Fragmenting the Judiciary: Potential Ideological Effects of Shifting Implementation of Supreme Court Doctrine from Federal Courts to State Courts

Ryan Walters
FRAGMENTING THE JUDICIARY:
POTENTIALIDEOLOGICAL EFFECTS OF SHIFTING IMPLEMENTATION OF
SUPREME COURT DOCTRINE FROM FEDERAL COURTS TO STATE COURTS

Ryan D. Walters

More than ever, the Supreme Court of the United States can rely on an army of life-
tenured judges on lower federal courts to implement the doctrines it develops on statutory and
constitutional issues. Those judges are shielded from public opinion on controversial rulings,
and recent research has shown that the Supreme Court itself is more likely to be affected by elite
opinion than that of the public.

Despite checks and balances being a centerpiece of the constitutional order, the
increasing size and jurisdictional scope of the federal judiciary, combined with its lack of
political accountability, has led to a increase in the centralization of judicial power in the
Supreme Court. However, Congress has the power to limit or even abolish the lower federal
courts and thereby leave the implementation of Supreme Court doctrines to the state courts,
which are more accountable to public opinion. This Essay examines several separate areas of
research to evaluate the probable effects of such an exercise of Congress’s powers, and to what
extent the empowerment of state courts can fragment the ability of the Supreme Court to
centralize its own power.

Table of Contents
I. Introduction ..............................................................................................................1
II. The Current Composition of the Judiciary in the United States .........................2
III. Influences on the United States Supreme Court: Public Versus Elite Opinion........5
IV. Empirical Evidence on State Court Responsiveness to Public Opinion.............10
V. Originalism and Conservative Judicial Outcomes: Public Versus Elite Opinion....11
VI. Institutional Effects of Shifting Implementation of Supreme Court Doctrine from
    Lower Federal Courts to State Courts.................................................................13
VII. Conclusion............................................................................................................18

I. INTRODUCTION

The size of the federal judiciary below the Supreme Court of the United States has
dramatically increased since the ratification of the Constitution. Each state also has its own
judicial system, and state courts are legally authorized (indeed, they are required) to apply
federal law. Judges on both state courts and the lower federal courts implement the doctrines
handed down by the Supreme Court; the Supreme Court hears a very small percentage of cases
applying federal statutes or the Constitution. But the differences between how state and federal
judges are selected and their tenure could affect how they implement those decisions, and

1 B.A., The Ohio State University, 2000; J.D., University of Michigan Law School, 2003; LL.M., University
of California, Berkeley School of Law, 2011. I am grateful to Kevin Quinn and James Cleith Phillips for their
valuable comments.
therefore affect how robustly the Supreme Court can influence the development of doctrine throughout the Nation.

Recent research has proposed that the Justices of the Supreme Court – particularly swing Justices near the ideological center – are influenced more by elite opinion epitomized by academics and journalists than by public opinion. Other empirical work has proposed that the decisions of elected state court judges are significantly affected by public opinion. A separate body of research has demonstrated that public opinion is both more politically conservative and more favorable to originalism as an interpretive methodology than is elite opinion.

This Essay fuses these parallel lines of research in order to examine the potential effects of Congress using its constitutional authority to abolish or restructure the lower federal judiciary. Such a move would shift implementation of Supreme Court doctrine from life-tenured federal judges mostly immunized from the effects of public opinion to state court judges who are more influenced by it.

II. THE CURRENT COMPOSITION OF THE JUDICIARY IN THE UNITED STATES

The United States Supreme Court stands at the apex of the federal judicial system, having final judicial authority regarding federal law over all inferior federal courts and all state courts. The Constitution creates the U.S. Supreme Court but gives Congress the discretion of whether to create any lower federal courts. All judges on any federal courts so created must have life tenure and irreducible salaries.

