopular."); Adam Liptak, Case May Alter Judge Elections Across Country, *N.Y. Times*, Feb. 15, 2009, at A29 (describing how the CEO of the defendant in *Caperton v. Massey* helped to defeat an incumbent justice by "instruct[ing] his aides to find a [judicial] decision that would enrage the public," and then using that decision in campaign ads against the incumbent).

<sup>43</sup> Baum, *supra* note 4, at 13 ("There is a widespread perception of growth in the frequency of strong challenges to incumbent judges that are based on the substance of judges' decisions."); see also *id.* at 13 n.1 (citing newspaper articles describing the change in dynamics in judicial elections); *id.* at 39 ("Has judicial independence declined? For state supreme court justices, almost certainly it has. . . . [J]ustices face a greater risk of paying an electoral price for the positions they take in cases."); Paul R. Brace & Melinda Gann Hall, Is Judicial Federalism Essential to Democracy? State Courts in the Federal System, *in* The Judicial Branch, *supra* note 2, at 174, 196 (Kermit L. Hall & Kevin T. McGuire eds., 2005) (observing that competition in judicial elections is increasing: "In 1990, only one out of every three justices (37.5 percent) in nonpartisan states . . . face[d] challengers, but by 2000 two of three (68.0 percent) were challenged for reelection."); see also Adam Jadhav, Judicial Candidates Promise Civil Campaign, *St. Louis Post-Dispatch*, Nov. 21, 2007, at B7 (describing how judicial elections in Illinois became "referenda on tort reform" after the Supreme Court's decision in *Republican Party of Minnesota v. White* freed judicial candidates to make statements about their positions on that issue).

<sup>44</sup> John H. Culver & John T. Wold, Rose Bird and the Politics of Judicial Accountability in California, 70 *Judicature* 81, 81, 87 (1986).

<sup>45</sup> Traci V. Reid, The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White, *Research on Judicial Selection* 1999, 83 *Judicature* 68, 70 (2000).

In 2004, West Virginia Supreme Court Justice Warren McGraw was defeated, in part because of advertisements criticizing his refusal to revoke the probation of a convicted child molester.<sup>46</sup>

In 2006, Nevada Supreme Court Justice Nancy Becker lost her bid for reelection after repeated attacks in the press for her vote in *Guinn v. Legislature of the State of Nevada*,<sup>47</sup> which held that Nevada's constitutional mandate that the state fund education trumped another constitutional provision requiring that all tax increases be approved by a two-thirds majority vote of the legislature.<sup>48</sup>

Although it is still true that the vast majority of sitting judges are re-elected, these anecdotes demonstrate that elected judges have strong incentives to remain attentive to voter preferences when deciding cases.<sup>49</sup> Indeed, even though ninety-two percent of all incumbent judges are re-elected, that percentage is slightly *lower* than the proportion of incumbents successfully reelected to the U.S. House of Representatives, meaning that elected judges will be at least as motivated to please their constituents as these members of Congress.<sup>50</sup> Moreover, even assuming most judges are shoe-ins for reelection—and it is not clear how much longer that assumption will hold in the new era of contested elections—

<sup>46</sup> See Carol Morello, W. Va. Supreme Court Justice Defeated in Rancorous Contest, Wash. Post, Nov. 4, 2004, at A15 (describing the “controversial ad” campaign that “criticized the justice for joining a 3 to 2 majority extending probation for Tony D. Arbaugh Jr., who had been convicted of sexually molesting a half brother”); see also Liptak, *supra* note 42, at A29 (describing the same ad campaign).

<sup>47</sup> 71 P.3d 1269, 1276 (Nev. 2003) (en banc), reh’g denied, 76 P.3d 22 (Nev. 2003).

<sup>48</sup> See, e.g., Editorial, Nancy Becker Faces Voters, Las Vegas Review-Journal, Sept. 22, 2006, at 8B, available at [http://www.reviewjournal.com/lvrj\\_home/2006/Sep-22-Fri-2006/opinion/9799698.html](http://www.reviewjournal.com/lvrj_home/2006/Sep-22-Fri-2006/opinion/9799698.html); see also Editorial, Becker Has the Right Stuff, Las Vegas Sun, Oct. 22, 2006, at A4 (stating that Becker’s opponent’s campaign “rests on a single issue—the Supreme Court’s 2003 decision in *Guinn v. Legislature*,” and noting that the “Far Right” sought “revenge” for that decision in the form of Becker’s defeat in the election).

<sup>49</sup> Political scientist Melinda Gann Hall has found that between 1980 and 1995, slightly less than ninety-two percent of all sitting state supreme court justices up for reelection were successful. Melinda Gann Hall, State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform, 95 Am. Pol. Sci. Rev. 315, 319 (2001). It appears that incumbent lower court judges do equally well. See Baum, *supra* note 4, at 27. It is worth noting that this data was gathered over a decade ago, when judicial elections had only just begun to become more competitive.

<sup>50</sup> Baum, *supra* note 4, at 27; see also Hall, *supra* note 49, at 319 (“The fact of the matter . . . is that supreme court justices face competition that is, by two of three measures, equivalent if not higher to that for the U.S. House.”).

they surely would be affected by the rare (but increasing number of) cases in which the public does reject an incumbent after an unpopular decision. Just like any other politician, an elected judge may vote the majority's preference far more often than is actually necessary to retain office in order to avoid issuing even a single unpopular decision that might become fodder for a future opponent.<sup>51</sup>

Numerous empirical studies confirm that judges facing election take public preferences into account more often than do appointed judges. One study of over 7000 tort cases found that the mean damages awarded against out-of-state defendants is \$144,970 higher in states with elective judiciaries.<sup>52</sup> Thus, elections had a statistically significant effect on tort awards against out-of-state defendants, which the authors of these studies speculated was caused by elected judges' incentives to distribute wealth from nonvoters to voters.<sup>53</sup> Another study reviewing hundreds of decisions by elected judges in Pennsylvania revealed that these judges imposed significantly longer sentences on criminal defendants as elections neared.<sup>54</sup> A number of different scholars have demonstrated that judges are more likely to sentence criminal defendants to death when elections are imminent.<sup>55</sup> In short, political scientists have consistently

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<sup>51</sup> See Croley, *supra* note 8, at 730 (noting that "judges who are candidates in low-salience elections are likely to be influenced by political pressures generated by high-salience elections"); cf. Jackson, *supra* note 9, at 992 ("It is reasonable to assume that most judges, like most people, do not want to lose their jobs and will, other things being equal, take steps to avoid doing so.").

<sup>52</sup> Tabarrok & Helland, *supra* note 34, at 163.

<sup>53</sup> The authors also found that elected judges issued higher tort awards against in-state defendants than did appointed judges, though the discrepancy was not as great. The authors noted that elected judges receive most of their campaign contributions from trial lawyers, and that all trial lawyers, whether defense side or plaintiff side, benefit financially from higher awards in tort cases. Thus, the authors of the study speculated that elected judges were pressured by these constituents to issue higher tort awards generally, as well as to issue particularly high awards against out-of-state defendants. *Id.* at 160–61 & n.11.

<sup>54</sup> See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When it Runs for Office?*, 48 *Am. J. Pol. Sci.* 247, 258 (2004) (finding that "all judges, even the most punitive, increase their sentences as reelection nears").

<sup>55</sup> Richard W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 *J. Crim. L. & Criminology* 609, 610 (2002) (finding that "criminal defendants [convicted of murder] were approximately fifteen percent more likely to be sentenced to death when the sentence was issued during the judge's election year"); see also Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 *Pol. Res. Q.* 5, 24 (1995); Stephen B. Bright & Patrick J. Keenan, *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, 784–91 (1995).

found that appointed judges behave differently than their elected counterparts.<sup>56</sup>

Perhaps the best evidence that elected judges are attentive to majority preferences comes from elected judges themselves. In a survey of 369 judges in states using retention elections, only a small minority considered themselves independent of voter influence.<sup>57</sup> The administrators of the survey found that a “very high percentage of judges . . . say judicial behavior is shaped by retention elections.”<sup>58</sup> As a former justice on the California Supreme Court colorfully put it: “There’s no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.”<sup>59</sup>

Concededly, appointed judges also have reason to care about the public and political reaction to their decision-making, especially if they serve short terms and will be seeking reappointment from one or both of their states’ political branches.<sup>60</sup> Even life-tenured federal judges are not immune from outside pressure; their decisions are quite likely affected by the possibility of impeachment, aspiration for elevation to a higher court, and public criticism, among other factors.<sup>61</sup> But the point is not

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<sup>56</sup> See, e.g., Stefanie A. Lindquist & Kevin Pybas, *State Supreme Court Decisions to Overrule Precedent, 1965–1996*, 20 Just. Sys. J. 17, 34 (1998) (finding that appointed, life-tenured justices on the New Jersey Supreme Court overruled decisions more often than did justices in states with elective judiciaries, leading the study’s authors to conclude that the New Jersey justices “may feel more insulated from the political process and thus more comfortable adopting an activist agenda”).

<sup>57</sup> Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 *Judicature* 306, 312 (1994).

<sup>58</sup> *Id.* at 315.

<sup>59</sup> Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58; see also *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (O’Connor, J., concurring) (“Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”).

<sup>60</sup> Baum, *supra* note 4, at 15 (giving examples of judges who were not reappointed by state governors who disagreed with their decisions on the bench).

<sup>61</sup> See Owen Fiss, *The Right Degree of Independence*, in *The Law as It Could Be* 62–65 (2003) (describing sources of influence on the federal judiciary); Stephen B. Burbank, *supra* note 25, 328–29 (2003) (describing the various mechanisms by which Congress retains power over the federal courts); Friedman, *supra* note 24, at 590–614 (asserting that the Supreme Court is responsive to public opinion despite the insulation of its members from political pressure); Jackson, *supra* note 9, at 967 (describing the “range of accountability mechanisms,” including internal mechanisms (such as appeals and disciplinary actions) and external mechanisms (such as political branch control of jurisdiction and funding)); *id.* at 984 (“[I]f lower court positions came to be viewed more as ‘stepping stones’ rather than ‘capstones,’ the temptation at the margin for self-interested decision-making might increase, es-

that appointed judges are immune from outside influences, but rather that, *relatively speaking*, elected judges are more attentive to public opinion than are appointed, life-tenured judges.<sup>62</sup>

The whole point of giving federal judges life tenure and salary protections is to ensure their independent decision-making,<sup>63</sup> and the whole point of electing judges is to ensure that they are accountable to the people.<sup>64</sup> One does not have to believe that appointed judges are perfectly insulated from public opinion and that elected judges are always guided by it to conclude that the method of selection affects outcomes in some cases.<sup>65</sup> For if these different selection systems are to serve any purpose

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pecially in an atmosphere in which confirmation battles focus more openly on ideology.”); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 6 (1996).

The actions of United States District Judge Harold Baer are often cited as an example of how even appointed judges respond to political pressure. Judge Baer had suppressed evidence in a drug case after concluding that the fact that defendant ran away when he saw the police did not constitute probable cause for the subsequent search. An intense political outcry followed, with many politicians calling for his resignation or impeachment. Judge Baer eventually reversed his ruling and held that the evidence was admissible. John M. Goshko & Nancy Reckler, *Controversial Drug Ruling is Reversed*, Wash. Post., Apr. 2, 1996, at A1; Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. Times, Apr. 2, 1996, at A1.

<sup>62</sup> See Hershkoff, *supra* note 15, at 1887 (describing state courts as “beholden to popular approval” and thus more “politically dependent than their Article III peers” because many state judges are elected, and almost all lack life tenure); see also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1159 (1999) (noting judicial independence does not take an “either/or form,” but rather “exists along a continuum”).

<sup>63</sup> As Alexander Hamilton declared in *The Federalist No. 78*, “If the power of making [judicial appointments] was committed . . . to the people . . . there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.” *The Federalist No. 78*, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Hamilton also believed that “permanency in office,” was superior to “[p]eriodical appointments” for similar reasons:

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.

*Id.* See also Jackson, *supra* note 9, at 987 (“There is little question that these tenure and salary protections promote Article III judges’ independence, from both the political branches and popular opinion.”).

<sup>64</sup> See, e.g., Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of the Elected Judiciary, 1846–1860*, 45 *The Historian* 337, 341 (2007).

<sup>65</sup> See, e.g., Pozen, *supra* note 3, at 278 n.56 (“[F]or electoral considerations to influence judicial decision-making in ways many would find objectionable, the retention of power

at all, then elected judges must, at least sometimes, vote in favor of majority preferences when appointed judges would not.<sup>66</sup>

## II. INTERACTIVE JUDICIAL FEDERALISM

Before describing how the federal courts can temper the majoritarian difficulty, it is first important to understand the relationship between the federal and state court systems. This Part briefly outlines the constitutional and statutory rules governing their interactions. (Readers familiar with the doctrine may wish to skip ahead to Part III.)

The federal judiciary is unique among the three branches of the U.S. government for its dependence on its state counterparts. Congress may choose to collaborate with state legislatures, but it is not required to review the work product of such state institutions. The President may cooperate with state and local executives, but he is not dependent on them for his power. Indeed, the political branches are constitutionally constrained from co-opting state institutions to accomplish federal goals on the grounds that allowing the federal government to do so could obscure accountability for federal policy and undermine the integrity of state government.<sup>67</sup>

In contrast, the Constitution requires that federal courts rely on, and regularly interact with, their state counterparts.<sup>68</sup> Article III assumes that state and federal courts will work together to address the “cases” and “controversies” that fall within its subject matter headings. In the *Federalist Papers*, Alexander Hamilton described the state courts as “natural auxiliaries” to the federal courts in “execut[ing] . . . the laws of the Un-

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need not be the first instinct of judges; it just needs to skew the decisional calculus enough to change certain outcomes.”).

<sup>66</sup> Jackson, *supra* note 9, at 969 (“[I]t seems plausible to assume, at least for present purposes, that selection and tenure rules play some role in supporting commitments to the independence of judging and the rule of law.”).

<sup>67</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 932 (1997); *New York v. United States*, 505 U.S. 144, 175 (1992).

<sup>68</sup> For example, in *New York v. United States*, the Supreme Court invalidated a federal statute that sought to “commandeer” the states by requiring that they either regulate radioactive waste disposal or take title to the waste, asserting that forcing states to regulate was beyond Congress’s Commerce Clause power. The Court distinguished Congress’s power to require state courts to apply federal law, explaining that “[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.” *Id.* at 178–79.

ion.”<sup>69</sup> Indeed, the so-called “Madisonian Compromise” gave Congress discretion over whether to establish lower federal courts, leaving open the possibility that *all* Article III cases would originate in state courts save those few that fall within the Supreme Court’s original jurisdiction.<sup>70</sup> As a result, state courts are essential components of the federal judicial system.

Summarized below are the many ways in which federal and state courts work together to resolve cases. Each Section first outlines the limited scope of federal jurisdiction under current law, and then describes the maximum constitutionally permissible interaction between federal and state courts.

#### *A. Supreme Court Review of State Court Decisions: Current Practice*

Under 28 U.S.C. § 1257, the Supreme Court has discretion to review final judgments on questions of federal law issued by the highest court of a state. Over the last six years, the Court has issued opinions on an average of twelve cases originating in state courts per term, constituting approximately fifteen percent of its docket.<sup>71</sup> This has declined from an average of thirty-seven state court decisions reviewed per term from 1950 until 1990, roughly twenty-five percent of the Court’s docket during those years.<sup>72</sup> The Court today is thus reviewing far fewer state court cases than in the past, as measured both in absolute numbers and as a percentage of its overall docket.