The current scope of the federal judiciary is enormous. Today, there are twelve regional courts of appeals having jurisdiction over certain geographical areas, and one specialized court of appeals with national jurisdiction. The courts of appeals have been rapidly growing in size: in 1950, there were 65 circuit judgeships and 2,830 appeals filed; in 1990, this had risen to 156 circuit judgeships and 40,898 appeals filed. The most recent statistics show 55,126 appeals filed in the regional federal circuits in 2011.

The federal courts of original jurisdiction are the U.S. district courts. These courts are divided into 94 geographical districts. There are 677 district court judgeships. Though the federal judiciary has been expanding, it is still overshadowed numerically by the state court

---

2 U.S. Const. art. III (“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”); Charles Gardner Geyh & Emily Field Van Tassel, The Independence of the Judicial Branch in the New Republic, 74 Chi-Kent L. Rev. 31, 45 (1998). (“[T]he decision to make the creation of the lower federal courts a matter of congressional prerogative, rather than constitutional mandate, was the product of a political compromise, designed to deflect the anti-Federalist fear that a national judiciary would usurp the role of the state courts.”).
3 U.S. Const. art. III, § 1.
systems. Approximately 95% of all cases are filed in state court systems.\footnote{R. LaFountain, R. Schauffler, S. Strickland, S. Gibson, & A. Mason, Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads (National Center for State Courts 2011), available at http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.} Congress can give federal courts exclusive jurisdiction of matters within the province of Article III, but unless Congress does so, state courts have concurrent power to adjudicate claims based on federal law. Indeed, state courts may not choose to decline to hear federal claims.\footnote{See Testa v. Katt, 330 U.S. 386 (1947).} “By any measure, the vast majority of cases raising federal issues are litigated in state courts, not federal courts.”\footnote{Michael E. Solimine, Supreme Court Monitoring of State Courts in the Twenty-first Century, 35 Ind. L. Rev. 335, 362 (2002).}

It is also important to understand that state courts are in no sense inferior or subservient to federal courts. Except in very limited circumstances, lower federal courts may not review decisions of state courts,\footnote{See Amanda Frost & Stefanie A. Lindquist, Countering the Majoritarian Difficulty, 96 Va. L. Rev. 719, 742 (2010) (noting that “[b]y statute, lower federal courts are not permitted to review state court decisions except those falling under habeas jurisdiction.”).} and state courts do not have to follow precedents of lower federal courts even regarding federal law.\footnote{Id. at 743.} Of course, both state courts and the lower federal courts are inferior to the U.S. Supreme Court on matters of federal law.

This duplicative, overlapping court structure in the United States is very unusual if one looks at other federations around the world to find a full dual system of both national and state courts. The standard structure in other federations, like Germany and Australia, is to have only a national supreme court and then state courts below it that decide cases of both state and federal law.\footnote{Steven G. Calabresi, The Congressional Roots of Judicial Activism, 20 J.L. & Politics 577, 584 (2004).}

Unlike the federal courts, state supreme courts have a variety of selection and retention methods. Thirty-eight have elections of some type, with six having partisan contested elections, fifteen with non-partisan contested elections, and seventeen with uncontested retention elections after an initial appointment.\footnote{Neal Devins, How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism, 62 Stan. L. Rev. 1629, 1645-49 (2010).}

Originally, state judicial selection resembled that of the federal judiciary. All thirteen of the original states selected judges by means of either executive or legislative appointment.\footnote{Joanna M. Shepherd, Are Appointed Judges Strategic Too?, 58 Duke L.J. 1589, 1595-96 (2009).} However, in 1832, Mississippi became the first state to force all of its judges to face the electorate, and since New York adopted elections in 1848, every state entering the union until 1912 required judges to face election; by 1865, 24 of the 34 states had judicial elections.\footnote{Id. at 1596. States that elect their judges almost never switch to a system abandoning the elections completely. See 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 judges has ever entirely abandoned judicial elections).}
Congress was given complete discretion over whether any lower federal courts would exist, and what the scope of their jurisdiction would encompass. Professor Steven Calabresi has argued that

[t]he Supreme Court’s power to engage in judicial activism would end tomorrow if Congress stopped providing supportive lower federal court judges to implement Supreme Court decrees. Without the help of the more than 750 lower federal court judges currently authorized for active duty, the nine Supreme Court Justices would be unable to legislate radical social change and unable to continue to enforce and expand upon past activist victories.

Although Professor Calabresi concedes that total abolition of lower federal courts is ultimately too radical an idea, a similar effect could also be obtained by stripping the lower federal courts of most federal question jurisdiction.

A more modest reform may be to retain the inferior federal judiciary for a small set of areas where national interests are widely understood as incompatible with state court adjudication. The U.S. Court of Appeals for the District of Columbia Circuit could retain its jurisdiction for the purpose of hearing appeals from federal agency actions. The U.S. Court of Appeals for the Federal Circuit could remain to hear appeals from the Trademark Trial and Appeal Board, the United States Court of Federal Claims (which is an Article I court, not Article III), Bankruptcy Appeals Panels (which are also made up of Article I judges, who in turn would hear appeals from Article I bankruptcy judges), and the remaining current jurisdiction for the Federal Circuit (including appeals from the United States Court of International Trade).

United States District Court judges would remain in every state, but would be statutorily limited to jurisdiction over patent actions, federal criminal cases, and perhaps a limited (by either amount in controversy or other criteria) diversity and removal jurisdiction if deemed necessary.

Everything else currently handled by United States District Court Judges would fall under the jurisdiction of state trial courts; appeals would go through the state system, and be subject to review by the U.S. Supreme Court. Finally, the United States Courts of Appeals could remain to hear appeals only from those cases within the original jurisdiction of the United States District Courts.

---

16 See Amanda Frost & Stefanie A. Lindquist, Countering the Majoritarian Difficulty, 96 Va. L. Rev. 719, 740-41 (2010). Once created, lower federal courts and the judges sitting on them may be abolished by Congress without violating Article III. See Roger C. Cramton, Reforming the Supreme Court, 95 Calif. L. Rev. 1313, 1329 (2007) (“On three occasions during the first seventy-five years of U.S. history (1802, 1812 and 1863), Congress abolished federal courts with the effect of leaving duly appointed Article III judges without any cases to decide.”).


18 See Bradford Clark, The Supremacy Clause as a Constraint on Federal Power, 71 Geo. Wash. U. L. Rev. 91, 104 (2003) (“The vast majority of federal question cases throughout history have been decided not by federal courts but by state courts, subject only to appellate review by the Supreme Court.”)
These hypothetical reforms are different only in degree; the primary change would be the shift of most litigation currently in life-tenured federal courts falling to the mostly-elected state courts. This Essay examines what the probable effect of such a reform would be on the ideology of lower court decision making, and how it would affect the Supreme Court’s ability to have its doctrines robustly implemented.

III. INFLUENCES ON THE UNITED STATES SUPREME COURT: PUBLIC VERSUS ELITE OPINION

The modern view of the U.S. Supreme Court, and federal courts in general, has been that it is a countermajoritarian force; that its prime role is protecting the rights of the minority against majority will.\(^\text{19}\) The obvious tension of this role with democracy (a tension heightened by the life-tenured, unelected nature of the Court) has been the subject of intense contemplation by legal academics.\(^\text{20}\)

A revisionist view has reached popular audiences. This view is that the Court has been largely consistent with public opinion and is not in any true sense a countermajoritarian force at all.\(^\text{21}\) It is undoubtedly true that public opinion has some effect on Justices. The most obvious