*Constitutional Limits:* Section 1257 does not extend as far as the Constitution allows. The Supreme Court has authority under the Constitution to review all state court decisions in cases that fall within the subject matter headings of Article III, including decisions issued by lower state courts, decisions that have yet to reach a final judgment, and pure ques-

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<sup>69</sup> The Federalist No. 82, at 462 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

<sup>70</sup> U.S. Const. art. III, § 1, cl. 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

<sup>71</sup> These statistics were compiled from Harvard Law Review’s annual review of Supreme Court statistics from 2004 to 2009. The Statistics, 123 Harv. L. Rev. 382, 391 (2009); The Statistics, 122 Harv. L. Rev. 516, 525 (2008); The Statistics, 121 Harv. L. Rev. 436, 445 (2007); The Statistics, 120 Harv. L. Rev. 372, 381 (2006); The Statistics, 119 Harv. L. Rev. 415, 427 (2005); The Statistics, 118 Harv. L. Rev. 497, 506 (2004).

<sup>72</sup> See Michael E. Solimine, Supreme Court Monitoring of State Courts in the Twenty-First Century, 35 Ind. L. Rev. 335, 352 (2002) (assuming an average docket of 150 for this period).

tions of state law.<sup>73</sup> For example, Article III permits the Supreme Court to review a question of state law arising in a diversity case, even if that question is unrelated to any federal issue.<sup>74</sup>

### *B. Lower Federal Court Review of State Court Decisions*

*Current Practice:* By statute, lower federal courts are not permitted to review state court decisions except those falling under habeas jurisdiction. Under 28 U.S.C. § 2254, lower federal courts review state court convictions of prisoners who are incarcerated, on probation, or on parole to determine if the state court judgment violates federal law. Since 1996, habeas corpus review has been governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which strictly limits both the procedures by which prisoners can seek review and the scope of that review.<sup>75</sup>

Aside from habeas corpus, Congress has not provided for review of state court decisions in the lower federal courts. The Supreme Court has prohibited litigants from attempting such “back door” appellate review on the ground that, pursuant to 28 U.S.C. § 1257, “appellate jurisdiction to reverse or modify a state-court judgment is lodged . . . exclusively in th[e] [Supreme] Court.”<sup>76</sup> The Court explained that, absent statutory authority, it would continue to bar actions in federal district court “brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”<sup>77</sup> As a related matter, state courts need not follow precedent established by the

<sup>73</sup> Alexander Hamilton, writing in *The Federalist No. 82* as Publius, asserted that “an appeal would certainly lie” from the state courts “to the Supreme Court of the United States” in cases in which the state and federal courts have concurrent jurisdiction, or “else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor.” *The Federalist No. 82*, at 461–62 (Alexander Hamilton) (Clinton Rossiter ed., 1999). The Supreme Court emphatically affirmed this understanding in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816).

<sup>74</sup> *Martin v. Hunter’s Lessee*, 14 U.S., at 337 (stating that “appellate jurisdiction is given by the constitution to the supreme court in all cases where it has not original jurisdiction,” rendering the Supreme Court “capable of embracing every case enumerated in the constitution”); see also Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 Mich. L. Rev. 80, 153–55 & n.303 (2002).

<sup>75</sup> Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996) (codified as amended at 28 U.S.C. § 2254(b), (d)–(e), (i) (2006)).

<sup>76</sup> *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005).

<sup>77</sup> *Id.* at 284.



lower federal courts, but can instead develop their own views on the meaning of federal law unless or until the Supreme Court resolves the matter for the nation.<sup>78</sup>

*Constitutional Limits:* The Constitution itself does not bar lower federal courts from reviewing state court decisions. In *The Federalist No. 82*, Hamilton speculated that the lower federal courts could review state court decisions, though he admitted it was a “difficult[]” question.<sup>79</sup> Hamilton observed that Article III speaks of original and appellate jurisdiction without expressing any limits on the appellate power of the lower federal courts, and thus concluded: “I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals.”<sup>80</sup> Indeed, he found “many advantages” in such an arrangement, including easing the burden on the Supreme Court.<sup>81</sup> In short, the Constitution does not appear to prevent Congress from granting lower federal courts the power to review state judicial decisions, or to require that state courts obey lower federal court precedent.

### C. Concurrent Jurisdiction

*Current Practice:* Congress has granted federal and state courts concurrent jurisdiction over civil cases in which a question of federal law arises on the face of a well-pleaded complaint,<sup>82</sup> and over cases in which the parties are completely diverse and the amount in controversy exceeds \$75,000.<sup>83</sup> Absent a clear indication to the contrary in the text or legislative history of a federal law, courts assume that Congress intended to create concurrent jurisdiction over all federal causes of action.<sup>84</sup> Furthermore, the jurisdictional statutes permit the case to be heard in federal court if *either* party prefers it (unless the plaintiff has filed a diversity case in the defendant’s home state court), leaving state courts to hear only those cases in which both parties agree on the state forum.

*Constitutional Limits:* The Supreme Court has interpreted the statutes granting federal district courts original jurisdiction over diversity and federal question cases more narrowly than their language suggests and

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<sup>78</sup> See *infra* notes 144–147 (discussing state courts’ views on this question).

<sup>79</sup> *The Federalist No. 82*, at 462 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

<sup>80</sup> *Id.* at 463.

<sup>81</sup> *Id.*

<sup>82</sup> See 28 U.S.C. § 1331 (2006).

<sup>83</sup> 28 U.S.C. § 1332(a) (2006).

<sup>84</sup> See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990).

the Constitution demands. Although the Supreme Court held in *Louisville & Nashville Railroad Co. v. Mottley* that federal courts only have jurisdiction over cases in which a federal question arises on the face of what has been come to be known as a “well-pleaded complaint,”<sup>85</sup> there is no constitutional prohibition against granting federal courts jurisdiction over cases in which federal law is raised as a defense.<sup>86</sup> Likewise, the Court’s holding in *Strawbridge v. Curtiss*<sup>87</sup> that Section 1332 grants federal jurisdiction over only those cases in which the parties are completely diverse is not constitutionally required, and in fact that limitation has at times been eliminated by Congress,<sup>88</sup> such as in the recently enacted Class Action Fairness Act of 2005.<sup>89</sup> Save for the small number of subjects that fall within the Supreme Court’s original jurisdiction, which must be heard by that Court in the first instance, Congress has almost complete discretion to assign federal courts exclusive or concurrent jurisdiction over cases arising under Article III.<sup>90</sup>

### III. INTERACTIVE JUDICIAL FEDERALISM AND THE MAJORITARIAN DIFFICULTY

The many points of interaction between appointed, life-tenured federal judges and elected state court judges can counteract majoritarian pressures on state courts. Federal courts have long served to ensure that state courts apply federal law accurately in the cases before them. In the past, some state court judges were openly defiant of federal courts and federal law, and thus federal judicial oversight of state judiciaries was essential to ensure vindication of federal rights and realization of federal policies.<sup>91</sup> The role described here for federal courts in ameliorating the

<sup>85</sup> 211 U.S. 149, 151–54 (1908).

<sup>86</sup> See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 818–23 (1824).

<sup>87</sup> 7 U.S. (3 Cranch) 267, 267–68 (1806).

<sup>88</sup> See, e.g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

<sup>89</sup> Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9 (codified as amended at 28 U.S.C. § 1332(d)(2) (2006)).

<sup>90</sup> The Eleventh Amendment, however, does limit the federal courts’ ability to order state officials to conform their conduct to state law, and thus such cases are best heard in the first instance in state courts. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

<sup>91</sup> See, e.g., Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 797–99 (1965) (describing southern courts’ unwillingness to uphold federal claims of right); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 Cal. L. Rev. 1721, 1738 (2001) (asserting that the Supreme Court’s

majoritarian difficulty is somewhat different, and potentially far more effective, than simply serving as a watchdog over recalcitrant state judges. Unlike some state judges of the past, elected judges are not necessarily hostile to federal claims of right, or to the neutral application of the law in each case, but rather are under pressure to avoid decisions that might be used against them in the next campaign. Through their extensive interactions with state courts, federal courts can mitigate those pressures in a number of ways.

First, and most obviously, federal courts can reverse on direct review some state court decisions tainted by majoritarian pressures. Second, Supreme Court precedent on questions of federal law binds state courts, and lower federal court decisions provide persuasive precedent. These sources of federal law counteract the influence of public opinion on elected judges and also provide political cover for unpopular state court outcomes. Third, the existence of an alternative federal forum funnels counter-majoritarian cases—that is, cases in which the correct legal outcome is at odds with voters’ preferences—away from elected state court judges, and thus limits their ability to shape both state and federal law in such cases. And finally, federal courts ensure that state courts provide due process of law, even in cases that otherwise fall outside the parameters of Article III. These procedural protections can moderate elected judges’ tendencies to rule as the majority prefers, rather than as the law requires.

Although all of these points of interaction provide federal courts with the *potential* to influence the development of the law in states that elect judges, that potential is not fully realized. The limited opportunities for direct review of state court decisions by federal courts and the lack of explicit jurisdictional policies prioritizing cases arising from states with elected judges mean that federal courts are less effective in curbing majoritarian impulses than they might be. This Part assesses the federal judiciary’s potential to ameliorate the majoritarian difficulty, and Part V follows up with a discussion of jurisdictional changes that could help accomplish that goal.

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reversal of the state court decision on state law in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), was influenced by its knowledge that southern courts were “engaged in a project of massive resistance” to the civil rights movement).

*A. The Influence of Federal Judicial Review on Elected Judges*

Under the current jurisdictional scheme, federal courts can reverse state court decisions on questions of federal law either through direct review in the Supreme Court or, in certain classes of criminal cases, on collateral habeas review in lower federal courts. In either scenario, the majoritarian influences on elected state court judges are negated, or at least offset, by the review of politically insulated federal judges. Moreover, even when no federal court actually engages in such review, the mere possibility of federal judicial oversight affects the decision-making of elected state court judges, counteracting the influence of public opinion.

*1. Supreme Court Review*

In most cases in which a state court issues an opinion that turns on federal law, the Supreme Court has the power to review and reverse that decision. If a state judge misapplies federal law to curry favor with the electorate, the Supreme Court can correct the error because it is far better insulated from majoritarian pressures, particularly those that operate at the state level.

Under the current jurisdictional statute, 28 U.S.C. § 1257, the Supreme Court can only review cases raising questions of federal law, and thus cannot remedy elected judges' misinterpretation or misapplication of state law. This, however, is not a significant limit on federal judicial power in an era in which federal law either shares or displaces state law on a wide variety of topics.<sup>92</sup> The role of federal law is particularly dominant in just the sorts of cases in which the majoritarian difficulty is most troubling—those in which historically unpopular or disadvantaged groups seek to vindicate their rights to full and equal citizenship.<sup>93</sup> Federal civil rights statutes have for many decades provided a cause of ac-

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<sup>92</sup> Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 459–60 (6th ed. 2009) (“In the more than fifty years since the First Edition was published, the expansion of federal legislation and administrative regulation noted in this discussion has accelerated; today one finds many more instances in which federal enactments supply both right and remedy in, or wholly occupy, a particular field. This same period has witnessed a broad extension of federal laws (constitutional and statutory) that protect individual rights and provide remedies for violations thereof. Thus, at present federal law appears to be more primary than interstitial in numerous areas.”).

<sup>93</sup> See Friedland, *supra* note 14, at 629–30 (noting that “the rights we believe are most important are protected by federal law”).

tion for those who have been dismissed from their jobs, denied their right to vote, or barred from public accommodations on the basis of race, national origin, religion, or gender.<sup>94</sup> The Constitution itself prohibits such discrimination on the ground that it violates “equal protection of the laws.”<sup>95</sup> The Bill of Rights protects those individual rights, such as the right to express unpopular opinions, that the Framers thought most critical to maintaining a democracy. The Bill of Rights grants procedural protections to criminal defendants that protect them from mistreatment during a criminal investigation, trial, and sentencing. Any litigant who falls within these broad categories, and who wishes to have access to Supreme Court review, would be sure to join a federal claim to any state law claims to ensure that possibility.<sup>96</sup>

Of course, federal law does not extend to all cases in which majoritarian pressures might color the view of an elected state court judge. For example, same-sex couples seeking benefits equivalent to those granted heterosexual couples have no cause of action under federal law, and thus no opportunity to petition the Supreme Court for review. Likewise, a federal jurisdictional hook is likely unavailable if the plaintiff or defendant is unpopular due to individual attributes, rather than qualities shared by a group. For example, if a corporate defendant is widely reviled because it is believed to have contaminated the state’s water supply, there is little likelihood of federal review even if the state court judge appears to have stretched the law to rule against the corporation. The only hope for Supreme Court review in such cases would be to challenge the ruling under the Due Process or Equal Protection Clause of the Constitution<sup>97</sup>—a long shot in any case.<sup>98</sup>

Moreover, even in cases squarely raising federal issues, Supreme Court review is too rare to provide much reassurance to those concerned about majoritarian influences on elected state court judges. Today, the Court grants approximately seventy-eight of the 9000 or so petitions filed every term and issues full opinions in an average of only twelve

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<sup>94</sup> See, e.g., 42 U.S.C. §§ 1981–83 (2006).

<sup>95</sup> U.S. Const. amend. XIV, § 1.

<sup>96</sup> Indeed, any litigant who could assert a federal claim would likely file her case in federal court, as is discussed in Section III.C.

<sup>97</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 631–35 (1996) (holding that an amendment to the Colorado Constitution prohibiting protection of homosexuals from discrimination violated the Equal Protection Clause).

<sup>98</sup> See *infra* notes 161–163; cf. *FTC v. Cement Inst.*, 333 U.S. 683, 702–03 (1948) (“[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level.”).

cases from the state high courts each year.<sup>99</sup> The cost of petitioning for a writ of certiorari, combined with the futility of doing so, likely leads many losing parties to forgo filing meritorious petitions, rendering the actual percentage of eligible decisions reviewed by the Court even smaller.<sup>100</sup> Thus, as discussed in more detail below, the real value of the Supreme Court in countering majoritarian pressures on elected state court judges may come from the *potential* for review, alongside a legal culture that adheres to Supreme Court precedent even when there is little chance of direct Supreme Court oversight.

## 2. Habeas Review

Federal courts sitting in habeas can also counteract the majoritarian difficulty through direct review of state court criminal convictions. Elected judges are particularly attentive to voter preferences when deciding criminal cases. Such cases are of high salience because they involve clear-cut outcomes—such as whether a criminal defendant is convicted and whether he receives a lengthy sentence—and tap into voters’ fears about personal safety and anger over crimes that go unpunished.<sup>101</sup> An incumbent judge’s decisions in criminal cases are easy targets for his opponents in the next election cycle, who can use almost any decision favorable to a criminal defendant, no matter how legally defensible, as grounds for portraying the incumbent as “soft on crime.”<sup>102</sup> As any savvy candidate knows, the public’s attention is most easily captured by

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<sup>99</sup> See *supra* note 71.

<sup>100</sup> Furthermore, state courts may seek to avoid federal judicial review and reversal by grounding their decision on factual questions, rather than by issuing a ruling on a question of federal law. The more fact-bound the decision, the less likely the Supreme Court will review it.

<sup>101</sup> See, e.g., Joanna Cohn Weiss, Note, Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants’ Due Process Rights, 81 N.Y.U. L. Rev. 1101, 1113–20 (2006) (describing media influence on public perceptions of crime).

<sup>102</sup> See Baum, *supra* note 4, at 34 (noting that crime is a “highly salient issue” in judicial elections); Croley, *supra* note 8, at 740–41 nn.151–52; Hans A. Linde, Elective Judges: Some Comparative Comments, 61 S. Cal. L. Rev. 1995, 2000–01 (1988) (noting that judicial campaigns often focus on claims regarding judges’ stance on crime); Pozen, *supra* note 3, at 287 (“Given the political unpopularity of criminal defendants as a group and the unique salience of crime in the public perception of judicial behavior, incumbent judges may be most vulnerable when their opponents are able to characterize them as soft on crime.”); see, e.g., O’Connor, *supra* note 4, at 4–5 (describing how opponents of Bill Cunningham’s 2006 campaign for the Kentucky Supreme Court ran “misleading” ads accusing him of releasing six rapists on parole).

political advertisements accusing the incumbent of being too lenient on defendants charged with committing heinous crimes.<sup>103</sup>

Accordingly, judges seeking reelection are likely to be most concerned about public reaction to their rulings in criminal cases and may be tempted to take a hard line in such cases, even when doing so is at odds with the law. Recent studies have confirmed that majoritarian pressures affect elected judges in criminal cases. Gregory Huber and Sanford Gordon reviewed more than 22,000 Pennsylvania trial court sentences for rape, robbery, and aggravated felony assault. They discovered that when elections were imminent, judges imposed sentences several months longer than those imposed by judges who had recently been elected or reelected.<sup>104</sup> Studies show a similar correlation between elections and imposition of the death penalty: elected state supreme court justices are more likely to affirm jury verdicts in favor of the death penalty during the two years prior to their reelections than at other times during their terms in office.<sup>105</sup>

Federal habeas review is thus a particularly important check on elected state court judiciaries. Although habeas is only available to defendants who are currently incarcerated, on probation, or on parole at the time of federal review, it is this subset of serious offenders whose cases raise the most political problems for elected judges. When appointed federal judges review state court convictions, their decisions will not be tainted by fears of voter backlash at the polls or by concerns about how the decision will be portrayed in an opponent's campaign literature. Certainly, federal judges are often sensitive to public opinion and sometimes change their decisions in response to public outcry, as Judge Harold Baer famously did after his decision to suppress evidence in a drug

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<sup>103</sup> Indeed, interest groups hoping to oust judges whom they perceive as unfriendly to business interest will sometimes target those judges for their criminal rulings, knowing they can influence public opinion more easily by claiming that the judge is "pro-criminal" than "anti-business." See, e.g., Amanda Frost, Only a Partial Win, *Nat'l L.J.*, June 15, 2009, at 43; Adam Liptak, Case May Alter the Election of Judges, *N.Y. Times*, Feb. 15, 2009, at 29 (describing how the CEO of the defendant in *Caperton v. Massey* helped to defeat an incumbent justice by "instruct[ing] his aides to find a [judicial] decision that would enrage the public" and then using that decision in campaign ads against the incumbent).

<sup>104</sup> Huber & Gordon, *supra* note 54, at 255.

<sup>105</sup> Cf. Paul R. Brace & Melinda Gann Hall, The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice, 59 *J. Pol.* 1206, 1219–21 (1997) (describing how short terms in office decrease differences between political parties).

case was widely condemned.<sup>106</sup> Nonetheless, because federal judges are carefully insulated from these types of pressures, they will not react as strongly to them.<sup>107</sup> Federal courts often stay executions, shorten or commute sentences, and establish new limits on the categories of citizens who can be put to death, when such decisions would be politically problematic for elected judges.

In its current form, however, habeas review is not an effective method of policing state courts. During the Warren Court-era, federal courts sitting in habeas engaged in de novo review of legal issues, though they deferred to state court findings of fact.<sup>108</sup> Since then, judicial decisions, as well as federal legislation, have drastically limited the scope of habeas. The Burger and Rehnquist Courts cut back on the availability of habeas, as well as on the level of scrutiny to be applied to state court determinations of law and fact.<sup>109</sup> Significant further restrictions on habeas review came with the enactment of the AEDPA in 1996, which watered down habeas from a searching reexamination of the conviction to a minimal and highly deferential review.<sup>110</sup> The authors of one recent study concluded that noncapital habeas review is so ineffective as to be worthless, and they argued that it would be preferable to scrap the fig leaf of habeas altogether in favor of improving the quality of criminal defense counsel for the indigent.<sup>111</sup> As discussed in more detail below, the benefit of habeas, if any, comes from elected judges' attention to federal precedent—attention due not only to the threat of judicial oversight, but also to a legal culture of respect for federal precedent—rather than from federal review itself.

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<sup>106</sup> *United States v. Bayless*, 921 F. Supp. 211, 212 (S.D.N.Y. 1996); see also Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. Times, Apr. 2, 1996, at A1.

<sup>107</sup> See *supra* Section I.B.

<sup>108</sup> See, e.g., *Brown v. Allen*, 344 U.S. 443, 458 (1953).

<sup>109</sup> See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 87–89 (1977); see also Fallon et al., *supra* note 92, at 1213–14, 1222–23 (describing the expansion of habeas corpus review of state convictions in *Brown v. Allen*, followed by the restrictions imposed during the Burger Court and codified in AEDPA).

<sup>110</sup> Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (codified as amended at 28 U.S.C. § 2254(e) (2006)).

<sup>111</sup> Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 818–33 (2009).



### 3. *Fear of Reversal*

Although Supreme Court review is extremely rare, and habeas review is so limited in scope as to be ineffective, the mere possibility of federal judicial oversight may serve as a counterweight to the majoritarian pressures on elected judges' decision-making.<sup>112</sup>

Studies show that judges care about their reversal rate, and particularly about reversal in a high profile setting such as the Supreme Court.<sup>113</sup> Like other judges, elected judges will seek to avoid being told that they were wrong in such a public setting, especially because Supreme Court reversal could provide ammunition for opponents in subsequent campaigns. These judges may tailor their decisions to avoid that result, which in turn counteracts their tendency to allow popular opinion to affect their rulings. Instead of trying to please their constituents, elected judges might find themselves complying with federal precedent to avoid triggering review and reversal. Although federal review of state court decisions is quite rare today, it was not always such a long shot,<sup>114</sup> and thus state court judges have been conditioned to take federal judicial precedent into account. In short, elected judges' interest in avoiding reversal by federal courts, whether on direct review in the Supreme Court or collateral review in habeas, could counteract the influence of public opinion on their decisions even in cases in which such review never actually occurs.

That said, fear of reversal by a federal court on direct review is likely getting weaker by the day. The last few decades have seen both an increase in public attention paid to judicial elections and a decrease in the percentage of state court cases reviewed by federal courts. The very low

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<sup>112</sup> Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *Yale L.J.* 1035, 1046 (1977) ("Redundancy could also spark a reduction of constitutional errors on the part of the states. If state courts knew that errors would be corrected by a federal court requiring a retrial, they might be more solicitous toward claims brought before them."). But see Pozen, *supra* note 3, at 287 ("Defendants who . . . bring habeas corpus claims will also generally find little succor in the federal courts, in light of the Antiterrorism and Effective Death Penalty Act's stringent standard for reversal.").

<sup>113</sup> Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 *Just. Sys. J.* 208, 213 (1978) (discussing the "embarrass[ment]" of reversal and stating that the "significance of reversal as a sanction makes it a meaningful incentive for adherence to Supreme Court doctrine, because deviation from the Court's policies increases the risk of reversal").

<sup>114</sup> In the past, the Supreme Court reviewed more state court cases each term than it does today, and there were fewer state court decisions that qualified for review. See Solimine, *supra* note 72, at 352.

probability of Supreme Court review, or searching federal habeas review in criminal cases, coupled with the certainty that each elected judge needs a majority of the voters' support in the next election, means that elected state court judges may conclude they would do better to attend to majority preferences than to those of federal judges.<sup>115</sup>

Furthermore, the very assumption made thus far—that state courts prefer to avoid federal review and reversal—might be erroneous. To the contrary, at least a few elected judges might revel in a Supreme Court reversal and would publicize that result. In communities that distrust the federal government and feel that their values and culture are not respected by national leaders, an elected judge's refusal to abide by Supreme Court precedent might even lead to the type of favorable publicity that would guarantee reelection.<sup>116</sup>

Former Alabama Supreme Court Chief Justice Roy Moore exemplifies this phenomenon. Moore was an unknown circuit court judge in the mid-1990s when he installed a carved wooden plaque of the Ten Commandments behind the bench in his courtroom in rural Etowah County, Alabama. Two lawsuits challenging the plaque were dismissed on justiciability grounds. The resulting publicity led to his successful 2000 bid for Chief Justice of the Alabama Supreme Court, during which he campaigned under the banner of the "Ten Commandments Judge."<sup>117</sup> Moore invited federal judicial review by installing a mammoth plaque displaying the Ten Commandments in his Alabama courthouse and then very publicly refused to abide by the Eleventh Circuit's decision holding that it must be taken down.<sup>118</sup> Moore himself was removed from office shortly thereafter by an (appointed) state ethics panel, and he faded from the

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<sup>115</sup> Baum, *supra* note 113, at 213 (noting that "when a court is several steps removed from the Supreme Court in the judicial hierarchy," as are state courts, reversal is a less effective sanction); cf. Sara C. Benesh & Wendy L. Martinek, *State Supreme Court Decision-Making in Confession Cases*, 23 *Just. Sys. J.* 109, 125–26 (2002) (reporting that the authors' data on state court decision-making show "no concern over review/reversal" by the Supreme Court, which they speculate is due to the fact that it "so rarely occurs"); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 *Sup. Ct. Rev.* 403, 436–37 (noting that as a result of the Supreme Court's shrunken docket, "[l]ower-court judges will no longer feel the spirit of goodwill and cooperation that comes from participation in a shared enterprise").

<sup>116</sup> Baum, *supra* note 113, at 213 ("[A] judge with strong reasons to resist the Court's leadership . . . probably will be willing to accept occasional reversals as the price of resistance.").

<sup>117</sup> *Glassroth v. Moore*, 335 F.3d 1282, 1284–85 (11th Cir. 2003).

<sup>118</sup> Jeffrey Gettleman, *Alabama Panel Ousts Judge Over Ten Commandments*, *N.Y. Times*, Nov. 14, 2003, at A16.

scene after running an unsuccessful campaign for state governor in 2006.<sup>119</sup>

Unquestionably, former Chief Justice Moore is an outlier. In previous eras, state courts regularly defied federal judicial pronouncements,<sup>120</sup> but such bad faith on the part of state judges is exceedingly rare today.<sup>121</sup> Nonetheless, his actions demonstrate that some elected state court judges might not object to Supreme Court review and reversal. Rather, they would use their opposition to federal precedent as a rallying cry for their future campaigns for office, undermining the countermajoritarian influence of federal courts on their decisions.<sup>122</sup> Decisions by these few defiant state court jurists, however, are just the type to attract Supreme Court attention, and ultimately reversal. Thus, the federal courts will reverse those judges who are openly hostile to federal law, and the threat of federal oversight may serve to deter significant deviation from federal precedent by the rest.

#### 4. *Political Cover*

Even the mere possibility of federal judicial oversight can serve as political cover for state court judges issuing unpopular decisions, thus providing another method by which federal courts can temper majoritarian pressures on elected judges. When a state court rests its opinion on a question of federal law or simply leaves the source of law supporting its decision unclear, the parties may seek review in the Supreme Court.<sup>123</sup> If the petition for a writ of certiorari is subsequently denied, as will almost certainly be the case because of the rarity of such review, then that denial partially insulates the state court from criticism by giving its decision the imprimatur of Supreme Court approval. Of course, denials of certiorari are not decisions on the merits and are not meant to

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<sup>119</sup> Monica Davey, *Alabama Governor Defeats Former Justice in Primary*, N.Y. Times, June 7, 2006, at A20.

<sup>120</sup> See *supra* note 91.

<sup>121</sup> See Neuborne, *supra* note 9, at 1119 (“We are not faced today with widespread state judicial refusal to enforce clear federal rights. When the mandates of the Federal Constitution are clear, most state judges respect the supremacy clause and enforce them.”).

<sup>122</sup> As discussed in Part V, were this dynamic to develop, the federal courts should take these majoritarian impulses into account when selecting state court cases for review.

<sup>123</sup> See *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (establishing that the Supreme Court may review any state court decisions that do not make clear whether they rely on state or federal law, even when such decisions go beyond federal constitutional protections and thus would be unreviewable if clearly grounded solely upon state law).

suggest that the Supreme Court agrees with the state court's conclusion. But the press often fails to make that distinction, misleading the public as well.<sup>124</sup> In any event, even the mere fact that the Supreme Court allowed a decision to stand gives that decision a degree of validity that it would not have had otherwise.

Perhaps for that reason, state courts often ground their decisions on federal constitutional law even when they could insulate themselves completely from Supreme Court review by issuing an opinion based purely on their state constitution.<sup>125</sup> In *Michigan v. Long*, the Supreme Court established a clear rule of thumb guiding its review of state judicial decisions on constitutional questions: if the basis for a state court's decision was unclear, then the Supreme Court would assume the state had relied on federal rather than state law, giving it the power to review the decision.<sup>126</sup> The majority claimed that this default rule would encourage state judges to be explicit about whether they were resting their decisions on state or federal grounds. As many subsequent studies have demonstrated, however, states have continued to obfuscate the source of law governing their decision, leaving their judgments susceptible to Supreme Court review.<sup>127</sup>

Professor Edward Hartnett has speculated that states prefer to leave their decisions open for federal review because they benefit politically from "passing the buck" to the federal judiciary:

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<sup>124</sup> Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 *Tex. L. Rev.* 907, 980 (1997) (noting that denials of certiorari are often described by the press as "decision[s] to 'let stand' the judgment sought to be reviewed").

<sup>125</sup> See, e.g., Fallon et al., *supra* note 92, at 479 (noting that "many post-*Michigan v. Long* state court decisions fail to indicate clearly whether they rest on state or federal grounds"); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 *Mich. L. Rev.* 761, 778–800 (1992) (studying 1208 state court decisions from seven states and finding that state courts repeatedly failed to specify whether the holding rested on state or federal constitutional grounds); Felicia A. Rosenfeld, Note, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 *Fordham L. Rev.* 1041, 1042, 1047 (1988) (studying over five hundred state court decisions post-*Michigan v. Long* and finding that "most state courts fail to indicate clearly the basis for their constitutional rulings").

On occasion, states have explicitly acknowledged deciding cases so as to invite Supreme Court review. For example, in an 1844 case, the Pennsylvania Supreme Court stated that "in cases of difficulty or doubt," it would "put [its] judgment in such a shape as would make it the subject of a writ of error" to the Supreme Court. *Chadwick v. Moore*, 8 *Watts & Serg.* 49, 53 (Pa. 1844).

<sup>126</sup> 463 U.S. at 1040–41.

<sup>127</sup> See *supra* note 125.

When state courts issue decisions that are unreviewable by the United States Supreme Court, they must be prepared to take all of the heat; when they issue decisions reviewable by the Supreme Court, they can partially insulate themselves from that heat. Faced with a choice between insulating their judgments from Supreme Court review or partially insulating themselves from internal political pressure, it is hardly surprising that most of the time state judges opt for the latter.<sup>128</sup>

*Michigan v. Long* may itself be an example of a state court's use of a federal precedent as political cover for its decision. David Long was convicted of drug possession after the police found marijuana during a search of the passenger compartment of his car. The Michigan Supreme Court reversed the conviction after concluding that the search was unconstitutional. To support its conclusion, the Michigan court cited both the Fourth Amendment and a similar provision in the Michigan state constitution, along with federal precedent construing the Fourth Amendment. Judges on the Michigan Supreme Court are elected to eight-year terms and thus must be attentive to voter preferences. Cases like Long's raise red flags for elected judges, who have reason to fear

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<sup>128</sup> Hartnett, *supra* note 124, at 983; see also Toby J. Heytens, Doctrine Formulation and Distrust, 83 Notre Dame L. Rev. 2045, 2080 (2008) (speculating that the Supreme Court began reviewing state court damage awards because of its "increasing conviction that juries had gotten out of control, and that at least some state courts were unwilling to rein them in . . . [possibly] because the political environment in various states made state court judges reluctant to take action in the absence of cover from the Supreme Court").