\(^{19}\) For a classic statement celebrating this countermajoritarian role for federal courts and contrasting them with state courts, see Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1120 (1977) (arguing that “there are several factors, unrelated to technical competence – which, lacking a better term, I call a court’s psychological set – that render it more likely that an individual with a constitutional claim will succeed in federal district court than in a state trial court.”); id. (“federal judges often display an enhanced sense of bureaucratic receptivity to the pronouncements of the Supreme Court. State judges, of course, almost always recognize that they too are bound not to disregard the Supreme Court’s interpretation of the Federal Constitution. Their bureaucratic relationship with the Supreme Court is, however, more attenuated than that of a district court judge.”); id. at 1125 (arguing that federal judges “appear to recognize an affirmative obligation to carry out and even anticipate the direction of the Supreme Court. Many state judges, on the other hand, appear to acknowledge only an obligation not to disobey clearly established law. While this distinction is subtle, in the doubtful case it can exert a discernible impact on the trial level outcome.”); id. at 1125 (“in seeking a federal forum, civil liberties lawyers hope to benefit from what can be described as an ‘ivory tower syndrome.’ And noting that federal judges are relatively isolated from the ‘distasteful and troubling fact patterns’ resulting from legal doctrine compared to state judges.”); id. at 1126 (“the differences in the backgrounds of the state and federal trial judges make it more likely that a federal judge will possess certain class-based predilections favorable to constitutional enforcement than will his state court counterpart. The federal bench is an elite, prestigious body, drawn primarily from a successful, homogenous educational class.”); id. at 1128 (“when arguable grounds supporting the majoritarian position exist, state trial judges are far more likely to embrace them than are federal judges.”).


way that public opinion affects the Justices is by the means they are appointed. Justices must be
ominated by the elected President and confirmed by a majority of the elected U.S. Senators.22

Due to life tenure and other structural and political features which insulate them from
direct popular and political branch backlash, the Court has been shown to make decisions based
on ideological or policy preferences.23 It has been noted that “citizen ideology should not be a
significant part of the judicial calculus in settings where judges are not elected and therefore not
subject to any kind of retaliation or retribution from the public for unpopular rulings.”24 In
empirical studies of state supreme courts, life tenure has been shown to be a statistically
significant influence on judicial decisions to overturn statutes; judges with life tenure are more
likely to be countermajoritarian than those who face election.25

There has been some pushback against the revisionist view, arguing that instead of public
opinion, the Justices of the Supreme Court are more influenced by elite opinion and are indeed
countermajoritarian.

Lawrence Baum and Neal Devins have recently articulated the reasons why they believe
elite opinion, rather than public opinion, has a greater influence on the Supreme Court.26 The
members of the Court are themselves socioeconomic elites,27 and the audience they will seek
esteem and approval from is likely from peer groups.28