Interestingly, the New Hampshire Supreme Court, whose judges are appointed for life, is an exception. That court's decisions regularly declare that citations to federal law are merely for "guidance" in interpreting state law, thereby insulating its decisions from direct review in the Supreme Court as much as possible. As Professor Hartnett notes, New Hampshire's willingness to take the full political heat for its decisions may be explained by the fact that its judges are appointed, not elected, and thus do not need the political protection that comes from the potential for Supreme Court review. Hartnett, *supra* note 124, at 983–84.

Some scholars contend that the doctrine prohibiting Supreme Court review of state court decisions clearly resting on an independent and adequate state law ground "permits state courts to hide behind federal law," hindering "accountability." Richard A. Matasar & Gregory S. Bruch, Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 Colum. L. Rev. 1291, 1364–65 (1986); see also George Deukmejian & Clifford K. Thompson, Jr., All Sail and No Anchor—Judicial Review Under the California Constitution, 6 Hastings Const. L.Q. 975, 996–97 (1979) (criticizing the California Supreme Court for avoiding Supreme Court review by resting its decisions on both state and federal constitutional law). But in fact it appears that the opposite phenomenon has occurred: state courts regularly rest their decisions on federal law because the availability of Supreme Court review diminishes their accountability for the results.

voter reaction to decisions allowing clearly guilty defendants to go free due to constitutional procedural errors. Accordingly, the Michigan Supreme Court might have preferred to ground its decision on the U.S. Constitution and federal precedent, thereby leaving the decision open to Supreme Court review. Indeed, when the case was remanded to the Michigan Supreme Court to address whether the police search of the trunk was unconstitutional—a question that had not previously been addressed—the Michigan Supreme Court concluded the search was illegal, and this time chose to rely *solely* on the U.S. Constitution's Fourth Amendment, even though it could have forestalled any further federal review by also citing the state constitution as a basis for its decision.<sup>129</sup>

All of this is speculative, of course. Professor Michael Solimine, for one, is skeptical that the electorate is “parsing . . . court decisions to see if reliance has been made on federal or state law,” and thus he doubts that judicial elections turn on whether state court judges based their decision on federal or state law.<sup>130</sup> Yet studies of voters in judicial elections demonstrate that they typically have higher incomes, are better educated, and are “more interested in and knowledgeable about politics” than the average voter.<sup>131</sup> Many are members of the bar, or have a more sophisticated understanding of the relationship between federal and state courts. It is thus not unreasonable to assume that many voters in judicial elections understand that at times state courts are bound to follow federal law even when it is at odds with their preferences and the preferences of state citizens generally. Finally, even if Solimine is correct that the electorate is not paying close attention, elected judges may nonetheless think they are. These judges might simply be more comfortable deciding cases based on federal questions so that they can respond to their critics that the “federal courts made me do it.”

### *B. The Influence of Federal Judicial Decisions on Elected Judges*

Federal judicial decisions may also influence state court decision-making for reasons unrelated to the threat of review and reversal. Supreme Court precedent on a question of federal law is binding, and thus state judges are required by the supremacy clause to follow it regardless

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<sup>129</sup> *People v. Long*, 359 N.W.2d 194, 198 (Mich. 1984).

<sup>130</sup> Solimine, *supra* note 72, at 343–44.

<sup>131</sup> Baum & Klein, *supra* note 41, at 150.

of whether that decision will end up being reviewed by a federal court.<sup>132</sup> Moreover, federal judicial decisions appear to influence state courts even when they are not binding, either because their reasoning is persuasive or because they provide political cover for an elected state court judge hoping to avoid blame for an unpopular decision.

### *1. The Supremacy Clause and a Culture of Deference*

State court judges are bound by the Supremacy Clause to apply federal law and follow Supreme Court precedent, and they have been socialized to do so even when the possibility of federal judicial review is remote.<sup>133</sup> In other words, state courts will follow Supreme Court precedent for reasons unrelated to the possibility of review and reversal. Disentangling state court motivations for adhering to federal precedent is not easy, and state court obeisance would likely diminish were the Supreme Court stripped of jurisdiction to review categories of state court decisions.<sup>134</sup> That said, in this day and age, there is no reason to assume that state judges will disregard their constitutional obligation to obey federal law just because federal judicial review is unlikely or unavailable. Indeed, states continue to follow federal law today despite the de minimis chance of Supreme Court oversight.

Adherence to federal precedent is a powerful constitutional and cultural norm. The Supremacy Clause declares that federal law trumps conflicting state law and explicitly instructs that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any

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<sup>132</sup> See U.S. Const. art. VI, cl. 2; see also Paul M. Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 Harv. J.L. & Pub. Pol’y 31, 33 (1984); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 868 (1994); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 Vill. L. Rev. 900, 925 (1982). A few scholars contend that lower courts need not adhere to Supreme Court precedent in cases in which the Supreme Court has been stripped of jurisdiction to review those decisions. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 258 n.170 (1985); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill. L. Rev. 929, 936–37 (1982).

<sup>133</sup> Cf. Baum, *supra* note 113, at 212 (“Judges are persons who have undergone a legal socialization process in which the authority of higher courts for their subordinates is an accepted value, and that socialization process inevitably has a significant effect on judges’ perspectives.”).

<sup>134</sup> Caminker, *supra* note 132, at 826–27.

State to the Contrary notwithstanding.”<sup>135</sup> The Clause thus speaks directly to the majoritarian difficulty, telling state judges in no uncertain terms that their first allegiance is to federal law, not state preferences. Although in the past state courts were known to blatantly ignore the Supremacy Clause’s mandate, today it guides state court decision-making.<sup>136</sup> Elected state court judges faced with cases brought by unpopular litigants, or raising unpopular issues, nonetheless are willing to make decisions that will displease their constituencies because federal law and precedent require it. In short, an ingrained acceptance of the supremacy of federal law, rather than a fear of reversal, may be what ultimately motivates elected judges to follow federal precedent.<sup>137</sup>

Scholars have attempted to study whether courts adhere to binding precedent even when review by a higher court is unavailable, and have found a surprisingly high level of compliance. Political scientists Sara Benesh and Wendy Martinek determined that state high courts attend quite closely to Supreme Court precedent for reasons other than a desire to avoid Supreme Court review and reversal.<sup>138</sup> In a study of state high court decisions from 1970 through 1991 regarding the admissibility of voluntary confessions by criminal defendants, Benesh and Martinek found that state courts sought to decide cases in accord with Supreme Court precedent despite the slim chance of Supreme Court review.<sup>139</sup> The authors concluded that “while the state supreme courts may appear to be only formally subordinate to the United States Supreme Court [because of the low probability of Supreme Court review], in practice they do heed their federal judicial principal.”<sup>140</sup> When surveyed, judges report that following precedent is something they strive to do even when they

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<sup>135</sup> U.S. Const. art VI, cl. 2.

<sup>136</sup> See *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (“Despite . . . the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.”).

<sup>137</sup> Solimine, *supra* note 72, at 358 (noting that possibility of Supreme Court review of any given state court decision is “remote,” and speculating that the “norm of following Supreme Court precedent is the principal compelling force” behind state court adherence to that precedent).

<sup>138</sup> Benesh & Martinek, *supra* note 115, at 122–24.

<sup>139</sup> *Id.* at 114–16, 122–23.

<sup>140</sup> *Id.* at 125.



disagree with the higher court's conclusions.<sup>141</sup> Indeed, one recent study of federal appellate decisions in tort diversity cases found that *federal* courts are willing to follow *state* law even when state law is at odds with their own ideological preferences, and when there is no opportunity for review by a higher court.<sup>142</sup> Although it is certainly possible that the culture could change as elected state judges become more responsive to the electorate, at least for now it appears that federal precedent continues to serve as a counterweight to majoritarian pressures.

## 2. *Persuasive Precedent*

State courts may also be influenced by federal precedent even when they are under no obligation to follow it. State courts' interpretations of federal law, and sometimes even of state law, are guided by Supreme Court dicta and by the decisions of the lower federal courts, despite the fact that these sources are not binding on state judges.<sup>143</sup>

No court is obligated to follow dicta, even when that dicta is included in a Supreme Court opinion. Nor does federal law require state courts to adhere to the precedent set by lower federal courts. Although the Supreme Court has never explicitly addressed the question, individual members of the Court have declared that states are not bound by lower federal courts' interpretations of federal law, including decisions by the federal circuit court with jurisdiction over that state.<sup>144</sup> At least twenty-nine state courts have held that they need not follow lower federal courts' pronouncements on questions of federal law.<sup>145</sup> Nonetheless,

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<sup>141</sup> J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System* 164 (1981) (reporting that out of thirty-five federal appeals court judges interviewed, thirty-two said that they found precedent "influential" when it is "clear and relevant").

<sup>142</sup> In a study of 697 tort diversity cases, researchers found that judges followed state law despite the fact that there was no possibility for either state or U.S. Supreme Court review. Donald R. Songer et al., *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 *Just. Sys. J.* 137, 141–42, 150 (2003).

<sup>143</sup> Cf. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *Harv. L. Rev.* 1131, 1169–70 (1999) (criticizing state courts for applying federal standards of review to state constitutional questions on the ground that many of the institutional limitations on federal courts do not apply to states).

<sup>144</sup> See *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (explaining that Arkansas trial court was not bound by Eighth Circuit precedent); *Steffel v. Thompson*, 415 U.S. 452, 482 (1974) (Rehnquist, J., concurring) ("State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties.").

<sup>145</sup> Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and Erie State Law Predic-*

these state courts generally find federal circuit precedent on questions of federal law to be “persuasive” authority entitled to “great weight.”<sup>146</sup> In addition, at least six other state courts have concluded that they *are* obligated to adopt circuit court precedent on questions of federal law, despite the absence of any federal law or judicial decision requiring them to do so, and thus these state courts treat federal circuit precedent as binding.<sup>147</sup>

State judges claim to follow federal precedent out of deference to federal courts as the more appropriate institution to construe federal regulations, statutes, and constitutional provisions. For example, the Utah Supreme Court declared that if “there is a decision from a federal court which is decisive of the [federal] question . . . it is our duty to follow the federal court rather than the state court, since the question involved is one upon which the federal courts have the ultimate right to speak.”<sup>148</sup> Other state courts have cited the need for uniformity as grounds for following federal precedent,<sup>149</sup> and some consider themselves bound to follow unanimous federal circuit precedent on the federal issue before them to preserve the “harmonious relationship” between federal and state

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tions, 3 Seton Hall Circuit Rev. 1, 17 n.77 (2006) (compiling state court cases describing their views regarding the precedential effect of lower federal court rulings on questions of federal law).

<sup>146</sup> See *Wrabley*, supra note 145, at 17–23 & n.77; see also, e.g., *Etcheverry v. Trig-Ag Serv., Inc.*, 993 P.2d 366, 368 (Cal. 2000); *Red Maple Props. v. Zoning Comm’n of Brookfield*, 610 A.2d 1238, 1242 n.7 (Conn. 1992).

<sup>147</sup> See, e.g., *King v. Grand Casinos of Miss., Inc.*, 697 So. 2d 439, 440 (Miss. 1997) (“This Court’s task in the present case is simplified greatly by the fact that there is a Fifth Circuit Court of Appeals decision on point, which this Court considers to be controlling with regard to the present issue of federal law.”); *Desmarais v. Joy Mfg. Co.*, 538 A.2d 1218, 1220 (N.H. 1988) (“[I]n exercising our jurisdiction with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes.”); see also *Wrabley*, supra note 145, at 19–20 (citing state court decisions in which state courts declare they are bound by the precedent set by lower federal courts).

<sup>148</sup> *Kuchenmeister v. L.A. & Salt Lake R.R. Co.*, 172 P. 725, 727 (Utah 1918).

<sup>149</sup> See, e.g., *Szewczyk v. Dep’t of Soc. Servs.*, 881 A.2d 259, 267 n.12 (Conn. 2005) (“Any disagreement by us with the Second Circuit’s statutory analysis must yield to the more compelling objective of uniform interpretation of federal laws . . . .”); *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957, 970 (Ill. 2004) (“[D]ecisions of the Federal courts interpreting a Federal Act . . . are controlling upon Illinois courts, in order that the act be given uniform application.”) (internal quotation marks and citation omitted); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (stating that lower federal courts’ opinions do not bind state courts but should be accorded “due respect” to promote uniformity).

courts.<sup>150</sup> As discussed above, state courts are socialized to respect the role of the federal courts in construing federal law: just as state courts follow Supreme Court precedent even when the possibility of Supreme Court review is remote, they are guided by Supreme Court dicta and the holdings of lower federal courts even though they are under no constitutional obligation to follow their lead.

In fact, to the chagrin of some, state judges have turned to lower federal court decisions interpreting *federal* law to inform their interpretations of similar provisions of *state* law.<sup>151</sup> Justice William Brennan wrote an influential article urging state courts to expand the interpretation of their own constitutions to protect individual rights,<sup>152</sup> and the Supreme Court's decision in *Long* made clear to state courts that they could insulate such decisions from Supreme Court review by clearly citing state law as the basis for their rulings.<sup>153</sup> Nonetheless, states have been surprisingly reluctant to rest decisions on state constitutional law, choosing instead to leave the grounds for their decisions ambiguous,<sup>154</sup> to rely solely on federal constitutional law, or to construe state constitutional provisions in lockstep with the mandates of the U.S. Constitution.<sup>155</sup> Ac-

<sup>150</sup> *Littlefield v. Maine Dep't of Human Servs.*, 480 A.2d 731, 737 (Me. 1984) ("[I]n the interests of existing harmonious federal-state relationships, it is a wise policy that a state court of last resort accept, so far as reasonably possible, a decision of its federal circuit court on such a federal question."); see also *Investment Co. of Sw. v. Reese*, 875 P.2d 1086, 1090 (N.M. 1994) (stating that it is "guided by the unanimity of opinion among the federal courts").

<sup>151</sup> See Gardner, *supra* note 125, at 795–97 (discussing *People v. Dunn*, 564 N.E.2d 1054 (N.Y. 1990)).

<sup>152</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

<sup>153</sup> 463 U.S. 1032, 1040–41 (1983).

<sup>154</sup> See Gardner, *supra* note 125, at 785–89 (describing cases in which state courts have failed to articulate clearly whether their decisions rest on federal or state law).

<sup>155</sup> See Solimine, *supra* note 72, at 338 ("[S]ystematic studies demonstrate that most state courts, when presented with the opportunity, have chosen *not* to depart from federal precedents when interpreting the rights-granting provisions of state constitutions.").

Despite the fact that state constitutions are, in theory, entirely separate from the U.S. Constitution, state courts regularly issue decisions either following federal precedent without mentioning state constitutional law, or stating that they "refuse to give a[] broader interpretation" to the provisions of the state constitution than federal courts have provided for similar provisions of the U.S. Constitution. See Gardner, *supra* note 125, at 792 (quoting *R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13*, 391 S.E.2d 587, 591 (Va. 1990)); see also James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 Alb. L. Rev. 1183, 1194–201 (2000) (examining 627 state supreme court opinions from twenty-five states and concluding that state courts were unwilling to deviate from federal courts' construction of the U.S. Constitution in most areas).

cordingly, even non-binding federal judicial decisions are an important influence that may offset the influence of public opinion on elected judges.