---

is entirely appropriate that that vacancy be filled by the President, responsible to a national constituency, as advised
by the Senate, whose members are responsible to regional constituencies. Thus, public opinion has some say in who
shall become judges of the Supreme Court.”).
23 See, e.g., Jeffrey A. Segal & Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDE
MODEL REVISITED (2002). See also Valerie Hoekstra, Competing Constraints: State Court Responses to
Supreme Court Decisions and Legislation on Wages and Hours, 58 Pol. Research Quarterly 317, 317 (2005) (noting
that “Justices on the United States Supreme Court have wide latitude to act upon their sincere preferences due to the
insularity and independence they enjoy.”); Gordon Tullock, Public Decisions as Public Goods, 79 J. Political
Economy 913. 914 (1971) (theorizing that life terms for federal judges may lead to judicial decisions that reflect the
judges’ own ideological preferences rather than original meaning of texts: “I would think that judges are, to a
considerable extent, affected by their personal preferences; and when their personal preferences are contrary to the
law for any one of a number of reasons, the public-good aspect of the law is likely to receive relatively short shrift
[compared to the private cost to the judge of making a ruling contrary to his own views.”).
24 Paul Brace, Melinda Gann Hall & Laura Langer, Judicial Choice and the Politics of Abortion: Institutions,
25 Id. at 1297.
26 Lawrence Baum & Neal Devins, Why the Supreme Court Cares About Elites, Not the American People, 98
Geo. L.J. 1515, 1516 (2010) (arguing, based on social psychology, that “Supreme Court Justices care more about the
views of academics, journalists, and other elites than they do about public opinion. This is true of nearly all Justices
and is especially true of swing Justices, who often cast the critical votes in the Court’s most visible decisions.”).
27 Id. at 1537 (arguing that Justices are more likely to care about perceptions of them by elite socioeconomic
groups because the Justices share that background).
28 Id. at 1532 (noting the desire to be liked by others, and reasoning that federal judges may be especially
affected by this factor, as the office, which pays less and requires more personal restrictions than law firm positions,
is likely to be most attractive to those who value the esteem such a position gives them); id. at 1533 (“Justices surely
understand that audiences outside the Court care – often a great deal – about the votes they cast and the legal rules
they support. If judges seek popularity and respect, they have good reason to do so as decision makers.”); id. at
1533-34 (“although the Justices will not cast votes that undermine their preferred legal or policy preferences, they
are also attentive to how they present themselves to audiences they care about. Put another way, Justices are not
Justices at the extreme ideological ends of the Court will likely see simpatico ideological reference groups as the people whose respect and approval they desire.29 Swing Justices with no firm ideological mission will be more likely to be influenced by the need for admiration from elite opinionmakers within that peer group.30 For Supreme Court Justices, that group of elite opinionmakers consists of elite lawyers, news media, and law professors.31 In recent times, elite legal opinion and news media has been decidedly to the left of public opinion.32 This includes the American Bar Association33 and elite lawyers in the aggregate.34


---

29 Id. at 1534 (arguing that Justices at the polar ends of the ideological spectrum may care most about the perceptions of groups whom they strongly identify with).

30 Id. at 1538 (arguing that legal profession is an important audience for Justices, especially legal academics and fellow judges, as they “perform the most intensive evaluations of the Justices’ voting behaviors and judicial opinions.”)

31 Id. at 1528 (noting that the Court’s retreat from controversial decisions on statutes dealing with communist subversion may have been affected by elite opinion likely to be influential with the Justices; the American Bar Association, legal academics and prominent jurists like Learned Hand had been highly critical); id. at 1542 (noting that news media and academics should be particularly influential with the Justices); id. at 1542 (noting that many of the Justices’ law clerks will become legal academics); id. at 1542-43 (noting that news media and academia “define the Justices’ status and reputation to society at large.”).

32 Id. at 1545 (“Supreme Court Justices are elites whose reference groups are also elites. And although there are both liberal and conservative elite audiences – so that highly ideological Justices are likely to garner praise from the interest groups they identify with as long as they generally support the positions of those groups – the Court’s swing Justices are especially likely to look to the media, law professors, and lawyers’ groups like the American Bar Association. As it turns out, these audiences are left-leaning, at least on civil liberties issues, in the current era.”); see also John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, The Patterns and Implications of Political Contributions by Elite Law School Faculty, 93 Geo. L.J. 1167 (2003) (finding that elite legal scholars overwhelmingly lean left); Deborah Jones Merritt, Research and Teaching on Law Faculties: An Empirical Exploration, 73 Chi.-Kent L. Rev. 765, 780 n.54 (1998) (same); David H. Weaver & G. Cleveland Wilhoit, THE AMERICAN JOURNALIST: A PORTRAIT OF U.S. NEWS PEOPLE AND THEIR WORK 28, 31 (1991) (significant tendency toward left opinions and allegiances among executives and staff members of prominent news organizations).