*C. Forum Selection as a Counterweight to Majoritarian Pressures on Elected Judges*

Federal courts can also counteract majoritarian pressures on state court judges simply by being available as an alternative forum in which litigants can file their cases. As previously mentioned, the typical “countermajoritarian case”—such as one involving a criminal defendant, minority group, or out-of-state corporation—will often turn on a question of federal law. The U.S. Constitution and federal statutes contain myriad protections for unpopular causes and individuals, guaranteeing the rights to free speech, freedom of religion, and equal treatment of racial and ethnic minorities. As a result, plaintiffs with claims that may not be well received in state court can file their cases in federal district court, and criminal defendants who believe that their federal rights have been violated can seek habeas review.

Federal courts are also available to decide questions of state law. In federal question cases, federal courts are empowered to hear related state law claims.<sup>156</sup> Federal courts may also preside over cases in which there is complete diversity of citizenship between the parties and the amount in controversy is satisfied. Indeed, according to most, the very purpose of diversity jurisdiction was to provide a neutral federal forum for an out-of-state litigant who feared that a state court’s prejudice would prevent that litigant from obtaining a fair hearing. In short, politically insulated federal courts can play a significant role in the application and interpretation of both federal and state law in states where the people elect their judges.<sup>157</sup>

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<sup>156</sup> 28 U.S.C. § 1367(a) (2006).

<sup>157</sup> In an article challenging the presumption of parity between state and federal courts, Professor Burt Neuborne argued that federal courts offer more hospitable fora for constitutional rights litigation than state courts, in part because federal judges are insulated from majoritarian pressures. Neuborne, *supra* note 9, at 1120–21. Neuborne addressed the issue from the perspective of litigator as well as scholar; he had served as a staff counsel for the New York Civil Liberties Union and then as an Assistant Legal Director to the American Civil Liberties Union, and he continued to litigate constitutional rights cases even after he joined the faculty of the New York University School of Law. *Id.* at 1105. He explained that as “a civil liberties lawyer for the past ten years, I have pursued a litigation strategy premised on . . . [the] assumption [that] . . . persons advancing federal constitutional claims against

Interestingly, then, it is likely that federal courts play a larger role in addressing federal and state claims that arise in states that elect rather than appoint their judges. If either party believes that public opinion favors his opponent, particularly in a high salience case, then that party is more likely to seek out the federal forum when the alternative is to appear before an elected judge. Victor Flango, a researcher for the National Center for State Courts, conducted a survey of 1642 attorneys who brought diversity cases in either state or federal court to determine their reasons for choosing one court system over the other. He found that important factors influencing attorneys' choices of forum were their fears of local bias and perceptions that federal judges are more competent than state judges,<sup>158</sup> considerations confirmed by other studies of litigant preferences.<sup>159</sup> In other words, if litigants fear that their state judges will be influenced by public opinion, they can respond by "voting with their feet" and choosing an appointed federal judge to preside over the resolution of their disputes.<sup>160</sup>

Accordingly, the more a state judiciary is viewed as responsive to majoritarian pressure and influence, the fewer opportunities it will likely have to address legal questions regarding the scope of fundamental rights or the protection of unpopular individuals or minorities. Conversely, appointed federal and state judges, by virtue of attracting more

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local officials will fare better, as a rule, in a federal, rather than a state, trial court." *Id.* at 1115–16.

<sup>158</sup> Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 *Akron L. Rev.* 41, 52–54 (1991). For further discussion of Flango's article, see *infra* Section IV.C.

<sup>159</sup> Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 *Am. U. L. Rev.* 369, 375 (1992); see also Kristin Bu-miller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 *Law & Soc'y Rev.* 749, 759–62 (1981) ("The bias influencing attorneys' decisions . . . is apparently neither regional bias nor particular hostility due to 'state' residence, but fear of favoritism to local interests.").

<sup>160</sup> Of course, for every litigant who seeks out a federal forum, there is an opposing party who would rather appear before an elected state judge. Under the current statutory framework, however, federal jurisdiction is the default whenever one of the two parties prefers it, unless federal jurisdiction is premised on diversity of citizenship and the case is filed in the defendant's home state. See 28 U.S.C. § 1441(b). The party who prefers to litigate in state court could try to block access to a federal forum through a number of methods—adding a nondiverse party, contesting the amount in controversy, seeking to have a federal question case remanded on the ground that state law predominates, or encouraging the federal court to abstain from deciding a question of state law. In general, however, federal courts will end up hearing cases over which they share jurisdiction with state courts when at least one party prefers the federal forum, since that is the result intended by the jurisdictional statutes.

civil rights cases than elected judges do, will likely have more opportunities to define and develop federal rights than will elected judges. Ironically, then, states that elect judges for the purpose of keeping them accountable to the citizens may have less influence over the development of state and federal law than do states that appoint their judges.<sup>161</sup>

#### *D. The Moderating Effects of Due Process*

An elected judge's decisions are also constrained by federal constitutional standards for judicial decision-making, the most significant being the Fourteenth Amendment's command that no citizen be deprived of life, liberty, or property without due process of law. Thus, even if a case arises between two citizens over a matter of state law, a federal court will be available to review and overturn the verdict if the manner in which the claim is heard and decided falls short of the constitutional standard. For example, defendants can seek Supreme Court review of "grossly excessive" punitive damage awards,<sup>162</sup> and any litigant can seek federal review on the ground that the state judge had a reason to be biased against them.<sup>163</sup>

<sup>161</sup> It is worth noting, however, that even when a litigant successfully shoehorns his case into federal court, the effects of majoritarian pressures might follow him into that forum. Federal judges must apply state law as construed by the highest court of the state, and thus if the state courts have already pronounced on the issue then the federal court is bound by that interpretation. If the legal question has never been addressed by the state's high court, federal judges attempt to predict how that court would decide the issue. *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967). If the state supreme court has a history of narrowly interpreting state constitutional and statutory provisions protecting individual and minority rights, the federal court may interpret the provision of state law before it in the same spirit, thereby perpetuating the majoritarian difficulty. A federal judge might even abstain from resolving a novel and important state law question, and instead seek the state court's input on that question through certification to the state's high court. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76–80 (1997); *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27–29 (1959). The very worst of the majoritarian impulses, however, will not follow litigants into federal court. If the state supreme court varies its interpretation of state law depending on the popularity of the litigants before it, federal courts will not engage in the same biased decision-making. Cf. Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 Va. L. Rev. 1869, 1900 (2008) ("To the extent that state courts are biased against out-of-state residents, state and federal courts do not, and *should not*, decide state law claims identically."). The bottom line is that if elected state court judges are viewed as hostile to "countermajoritarian" cases, litigants in these cases will proceed in federal court more often than they would in states with appointed judges.

<sup>162</sup> See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996).

<sup>163</sup> See, e.g., *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

Admittedly, the requirements of due process are minimal and federal courts are willing to give states leeway to structure their judicial systems as they think best.<sup>164</sup> The Supreme Court has expressly rejected the claim that elective judiciaries violate due process, it and has been willing to tolerate the activities that come with elections.<sup>165</sup> If the Due Process Clause does not bar states from electing their judges, then it must permit those judges to campaign for office, fundraise, and, as *Republican Party of Minnesota v. White* made clear, announce their views on the issues of the day. The Supreme Court has declined to review a number of cases in which state court judges were claimed to have violated the litigants' due process rights by refusing to recuse themselves from cases involving major campaign donors.<sup>166</sup> In the past, a litigant who believed that a state judicial system was tainted by the manner in which its judges were selected was unlikely to convince a federal court that the decision should be overturned for that reason.<sup>167</sup>

The situation may be changing, however. Just this past term, in *Caperton v. A. T. Massey Coal Co.*, the Supreme Court reversed a West Virginia Supreme Court decision because the case involved a company whose Chief Executive Officer had raised millions of dollars to support the election of one of the justices on that court.<sup>168</sup> The Supreme Court thus established that due process demands that an elected judge disqualify himself in a case involving a person actively involved in supporting that judge's campaign for office, particularly if that person assisted in the judge's election while the case was pending before that judge's court. Although the facts of *Caperton* are extraordinary, the case signals to state courts that they must police themselves or risk an embarrassing Supreme Court rebuke.

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<sup>164</sup> Friedland, *supra* note 14, at 577–604 (noting that the Due Process Clause only requires judicial disqualification under narrow circumstances).

<sup>165</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 782–83 (2001) (stating that the Due Process Clause has “coexisted with the election of judges ever since it was adopted,” and thus cannot be read to bar judicial elections). Some legal academics have suggested that elective judiciaries are at odds with due process. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *Yale L.J.* 455, 498 (1986) (“[I]n cases involving the assertion of a liberty or property interest in which the state is a party, the use of non-tenured state judges seems to be a clear violation of procedural due process.”).

<sup>166</sup> See, e.g., *Petition for Writ of Certiorari, Avery v. State Farm Mut. Auto. Ins. Co.*, No. 05-842 (U.S. Dec. 27, 2005), cert. denied, 547 U.S. 1003 (2006).

<sup>167</sup> See, e.g., *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212 (5th Cir. 2001).

<sup>168</sup> 129 S. Ct. 2252, 2265 (2009).

More importantly, the basic tenets of due process influence the way in which elected state court judges approach cases. However unattractive a party or legal argument is to the general public, state court judges must ensure that each party benefits from the basic procedural rights of notice and an opportunity to be heard, must make their decision in accordance with the constitutionally required standard of proof, and must issue a ruling, usually accompanied by some explanation. These procedural formalities may counter the pressures on state court judges to reach a decision that, while preferred by the electorate, is unsupported by the law.

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Federal courts' regular interactions with elected state court judges provide a countervailing influence that can offset majoritarian pressures. Elected judges are primed to decide cases in accord with their constituents' preferences, but the threat of federal review, the persuasive power of federal precedent, and the political cover provided by federal judicial decisions can all temper those instincts. And when these mechanisms fail, at least some litigants can frame cases to get into federal court, either as an original matter or on review.

Federal courts are not as effective as they might be in responding to the majoritarian difficulty, however. Limited capacity for review of state court decisions, coupled with jurisdictional rules and policies that do not take into consideration state judicial selection methods, mean that federal courts do not play as extensive a role in protecting against majoritarian pressures as they could.

#### IV. MEASURING THE INFLUENCE OF THE FEDERAL JUDICIARY ON THE MAJORITARIAN DIFFICULTY

Part III of this Article describes the ways in which the federal judiciary may serve to counteract majoritarian pressures on state court judges. This Part examines the question empirically, from the federal court system's perspective and from litigants' perspectives, to determine whether federal courts' interactions with judges initially selected by ballot differ from their interactions with judges selected by appointment or through a merit selection procedure.

This Part does not set out to "prove" the arguments made in Part III. After all, even if federal courts do not treat decisions by elected state judges any differently from appointed or merit-selected judges, they can



still have a significant influence on elected judges simply by reviewing the decisions of elected judges and setting federal precedent. Rather, this Part seeks to determine, as a descriptive matter, whether federal courts are in fact engaged in more vigorous oversight of elected state court judges. If so, these data suggest that the federal judiciary may already be playing a role in moderating the majoritarian difficulty, albeit without appearing to make any conscious effort to do so. That information in turn supports Part V's proposal that federal courts adopt explicit policies in favor of supervising elected state court judges, at least in cases in which public opinion would be most likely to have undue influence.

At the outset, we admit that this empirical task is daunting. At every turn, the data are affected by differences among the state courts unrelated to the method of judicial selection. Furthermore, all data more than a decade old are compromised by the fact that judicial elections have only recently become high salience events, and thus in the past there was little reason for either federal courts or litigants to treat elected judges differently than appointed judges.<sup>169</sup> Moreover, despite the need for greater federal oversight of elected judges, federal courts have not explicitly taken on this new role, and thus they may not give decisions by elected state court judges the scrutiny they deserve. Likewise, many litigants may not be fully cognizant of the majoritarian difficulty, and so they may fail to seek out a federal forum even when it would make sense to do so. For all of these reasons, the data discussing federal judicial oversight of state courts can provide only an incomplete picture, at best, of the manner in which federal courts can offset the majoritarian difficulty.

That said, examining data regarding litigant choices, state court decisions, and federal review of elected state court judges is an important component of this project. Political scientists have rightly criticized legal scholars for simply ignoring empirical data that can shed light on theory.<sup>170</sup> Whether the federal judiciary can offset majoritarian pressures on elected state judges is a factual question, even if attempts to measure that effect are necessarily imperfect, and thus it is worth examining any data that shed light on the relationship between federal courts and elected state judges.

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<sup>169</sup> See *supra* Section I.B.

<sup>170</sup> See, e.g., David Muttart, *The Empirical Gap in Jurisprudence* (2007).

This Part begins by comparing the Supreme Court's review of decisions by elected, appointed, and merit-selected or -retained state court judges, then turns to the data regarding habeas filings in the lower federal courts, and concludes by examining the trends in diversity filings in federal district courts. The data are not definitive, but are consistent with the conclusion that elected state court judges—particularly those on partisan-elected courts—are subject to more active federal oversight than appointed judges in some contexts, and that litigants are more likely to seek a federal forum when their alternative is a hearing before an elected judge.

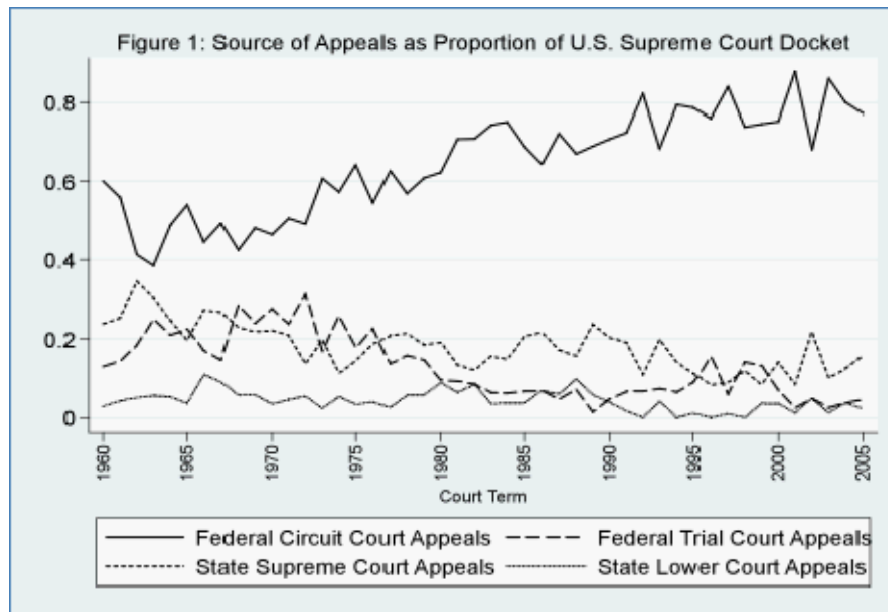
*A. Comparing Supreme Court Review and Reversal of Decisions Across State Judicial Selection Systems*

We began by analyzing the Supreme Court's review of state appeals. To do so, we relied on the Supreme Court Database, which identifies the court from which each case was appealed.<sup>171</sup> Using the "SOURCE" variable for Court terms 1960 to 2005, we identified whether a case was appealed from a federal court (circuit or trial) or state court (high or lower) and the identity of the state. The distribution of the Court's docket over that time period is displayed in Figure 1, which indicates the declining proportion of the docket dedicated to review of state court cases. During the same time period, however, the Court tended to reverse state court decisions at a higher rate than federal court decisions. Although the Supreme Court reversed sixty-seven percent and fifty-nine percent of federal circuit and district court decisions, respectively, it reversed approximately seventy percent of both state supreme and lower court decisions.<sup>172</sup> This higher reversal rate could suggest that state courts more often misapply federal law than do the lower federal courts, but it also could be the product of selection effect if the Court exercises its power to review state court judgments only in the most egregious circumstances.

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<sup>171</sup> <http://scdb.wustl.edu/data.php> (last visited Mar. 15, 2010). To construct the data analysis in this section, we selected cases using the following criteria: ANALU= 0 (case citation); and DEC\_TYPE = 1, 2, 5, 6, and 7 (all decision types except memorandum cases and decrees). To construct the reversal variable, we coded a reversal = 1 if the variable DIS = 0, 2, 3, 4, 5, 6, or 7.

<sup>172</sup> See also Solimine, *supra* note 72, at 354 & n.93.



The purpose of examining the federal judicial reaction to the majoritarian difficulty, however, is not only to determine whether states courts are more likely to be reversed than federal courts, but also to evaluate specifically whether the states' method of judicial selection or retention is related to reversal at the Supreme Court. Thus, it is necessary to compare Supreme Court review of decisions from states with different methods of judicial selection and retention to make that determination.

To conduct such an analysis, we coded each case in the dataset in terms of whether it emerged from a state in which the state supreme court was (1) selected via partisan election, (2) chosen via nonpartisan election, (3) appointed by the governor or legislature, or (4) selected using some form of a merit or Missouri plan.<sup>173</sup> Retention methods may,

<sup>173</sup> State Politics & Policy Quarterly: Data Resource/The Practical Researcher, [http://academic.udayton.edu/SPPQ-TPR/tpr\\_data\\_sets.html](http://academic.udayton.edu/SPPQ-TPR/tpr_data_sets.html) (last visited Feb. 2, 2010) (click on "State Dataset" to download Excel spreadsheet). Because states often vary their selection methods across levels of the judiciary, we also coded each state's trial court selection system according to the same typology. Some states have changed their method of judicial selection over time, and our data reflect those changes. For the year 2004, we relied on data provided by the American Judicature Society, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm) (last visited Feb. 23, 2010), and categorized the state supreme courts as follows: (1) partisan-elected

however, differ from selection methods. For example, while California initially appoints its justices, they remain on the bench via retention elections. We followed the same procedure to code the states' retention methods, categorized in terms of whether the state supreme court was retained pursuant to (1) partisan elections, (2) nonpartisan elections, (3) retention elections, or (4) reappointment or life tenure.<sup>174</sup> We began our assessment of the relationship between reversal and state court selection/retention method by calculating the proportion of cases reversed by the Supreme Court for each group. Those percentages are set forth in Table 1, revealing that states with partisan-elected state supreme courts (either at the selection or retention stages) are the most likely to be reversed, followed by states with nonpartisan-elected state supreme courts. To subject this relationship to a more rigorous evaluation, we then specified several logit models of the Supreme Court's decision to reverse (coded 1 if the Court reversed in whole or in part, and 0 otherwise). The variable of interest in these models is the source of the case (federal or state), and in the case of the states, the type of judicial selection/retention system the state employs.<sup>175</sup> To control for other agenda-

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states: Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas, West Virginia; (2) nonpartisan-elected states: Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, Wisconsin; (3) merit-selected states: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wyoming; (4) appointed states: California, Maine, Massachusetts, New Hampshire, New Jersey, South Carolina, Virginia. We categorized Massachusetts and New Hampshire as appointed states because of the governors' discretion in the selection process. These data are on file with the authors.

<sup>174</sup> For purposes of coding retention methods, we again relied on data provided by the American Judicature Society, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm) (last visited Feb. 23, 2010). For the year 2004, we categorized the states as follows: (1) partisan election: Alabama, Louisiana, Texas, West Virginia; (2) nonpartisan election: Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, Wisconsin; (3) retention election: Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Wyoming; (4) reappointment or life tenure: Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Vermont, Virginia. These methods have changed over time in some states, with some, for example, shifting from partisan to nonpartisan elections over time. Our data account for those temporal changes.

<sup>175</sup> We tested whether any significant relationship existed between a state's trial court selection system and reversal by the Supreme Court, particularly when the lower court selection system differed from that of the state supreme court and when the case was appealed

setting effects that might affect the Supreme Court's decision to reverse, we included variables that reflect whether the case involved a conflict among the courts below,<sup>176</sup> and whether the case was taken on appeal as opposed to certiorari.<sup>177</sup> Tables 2 (selection method) and 3 (retention method) set forth the results of our model estimations.<sup>178</sup>

**Table 1: U.S. Supreme Court Reversal,  
1960 to 2005 Terms**

<b>Selection Method (State Supreme Court)</b>	<b>Percent Reversed</b>	<b>Total N</b>
Partisan Election	72.84	578
Nonpartisan Election	70.00	310
Merit Selection	66.39	244
Appointment	66.99	312
<b>Retention Method (State Supreme Court)</b>		
Partisan Election	73.68	456
Nonpartisan Election	70.96	272
Retention Election	65.06	435
Reappointment or Life Tenure	69.75	281
<b>Federal Courts</b>		
Federal Circuit Courts	66.77	3900
Federal Trial Courts	58.60	860

**Table 2: Models of U.S. Supreme Court Reversal by Judicial Selection  
Method, 1960 to 2005 Terms**

	<b>Model 1 Federal and State</b>	<b>Model 2 All State Ap- peals</b>	<b>Model 3 All State Ap- peals</b>

directly from the lower court. These tests revealed no significant relationships between lower court selection method and Supreme Court reversals.

<sup>176</sup> We coded the conflict variable based on the CERT variable in the Supreme Court Database (CERT = 1, 2, 3, 4, 5).

<sup>177</sup> The appeal variable was coded based on the JUR variable in the Supreme Court Database (JUR = 2, 6, 7).

<sup>178</sup> Ideally, we would also control for ideological effects on the Supreme Court's decision to reverse, such as by incorporating the distance between the median justice on the Supreme Court and the median justice on the state supreme court. At this time, however, we do not have a measure of judicial ideology that is comparable across the state and federal courts.

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	<b>Appeals</b>		
<b>Independent Variable</b>	<b>Coefficient (Std. Error)</b>	<b>Coefficient (Std. Error)</b>	<b>Coefficient (Std. Error)</b>
State Court (Source)	.135* (.067)	--	--
Partisan-Elected State Supreme Court	--	.291† (.159)	.165 (.169)
Nonpartisan-Elected State Supreme Court	--	.255 (.182)	.073 (.203)
Merit Selected State Supreme Court	--	.074 (.192)	-.111 (.214)
State Court Professionalism	--	--	-.830* (.405)
Conflict	-.517*** (.071)	-.414† (.223)	-.439* (.293)
Appeal	-.492*** (.071)	-.567*** (.143)	-.566*** (.144)
Constant	.372* (.172)	.227 (.340)	.933* (.477)
N	6204	1444	1444
Log-likelihood	-3662.60	-840.56	-838.41

Note: Reference categories are Appointed State Supreme Courts; term dummy variables omitted from table; robust standard errors reported. †p<.06; \*p<.05; \*\*\*p<.001. All significance tests are two-tailed.

**Table 3: Models of U.S. Supreme Court Reversal by Judicial Retention Method, 1960 to 2005 Terms**

	<b>Model 1</b>	<b>Model 2</b>
	<b>All State Appeals</b>	<b>All State Appeals</b>
<b>Independent Variable</b>	<b>Coefficient (Std. Error)</b>	<b>Coefficient (Std. Error)</b>
Partisan Election	.068 (.169)	.047 (.170)
Nonpartisan Election	.123 (.194)	.085 (.197)
Retention Election	-.278 (.173)	-.212 (.177)
State Court Professionalism	--	-.572 (.379)
Conflict	-.408† (.223)	-.433* (.224)
Appeal	-.584*** (.144)	-.580*** (.145)
Constant	.386 (.341)	.811† (.439)
N	1444	1444
Log-likelihood	-839.52	-838.35

Note: Reference categories are Reappointed or Life Tenured State Supreme Court justices; term dummy variables omitted from table; robust standard errors reported. †p<.06; \*p<.05; \*\*\*p<.001. All significance tests are two-tailed.

In Table 2, Model 1 includes all appeals from both state and federal courts and confirms the conclusion drawn above based on bivariate statistics: even after controlling for other factors related to reversal, state courts are more likely to be reversed than are federal courts. As noted above, this result could stem from selection effects if, for reasons related to comity or to limited docket space, the Supreme Court takes only those appeals from state supreme court where the reversible error is most plain. To compare across states with different selection methods, Model 2 incorporates data from all state appeals and assesses the impact of state supreme court selection method on the Supreme Court's likelihood of

reversal. Dummy variables reflect the state court selection method, with appointed selection systems as the reference category; alternative reference categories were also tested to determine whether significant differences exist among the groups included.<sup>179</sup> As Table 2 reveals, decisions rendered by states with partisan supreme court selection systems are significantly more likely to be reversed than those emerging from states with appointed high courts ( $p < .05$  in a one-tailed test). Calculation of the partisan election variable's marginal effect indicates that a partisan-elected state supreme court is almost seven percent more likely to be reversed than an appointed court, controlling for other factors. No other significant differences were identified under alternative model specifications.

It is also possible, however, that other factors related to the professionalization of a state judiciary affect the quality of that state's judicial decision-making, which might in turn affect Supreme Court review. Measures of state court professionalization are limited; one of the best available, developed by Professor Peverill Squire, has been calculated for 2004 only.<sup>180</sup> Nevertheless, as a preliminary test of this hypothesis, we included the measure for each state in the estimation of Model 3. Squire's professionalism measure varies from .267 to 1.051 and is based on the proportion of cases on each court's docket that involve discretionary (as opposed to mandatory) appeals, the number of law clerks working for each justice, and the justices' salaries. Note that even though this measure reflects an assessment of these state courts in 2004,<sup>181</sup> its coefficient is significant at the .05 probability level and is in

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<sup>179</sup> A "dummy variable" reflects the presence or absence of a particular condition, in this case, the form of selection method. Where multiple dummy variables reflect mutually exclusive conditions, a regression model must omit one dummy variable as a reference category. All other dummy variables then evaluate any statistically significant differences in the dependent variable for the included dummy variable compared to the reference category. In our model of Supreme Court reversal, for example, the coefficient on the dummy variable "partisan-elected state supreme court" reflects the difference between the likelihood of reversal for cases appealed from states with partisan-elected judiciaries compared to the likelihood of reversal in cases appealed from states in the reference category, that is, those with appointed judiciaries.

<sup>180</sup> Peverill Squire, *Measuring Professionalization of U.S. State Courts of Last Resort*, 8 St. Pol. & Pol'y Q. 223 (2008) (creating a court professionalism variable that incorporates information about judges' salaries, their staffs (clerks), and their ability to control their own dockets).

<sup>181</sup> *Id.* at 229–30 (noting that these findings correlate with older measures of state court professionalism that were up to thirty years old at the time of his study).



the expected direction: Greater state court professionalism is associated with a reduced likelihood of reversal by the Supreme Court. The marginal effect of this variable demonstrates its importance as well, as it exerts a stronger marginal effect than the controls in the model for case selection and conflict. Moreover, once this measure is included, the partisan election variable loses statistical significance. Thus, while judicial selection method may be related to Supreme Court reversal, particularly in states with partisan elected state supreme courts, the level of professionalization within a state court system could be a stronger influence on the likelihood of reversal. These results are tentative, however, given the limited nature of our data.

Table 3 provides the results of our model of reversal, controlling for judicial retention method (as opposed to judicial selection method). These results suggest that retention methods are not related to the likelihood of Supreme Court reversal. Model 1 assesses the relationship between retention method and reversal, controlling for agenda-setting effects; Model 2 incorporates the state court professionalism variable described above. Neither model reveals significant effects related to retention method. Moreover, in Model 2, the court professionalism variable has a negative effect as expected and approaches statistical significance in a one-tailed test, but it fails to achieve the conventional level of significance in a two-tailed test seen in the model in Table 2.

These results suggest that, while there may be some reason to believe that judicial selection and retention in the state courts of last resort has some relationship to Supreme Court reversal (based on the bivariate statistics in Table 1), that relationship is not a particularly strong one once controls are introduced for other factors. Nevertheless, these models are limited and thus the proposition is worthy of further analysis in future research. We now turn to the data on habeas filings across the states.

### *B. Comparing Federal Habeas Filings Across State Judicial Selection Systems*

Federal habeas review provides a particularly important subset of cases in which to examine the role of federal courts in tempering the majoritarian difficulty. The general purpose served by the writ of habeas corpus is to ensure state court adherence to federal law in criminal cases. As discussed, criminal cases are particularly sensitive for elected judges, since a decision to dismiss charges, reverse a conviction, or reduce a sentence could all be used by that judge's opponent as grounds for

claiming the judge is “soft on crime”—a frequent campaign tactic that may have traction with voters. The electorate might be particularly hard on a judge who released a prisoner for a constitutional violation unrelated to the question of guilt or innocence. For example, voters might strongly object to overturning a conviction on the grounds that the prisoner was denied either his right to counsel before confessing or to confront a witness, if the evidence otherwise supports the conviction. Thus, habeas cases present an opportunity for federal courts to review and reverse elected state court judges who may find it difficult to follow the requirements of federal law in some cases.

To shed some initial light on whether state court selection method is related to habeas petitions, we regressed the number of habeas petitions generated by each state per one thousand in the prison population on state court selection and retention methods, using data from the Federal Judicial Center for the years 1990 and 2000.<sup>182</sup> This modeling strategy provides some insight into the tendency of state prisoners to file habeas petitions across the states; it does not, of course, shed light on the likelihood that those petitions will be successful.<sup>183</sup> Nevertheless, the number of habeas petitions filed may serve as a rough proxy for the rate of errors that occurred in the process of obtaining a conviction.<sup>184</sup> The first model tests the estimated effect of state supreme court selection method on habeas petitions from state prisoners, while the second tests the effect of state supreme court retention method on the same dependent variable. The models also control for time effects by including a dummy variable for the year 1990, as well as a dummy variable reflecting whether the

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<sup>182</sup> Victor E. Flango, *State Just. Inst., Habeas Corpus in State and Federal Courts* 14 (1994); John Scalia, U.S. Dep’t of Just., *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980–2000*, Bureau of Justice Statistics Special Report 1–2 (2002).

<sup>183</sup> A study of the likelihood of success would be hampered by the fact that only a tiny percentage of habeas petitions are granted relief, especially in noncapital cases. See Nancy J. King, Fred L. Cheesman II, & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts* 52 (2007) (finding that only .29% of habeas petitions were granted relief in sample of noncapital cases).

<sup>184</sup> Because habeas petitions are as likely to reveal error in the state trial court as to reveal shortcomings in the state appellate process, we used separate models to assess the impact of judicial selection in the state supreme court and trial courts. The results in the trial court models were substantially similar to the results for the supreme court models; for that reason, we report only the supreme court models here.

state employs the death penalty.<sup>185</sup> We also controlled for court professionalism, as described above. The results are presented in Table 4.

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<sup>185</sup> A disparity in the number of prisoners sentenced to death in particular might skew the figures, since these prisoners are the most likely to file habeas petitions.

**Table 4: Regression Model of Habeas Filings in Federal District Court By Judicial Selection and Retention Methods**  
(Per 1000 State Prisoners for Years 1990, 2000)

<b>Independent Variable</b>	<b>Model 1 Judicial Selection</b>	<b>Model 2 Judicial Retention</b>
Partisan Election	9.45** (4.72)	10.80* (4.64)
Nonpartisan Election	.52 (3.80)	1.55 (3.28)
Merit Selection (Model 1) or Retention Election (Model 2)	-.61 (3.72)	1.97 (3.58)
Death Penalty State	5.80* (2.70)	5.72* (2.92)
State Court Professionalism	4.26 (6.73)	8.38 (6.66)
1990 (Year Dummy Variable)	-16.46*** (2.47)	-16.43*** (2.46)
Constant	26.88*** (6.29)	23.54*** (5.37)
R-Square	.398	.387

Note: N = 100. \*p<.05; \*\*p<.01; \*\*\*p<.001. Reference categories are Appointed or Reappointed/Life-tenured State Supreme Court Justices. All significance tests are two-tailed; standard errors are robust.

The results in Table 4 indicate that states with partisan-elected state supreme courts (whether at the selection or retention stage) generate significantly more habeas petitions than states with appointed systems. In fact, alternative model specifications with different reference categories also reveal that states with partisan-elected judiciaries generate significantly more habeas petitions than any other state category. In the model presented in Table 4, states with partisan-elected state courts produce about ten additional habeas petitions per one thousand state prisoners than appointed courts; the same result is obtained when retention rather than selection methods are compared. Moreover, as expected, death penalty states produce significantly more habeas petitions than other states.

Finally, no significant relationship exists between the measure of court professionalism and habeas petitions.

One possible explanation for the results presented in Table 4 is that prisoners who are convicted and sentenced in cases presided over by partisan-elected judges conclude that they are the victims of constitutional error more often than those whose cases come before judges selected by other mechanisms. We recognize, however, that other factors may influence the rate of prisoner habeas petitions as well. For example, states that elect judges may also have harsher criminal penalties and that fact alone could increase the rate of habeas filings from those states, although we controlled for this possibility to some extent by including a variable reflecting whether the state imposed the death penalty. Even with the addition of that control for death penalty states, the variable reflecting partisan election remained significant. Another alternative explanation or caveat to these findings involves the percentage of habeas petitions challenging post-conviction administrative decisions involving sentencing length: Professors Nancy King and Suzanna Sherry report that “[n]early one-fifth of state prisoners’ noncapital habeas petitions filed in federal district courts between 2003 and 2004 challenged not the legality of the conviction or sentence, but the constitutionality of a decision by state corrections or parole officials regarding the administration of the petitioner’s sentence.”<sup>186</sup> To the extent that these claims of administrative rather than judicial error are more common in courts with partisan-elected judges, our findings may reflect the prominence of that trend rather than prisoners’ distrust of elected courts. These explanations await further investigation. At this point, however, the initial analysis presented here is consistent with the conclusion that convicted defendants in states with elected judges—and particularly partisan-elected judges—may more often seek recourse in the federal courts.

### *C. Comparing Litigant Choice to File in Federal Court Across State Judicial Selection Systems*

On behalf of the National Center for State Courts, Victor Flango surveyed 1642 attorneys who brought diversity cases in either state or federal court to determine their rationales for their choice of forum. Flango’s survey demonstrates that fear of local bias and perceptions of

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<sup>186</sup> Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 *Duke L.J.* 1, 19 (2008).

comparatively superior federal court competence were the most important factors influencing selection of the federal courts in diversity cases. These issues trumped other considerations, such as preferences for one court's procedures, the relative convenience of court systems, and differences in case processing time. Flango reported that attorneys were particularly sensitive to the significance of their clients' state citizenship:

Over 60% of all respondents, and 72% of the respondents in the federal sample [i.e., those who had filed their cases in federal courts], consider the fact that their client is not a resident of the state in which the suit is filed to be a relevant factor. With a non-resident as a client, the overwhelming proportion of these attorneys . . . prefer to file in federal courts.<sup>187</sup>

Of attorneys he surveyed in West Virginia—where judges are elected by partisan ballot—Flango reported one attorney's remark that "[in litigation brought by] a local individual against an out-of-state corporation the judge presiding, who is an elected official, has a natural, inherent bias for the local voter."<sup>188</sup> Accordingly, even though Flango's survey does not definitively establish that attorneys from states with elective judiciaries will seek out a federal forum more often than those from states that appoint judges, it is a logical inference to draw from the data showing that fear of state court bias is a major factor in forum selection.

To evaluate this hypothesis using more systematic data from the Federal Judicial Center's Civil Terminations and Civil Pending data files,<sup>189</sup> we regressed the rate of diversity filings for 2006 and 2007 across the states on variables measuring judicial selection and retention methods, as well as court professionalism and the percentage of lawyers in the overall population. The latter variable was included to control for the possibility that more lawyers in the population could lead to more filings in either state or federal court. We estimated two models to assess the

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<sup>187</sup> Flango, *supra* note 158, at 63.

<sup>188</sup> *Id.* at 64. Similarly, Dickie Scruggs, a well-known plaintiff's lawyer, explained that he and other plaintiffs' attorneys seek to file cases in what he referred to as a "magic jurisdiction," which he defined as a jurisdiction "where the judiciary is elected with verdict money" and where "trial lawyers have established relationships with the judges that are elected." Scruggs explained, "it's almost impossible to get a fair trial if you're a defendant in some of these places." Jim Copland, Op-Ed., *The Tort Tax*, *Wall St. J.*, June 11, 2003, at A16.

<sup>189</sup> These data are on file with the authors and with Interuniversity Consortium for Political and Social Research at the University of Michigan ([www.icpsr.umich.edu](http://www.icpsr.umich.edu)).

impact of judicial selection and retention method separately; the results are presented in Table 5.

**Table 5: Regression Model of Diversity Filings in Federal District Court  
(Per 100 in State Population for Years 2006, 2007)**

<b>Independent Variable</b>	<b>Model 1 Judicial Selection</b>	<b>Model 2 Judicial Retention</b>
Partisan Election	.051** (.020)	.048* (.025)
Nonpartisan Election	.015** (.006)	.014** (.005)
Merit Selection (Model 1) or Retention Election (Model 2)	.007 (.004)	.011 (.006)
Lawyers per 100 Population	.019 (.019)	.031 (.020)
State Court Professionalism	.032 (.021)	.043 (.028)
Constant	-.018 (.015)	-.026 (.018)
R-Square	.267	.186

Note: N = 100. \*p<.05; \*\*p<.01. Reference categories are Appointed or Reappointed/Life-tenured State Supreme Court justices. All significance tests are two-tailed; standard errors are robust.

The data on diversity filings suggest that citizens (and their lawyers) in states that elect judges may prefer a federal forum more than citizens in states that appoint judges. The coefficient on the partisan-elected dummy variable indicates that almost five more diversity filings for every ten thousand residents are made in federal district court in those states than in states that appoint their supreme court justices. States that select or retain judges using nonpartisan elections also experience higher rates of diversity filings, although the substantive effect of this variable is much smaller than that of the partisan election variable. Control variables in our model, including the measure of lawyers in the population and court professionalism, are not significant. Thus, it appears that the rate of diversity filings may be affected by the method of state court selection, reflecting the possibility that litigants fear that elected judges may not be fair and impartial, either because of bias against out-of-state

citizens or because the pressures of reelection might lead elected judges to vote as the majority prefers.

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In conclusion, the data comparing federal judicial activity in states that elect judges with states that appoint judges reveal that federal courts are more involved in overseeing elected state court judges and in hearing cases from states that elect judges. The Supreme Court reverses more cases originating in states that elect judges, although that result may be better explained by court professionalism. Indeed, it may not be surprising that the state supreme court professionalism influences the likelihood of reversal at the Supreme Court but has no effect on habeas or diversity filings. After all, the Supreme Court is reviewing the *merits* of those appeals, and a more professional court may produce more defensible opinions.<sup>190</sup> In contrast, the models of habeas and diversity filings reflect the judgments of litigants to file in a particular forum and do not evaluate the *success* of those claims on the merits.<sup>191</sup> Furthermore, the court professionalism measure assesses the quality of the state supreme court, rather than the lower state courts. Choices made by litigants (prisoners and plaintiffs' lawyers) likely reflect perceptions regarding the procedural opportunities those litigants will receive from the entire state court system, including the lower courts.

We recognize, of course, that the data presented here are not definitive. But these preliminary results are consistent with the conclusion that federal courts serve as a source of relief for litigants who fear that elected judges cannot provide justice in certain categories of cases. The question is whether federal courts can and should do more to offset majoritarian pressures on state court judges by taking judicial selection into account when making jurisdictional choices.

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<sup>190</sup> Moreover, there appears to be no meaningful correlation between court professionalism and state selection method; for example, appointed and partisan-elected courts have very similar average professionalism scores. As Squire notes: "The way state courts are organized and the manner in which their judges gain the bench . . . are distinct from the professionalization" reflected in his measurement. Squire, *supra* note 180, at 234–35. As an additional control for court structure, we included a variable measuring whether each court system had an intermediate appellate court; this variable was not significant in any model.

<sup>191</sup> For habeas cases in particular, evaluating the success of actions would be extremely difficult because of the small number of such claims that are ultimately successful in federal court. See King et al., *supra* note 183, at 52.



## V. COUNTERING THE MAJORITARIAN DIFFICULTY

The federal judiciary is already playing a larger role in overseeing elected state court judges than their appointed counterparts, albeit in an ad hoc fashion. Now that the majoritarian difficulty is becoming a serious concern, as so many legal academics, policymakers, and jurists have argued,<sup>192</sup> federal courts should increase their oversight of elected judges by taking the elective status of state judges into account both when making jurisdictional choices and when calibrating the rigor of their review.

*A. Congressional Power to Expand Federal Jurisdiction to Address the Majoritarian Difficulty*

A threshold question is whether such a change in federal jurisdictional practices should originate in Congress rather than the courts. Congress could alter jurisdictional statutes to enable federal courts to address troubling decisions issued by elected state court judges. For example, Congress could amend 28 U.S.C. § 1331 to grant federal district courts original jurisdiction over all cases in which a federal question is implicated (even if that federal issue arises only as a defense), and it could expand diversity jurisdiction under 28 U.S.C. § 1332 to encompass cases in which the parties are minimally diverse. By statute, Congress could eliminate abstention and certification practices, and require federal district courts to exercise supplemental jurisdiction over all state law claims that are related to a federal question. Congress could make these expansions of jurisdiction mandatory for cases arising in fora with elective judiciaries, or it could give courts discretion whether to take on these cases after evaluating the quality of justice available at the state level.

Indeed, Congress recently expanded federal jurisdiction over class actions in response to complaints that state courts were too often willing to certify class actions and award high damages in cases that would not receive such treatment in federal court. The Class Action Fairness Act provides for concurrent federal jurisdiction over class actions in which there is minimal diversity, and in which the amount in controversy exceeds \$5 million.<sup>193</sup> Although the report did not focus on the particular problem posed by elected state court judges, it did make clear that Congress was responding to perceived bias against out-of-state litigants by

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<sup>192</sup> See *supra* note 4.

<sup>193</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

state judges and jurors.<sup>194</sup> The Senate Report justified the expansion of jurisdiction as necessary to counter state court “provincialism against out-of-state defendants.”<sup>195</sup>

Yet Congress is unlikely to alter jurisdictional policies across the board in response to the majoritarian difficulty. As a practical matter, federal courts are struggling to manage their current case load, and so Congress might hesitate to enact legislation that would further burden these courts. Furthermore, a targeted expansion of federal jurisdiction aimed at elective judiciaries would not be received kindly by states that select judges through the ballot. Congress might be reluctant to strip sovereign state courts of power to hear a significant number of cases, particularly those involving only state law, out of concern that state governments should not be deprived of control over state matters.<sup>196</sup> Moreover, members of Congress might actually *prefer* that judicial power be wielded by those who are also elected to office. The majoritarian difficulty affects the least popular citizens in each state—such as those accused of committing violent crimes, or seeking the right to express unpopular views—and thus members of Congress, elected by those same states’ citizens, have as little incentive to protect these groups as any elected state court judge does. In short, the majoritarian difficulty is unlikely to be addressed by a majoritarian Congress.

*B. The Federal Judiciary’s Duty and Power to Address the Majoritarian Difficulty*

Even in the absence of legislation altering the scope of federal jurisdiction, however, the federal judiciary can play a more proactive role in responding to the majoritarian difficulty. Although federal jurisdiction is constrained by federal statutes, federal courts have long exercised the discretion to alter jurisdictional rules at the margins, enabling them to hear or avoid cases based on equitable principles and common law prac-

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<sup>194</sup> Id. at 6.

<sup>195</sup> S. Rep. No. 109-14, at 6 (2005); see also id. at 11–12 (quoting *Davis v. Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999) (asserting that the out-of-state defendant is facing “a state court system [prone to] produc[ing] gigantic awards against out-of-state-corporate defendants”)).

<sup>196</sup> One of the primary objections to the Class Action Fairness Act was that it impinged on state sovereignty. Id. at 93–94 (stating the minority view that the Class Action Fairness Act is “an unacceptable infringement upon state sovereignty”).

tices that promote the values of the federal court system.<sup>197</sup> In fact, scholars of the federal courts argue that giving courts some leeway over the exercise of jurisdiction is preferable to legislation establishing rigid jurisdictional rules, in that it provides flexibility that allows federal courts to tailor their review to the specific circumstances of the cases before them.<sup>198</sup> The federal judiciary can employ this discretion to counteract majoritarian pressures on elected state court judges.

Indeed, one could argue that federal courts have not just the power, but the obligation, to protect the integrity of the judicial system. State political institutions typically operate with little interference from the federal government, as should be the case in a federal system in which the state and federal governments divide the power of governing among them. But state courts are different. As previously discussed, the federal judiciary is dependent on counterpart state institutions in a way that Congress and the executive branch are not.<sup>199</sup> Because federal judicial power is so intimately intertwined with state judicial power, federal courts must have some authority to react to, and correct, the weaknesses in state judiciaries.<sup>200</sup>

Expanding federal judicial review to counteract unreliable state judiciaries has a long historical pedigree. Some of the quirkiest doctrines governing federal jurisdiction arose from the need to check recalcitrant states. Although the Supreme Court has statutory authority to review only questions of federal law,<sup>201</sup> it will nonetheless examine state law that is antecedent to a question of federal law to prevent a state court from

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<sup>197</sup> See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 545 (1985) (“[T]he existence of this discretion is much more pervasive than is generally realized, and . . . it has ancient and honorable roots at common law as well as in equity.”).

<sup>198</sup> *Id.* at 574 (“[T]he courts are functionally better adapted to engage in the necessary fine tuning [of jurisdiction] than is the legislature.”).

<sup>199</sup> See *supra* Part II.

<sup>200</sup> Indeed, the scope of federal jurisdiction under Article III is in part a response to the weaknesses the Founders identified in state judicial systems; if state courts had been fully trusted to administer the law, there would be no need for diversity jurisdiction. See, e.g., Michael G. Collins, *Judicial Independence and the Scope of Article III—A View from The Federalist*, 38 U. Rich. L. Rev. 675, 678 (2004) (“For Hamilton, an important function of the federal courts was to make up for the separation of powers provisions that were lacking in some of the states’ judiciaries, at least for certain categories of cases in which the risk of appointing-power deference was thought to present a national concern.”); cf. Sandra Day O’Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 142 (2003) (“[T]he health of the entire legal system—both state and federal—depends on a strong state judiciary.”).

<sup>201</sup> See 28 U.S.C. § 1257 (2006).

manipulating its own legal standards to thwart federal claims of rights.<sup>202</sup> For example, as the civil rights movement gained momentum, the Supreme Court developed a number of special jurisdictional rules to counter state courts' denial of constitutional rights, particularly in cases involving African-American criminal defendants. Among other innovations, the Supreme Court concluded it could review cases in which a state court held that a litigant had procedurally defaulted a federal claim if the alleged default was based on a novel or inconsistent interpretation of state law.<sup>203</sup> Although at the time the Court never declared that these doctrines were specially designed to deal with problem judges and juries in southern states, today even the Justices themselves acknowledge that the Court altered its jurisdictional rules to address the serious defects in the southern states' judicial systems.<sup>204</sup>

Accordingly, it is not unprecedented for federal courts to expand their oversight of some state courts to cure flaws in the administration of justice, and thus not unreasonable to suggest that federal courts consider doing so again today to address the burgeoning majoritarian difficulty. Unlike in the past, however, the federal judiciary need not alter jurisdictional policy covertly. During the civil rights era, the Supreme Court did not acknowledge giving judicial decisions from southern states greater scrutiny than those from other regions. Although its reluctance to do so was understandable in light of regional tensions and the political sensitivity of the issues involved, there is no reason for such reticence today. If federal judges believe that elected state judges might be improperly influenced by public opinion in certain categories of cases, they should

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<sup>202</sup> See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); see also Fitzgerald, *supra* note 74, at 86–87 (concluding that the Supreme Court's willingness to reverse the state court's interpretation of state law in *Martin v. Hunter's Lessee* rests “on the intuition that — given the obvious need to enforce federal law's *supremacy* — there simply must be some federal judicial mechanism for catching state courts that disingenuously manipulate antecedent state law to thwart federal interests and then shield their misconduct behind that superficially ‘adequate’ state ground”).

<sup>203</sup> See *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 294–302 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457–58 (1958). See generally Fallon et al., *supra* note 92, at 505–18.

<sup>204</sup> See *Bush v. Gore*, 531 U.S. 98, 139–41 (2000) (Ginsburg, J., dissenting) (asserting that “historical context[]” of “Southern resistance to the civil rights movement” explain the “rare” cases in which the Court rejected state court interpretation of state law); Klarman, *supra* note 91, at 1738. The Supreme Court reviewed more cases originating from the South than other parts of the country during the civil rights era. See Lee Epstein et al., *The Supreme Court Compendium* 727–29 (4th ed. 2007).

openly acknowledge reviewing such decisions more carefully than those arising from states with appointed judiciaries.<sup>205</sup> In fact, the public declaration of heightened review for decisions by elected judiciaries could by itself moderate majoritarian impulses and might even inspire states to consider whether the benefits of electing judges are worth the costs.

### *C. Expanding the Federal Judiciary's Oversight of Elective Judiciaries*

Below is a description of the various ways in which the federal judiciary could expand, or simply alter, current jurisdictional practices to address the majoritarian difficulty.

#### *1. Supreme Court Review*

Currently, the Supreme Court's criteria for determining which cases to review do not explicitly take into account institutional differences between the lower courts. Supreme Court Rule 10 explains that review is "not a matter of right, but of judicial discretion."<sup>206</sup> The Rule states that the Court will grant a petition only for "compelling reasons," and then lists certain characteristics that make review more likely, such as a split in authority among the lower courts on an important question or a conflict between a lower court's decision and Supreme Court precedent.<sup>207</sup> Thus, although the Court has broad discretion over which cases it will review, it apparently does not consider the characteristics of the court system from which the case originates.

A review of the Supreme Court's docket confirms that the Court engages in minimal oversight of the state judiciary. State court cases make up a significantly smaller percentage of the Court's docket than in the past. Between 1950 and 1990, the Court reviewed on average thirty-seven state court cases per term, which constituted approximately twenty-five percent of a total docket that averaged 150 cases per year.<sup>208</sup> Today, the Court reviews an average of twelve state court decisions a year,

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<sup>205</sup> Cf. *Boumediene v. Bush*, 128 S. Ct. 2229, 2268 (2008) (stating that the rigor of habeas review should be correlated to the quality of the lower court's proceedings); Fitzgerald, *supra* note 74, at 89 (arguing that the Supreme Court should only be allowed to reverse state court decisions of state law antecedent to federal questions when "it can identify and substantiate some concrete indication that the state court has deliberately manipulated state law to thwart federal law and then evade Supreme Court review").

<sup>206</sup> Sup. Ct. R. 10.

<sup>207</sup> *Id.*

<sup>208</sup> Solimine, *supra* note 72, at 352.

which amounts to approximately fifteen percent of its shrunken docket of seventy-eight cases a year.<sup>209</sup> Yet the Court reverses elected state court decisions at a higher rate than those of appointed judges (both state and federal), and its decision in *Caperton v. Massey* suggests a majority of the Court is disturbed by the transformation of judicial elections into full-throated political battles that cannot avoid affecting state court decision-making. In light of its diminished capacity to broadly supervise state courts, it is time for the Court to take judicial selection method into account when targeting cases for review.

Under 28 U.S.C. § 1257, the Court has plenty of leeway to prioritize review of cases in which the majoritarian difficulty appears to have affected state court decision-making. The Court should be on the lookout for the more politically sensitive cases decided by judges. Cases involving high-profile crimes or hot-button social issues that arise before a judge facing an imminent reelection or in the midst of a heavily contested race should be of greater interest to the Court than lower-profile matters before judges with job security. Litigants should flag these issues in their certiorari petitions to put the Justices on notice that electoral pressures may have affected the outcome, and Justices should give such cases a larger proportion of the docket than they currently command. By doing so, the Court would not only be correcting errors, it would be preserving the integrity of the state court systems in which the great majority of cases are heard and decided.

Some might object that altering certiorari policy in such a manner is overtly hostile to judicial elections, which, after all, the Supreme Court has repeatedly held are a permissible method of selecting judges. Unquestionably, by incorporating the judicial selection method and the temporal proximity of upcoming elections into its decision to review state court cases, the Court would be acknowledging that it trusts elected state court judges less than appointed ones. The benefit of this system, however, is that it replaces the binary choice—whether or not to abolish elected state court judges—with a contextual analysis that both allows states to utilize elected judges while also checking their worst instincts. The Supreme Court has made clear that due process does not demand appointed, life-tenured judges.<sup>210</sup> Due process may, however, require

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<sup>209</sup> See *supra* note 71.

<sup>210</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 782–83 (2002) (reaffirming that selecting judges through election is compatible with due process).

oversight by appointed, life-tenured judges in cases in which electoral pressures might lead to biased judicial decision-making.

## 2. *Supplemental Jurisdiction*

District courts have considerable discretion to hear state law claims raised in the same action as claims over which the court has original jurisdiction. Under the current jurisdictional statute, 28 U.S.C. § 1367, district courts may hear claims that constitute the same constitutional “case or controversy” as the matter over which they have original jurisdiction. District courts, however, may decline to exercise supplemental jurisdiction if the state law claim is “novel” or “complex,” if the claim “predominates” over the federal claims in the case, if the court has dismissed the claim(s) over which it had original jurisdiction, or if there is a “compelling” reason to do so.<sup>211</sup> Section 1367 thus gives federal district courts discretion to hear related state law claims or, alternatively, to force them into state court.

Although nothing in Section 1367 provides that district courts should take into account state judicial selection methods when considering whether to hear a supplemental state law claim, by the same token nothing in that statute would prevent district court judges from incorporating the majoritarian difficulty into their calculus. If state law claims are closely related to a litigant’s case, and the judges in the state trial and appellate courts face regular reelections that might affect their abilities to resolve the matter, then district courts should hesitate before refusing to exercise supplemental jurisdiction over the related claims. Nor should litigants be shy about making such arguments. In any venue dispute, each party is angling to have their case heard in the forum most favorable to their claims and defenses. Some grounds for favoring one court over the other are not worthy of judicial consideration; for example, a court should not give any weight to a plaintiff’s contention that the juries in one venue are more generous to plaintiffs than those in another. There is nothing improper, however, about a federal court taking into account the possibility that a countermajoritarian claim will not fare well before an elected judge when deciding whether to exercise supplemental jurisdiction.

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<sup>211</sup> 28 U.S.C. § 1367(c) (2006).

### *3. Abstention and Certification*

At the very least, federal courts should hesitate before employing abstention doctrines in cases in which state courts might be susceptible to majoritarian pressures. Abstention allows federal courts to hold resolution of a federal constitutional question in abeyance while requiring that the litigant resolve an antecedent state law issue in state court.<sup>212</sup> Abstention thus enables federal courts to avoid pronouncements on constitutional questions and allows state courts to address in the first instance “sensitive” questions of “social policy,” thereby avoiding “needless friction” with states.<sup>213</sup> Yet it is entirely a judge-made doctrine, and one that federal courts are free to abandon in the face of competing concerns.

Accordingly, federal courts should refuse to abstain in cases where it appears justice may be hard to find in state court. If a case involves a reviled litigant or an unpopular issue, and the only alternative forum is a state court whose judges faces regular elections, then federal courts should think twice before sending the state law issue to the state court. Even if the federal court does abstain, it should scrutinize the resulting state court decision carefully to ensure that majoritarian pressures on the elected judges have not skewed that court’s resolution of the legal issues.

### *4. Federal Habeas Review*

Majoritarian pressures on elected judges are at their apex in criminal cases, and thus the need for federal oversight is heightened in cases involving the conviction and sentencing of violent criminals. Habeas corpus provides a vehicle for such oversight, and yet, as a result of AEDPA, it is an area in which the federal courts have the least flexibility to expand federal review. For example, AEDPA bars federal courts from addressing constitutional violations that were not brought to the federal

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<sup>212</sup> For a general discussion of abstention doctrines, see Fallon et al., *supra* note 92, at 1057–69. Although abstention is a judicially created jurisdictional device, 28 U.S.C. § 1367(c) now provides that federal courts may choose not to exercise concurrent jurisdiction over a related state law claim in a federal question case if it “raises a novel or complex issue of state law.” The relationship between abstention doctrines and Section 1367 is not clear, but some scholars have argued that Section 1367 displaces abstention. See Robert Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 Cal. L. Rev. 1409, 1421–22 & n.52 (1999).

<sup>213</sup> *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 498–500 (1941).



courts' attention within AEDPA's one-year deadline,<sup>214</sup> or that involve facts that the prisoner failed to develop in the state courts.<sup>215</sup> Moreover, relief is only available in limited circumstances, such as if a state court decision is at odds with a clearly established Supreme Court precedent.<sup>216</sup> These obstacles to habeas review have drastically reduced the number of successful habeas petitions in recent years.

Nonetheless, a federal court has latitude to engage in a more searching review of state court convictions and sentences that it believes may be tainted by majoritarian pressures on elected state court judges. As many scholars have noted, federal judges continue to overturn death sentences on habeas with some frequency, suggesting that these courts engage in a more stringent review of state court decisions in such cases. In its recent decision in *Boumediene v. Bush*, the Supreme Court explicitly stated that federal courts should calibrate the rigor of habeas review to the quality of justice available in the court of conviction.<sup>217</sup> Federal courts can similarly engage in a more searching review of cases whose circumstances suggest that the state judiciary was under political pressure to uphold a conviction. Habeas petitioners should assist the federal courts by noting whether the judge who presided over their conviction was elected and how soon thereafter the judge was up for reelection. As already discussed, numerous studies have shown that judges impose harsher sentences, including death sentences, closer to a reelection.<sup>218</sup> Federal courts sitting in habeas should be made aware of this fact.

Admittedly, habeas cannot be a particularly useful method for checking majoritarian pressures on state judges as long as AEDPA's restrictions remain in place. Yet it need not be a wasted opportunity for countering the influence of public opinion on elected state court judges either. In egregious cases, federal courts still have the ability to step in and respond to state court decisions that sacrifice federal constitutional rights in order to curry favor with the electorate.

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<sup>214</sup> 28 U.S.C. § 2244(d) (2006).

<sup>215</sup> Id. § 2254(e)(2) (2006).

<sup>216</sup> Id. § 2254(d)(1) (2006).

<sup>217</sup> 128 S. Ct. 2229, 2268 (2008) (stating that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings . . .").

<sup>218</sup> See *supra* notes 53–54.

It is time to acknowledge that elected judges are a significant and permanent part of the American legal landscape and to focus on improving rather than abolishing them. Elected judges will have to keep the next election in mind whenever they decide a case. But they will also respond to the influences of federal courts, which can affect outcomes by setting precedent, engaging in review, and providing political cover for such judges.

Ideally, elected and appointed judges would work together, each benefitting from the others' strengths. Judges who are responsive to public opinion may do a better job making common law, advising state government on policy, and construing and applying state laws.<sup>219</sup> Sometimes judging is really policymaking, particularly at the state level, and in such cases it makes sense to ensure that judges are accountable to the public they serve. These are situations for which elected judges are well-suited. In other cases, however, judges are needed to protect unpopular litigants and unpopular rights, and it is in these cases that federal courts must step in to supervise and guide elected judges. If calibrated correctly, the interactions between state and federal courts could ease the tension between democratic legitimacy, on the one hand, and commitments to constitutionalism and the rule of law on the other.

#### CONCLUSION

Judicial elections have irrevocably been altered from quiet, collegial events to high profile political battles. As judicial elections have come to resemble elections for any other state office, they raise the question whether the judges chosen by these methods can continue to protect the rule of law in the face of public pressure to do otherwise. Many observers (including a number of state and federal judges) have concluded that no-holds-barred elections are simply incompatible with judging. And yet even the most vociferous critics acknowledge that judicial elections are not going to disappear anytime soon.

This Article contends that the appointed, life-tenured judges of the federal courts can counteract the political pressures on elected state court judges. In the past, federal courts responded to a more pernicious, but less complicated, problem—that of state judges who willfully ignore federal law. The federal courts had fewer options when it came to such state court defiance (since these state judges could not be persuaded to

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<sup>219</sup> See generally Hershkoff, *supra* note 15.

follow federal law), and thus the only remedy was outright, and sometimes repeated, reversal of their decisions.

The majoritarian difficulty poses a subtler problem, but one that the federal courts have greater means to remedy. Elected state judges who are under constant pressure to skew the law in the direction favored by public opinion can be influenced, and even protected, by federal precedent and federal review. Indeed, as many scholars have noted, state courts have been slow to develop state constitutional jurisprudence, perhaps because they enjoy the benefits of the political cover provided by federal precedent and federal judicial review. The mere threat of Supreme Court and habeas review, combined with a culture of respect for federal law and federal precedent, may also serve as an important counterweight to majoritarian pressures. Perhaps most important, federal courts are available in the first instance in any case that can be shaped to fit within the district court's original jurisdiction, and thus litigants who fear that state court judges will be unduly influenced by public opinion can simply choose to avoid the elective judiciary altogether.

Admittedly, however, these sources of federal influences are shrinking by the day. The Supreme Court's docket is half its former size, and it only reviews a handful of state court cases a year. AEDPA has reduced habeas review to a mere shadow of its former self. Some cases do not fall within the federal courts' original jurisdiction, and federal courts are already burdened with oversized dockets. In short, electoral pressures are increasing even as federal oversight recedes, and thus it is hard to imagine the federal courts retaining the same influence over elected judges in the future that they have today.

Accordingly, this Article suggests that the federal courts take the majoritarian difficulty into account when deciding which cases to review, whether to retain jurisdiction over state law claims, and how rigorously to review a criminal conviction on habeas. They should do so not only to provide justice in individual cases, but also to protect the integrity of the state court system upon which a healthy federal judiciary depends.