Baum and Devins argue that public opinion can be resisted by the Court because public support for the Court is “strong and robust, and it is not fragile in the sense that negative reactions to the Court’s decisions threaten it.” Furthermore, “the powers of the other branches do not necessarily create strong incentives for the justices to respond to public opinion” because lawmakers’ threats to act against the Court have been hollow. And the evidence shows that public opinion, as expressed in polling data, has often been strongly opposed to many of the most politically salient Supreme Court rulings. “In light of the evidence that the Justices have little to fear from public disapproval, there is good reason to be skeptical about the belief that the Justices rein themselves in to avoid running afoul of public opinion.” Indeed, the evidence of those arguing that the Supreme Court is highly restricted by public opinion have yet to deal with the argument that the Court’s action can itself influence public opinion, so that cause and effect can be unclear.

Instead, Justices seem to move left ideologically the longer they are on the Court and, where elite opinion diverges from public opinion, the Court often sides with the former, even where the issue becomes highly salient. Noted swing Justice Sandra Day O’Connor moved...
leftward on several social issues salient to elite opinion, with her later views explicitly contradicting her earlier ones.\(^{42}\)

Frederick Schauer has also argued that elite opinion is likely to be more influential with the Justices than public opinion.\(^{43}\) Schauer notes that ideological drift in recent times has been almost uniformly in a leftward direction.\(^{44}\) Schauer emphasizes how elite legal opinion likely influences Justices’ decision making, particularly as their careers come to a close, because the Justices worry about their reputations at the hands of those who can make or break it.\(^{45}\)

This does not mean that the influence of elite opinion on Justices will always move them leftward. To the contrary, elite legal opinion has in the past been to the right of public opinion. During the early twentieth century, when peer elites were more conservative than the public-at-large, the Supreme Court reflected that by resisting redistributive, anti-laissez faire laws passed through the majoritarian political process.\(^{46}\)

It is difficult to say whether those who say the Court is influenced by public opinion or those who maintain that it is instead elite opinion have the winning argument. Both cite public opinion to support their claims. But it is not necessarily an either/or proposition. It seems logical that both public opinion and elite opinion, along with myriad other factors, affect the Justices’ decision making. The important question for our purposes here is a relative one: are


\(^{44}\) Id. at 625 (noting that of the ten Republican Justices appointed between 1968 and 2000, six moved ideologically leftward even though all had been billed as conservatives).

\(^{45}\) Id. at 625 n. 53(noting that Justice Powell made a public statement after his retirement regretting his vote upholding sodomy laws, and musing that concern for his reputation among legal academics may have played a role);

\(^{46}\) See, e.g., Edward A. Purcell, Jr., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 11-38 (2000) (arguing that from 1877 to 1937, federal courts were pro-business and anti-regulation); Lawrence Baum & Neal Devins, Why the Supreme Court Cares About Elites, Not the American People, 98 Geo. L.J. 1515, 1543 n.147 (2010) (noting that “[b]efore 1930 . . . economic issues dominated and the cultural elite supported ‘a constitutional jurisprudence that was somewhat more protective of property rights than was majoritarian politics’”) (internal citation omitted); Stephen A. Siegel, Lochner Era Jurisprudence and the American Constitutional Tradition, 70 N.C. L. Rev. 1, 111 n. 528 (1991) (noting that Thomas Cooley, the leading law professor of the Lochner era, strongly supported the liberty-of-contract doctrines of the period).
judges who do not have to face elections more influenced in their judicial decisions by elite opinion than those who must face a vote of the public to retain their offices?

Overall, the social psychology evidence seems to bolster the older countermajoritarian model. Without a doubt, public opinion does cabin Supreme Court discretion to some extent. But a specific subset of that opinion, held by those who shape Supreme Court Justices’ reputations, is more likely to have an effect at the margins of swing Justices. The next section will examine the empirically demonstrated effects of public opinion on elected state supreme court justices compared to those who (like federal court judges) do not face election.

IV. EMPIRICAL EVIDENCE ON STATE COURT RESPONSIVENESS TO PUBLIC OPINION

No doubt many state court judges are of similar cultural and socioeconomic background as federal judges. However, the electoral accountability of most state court judges makes public opinion likely to be a far more salient factor that must be accounted for. 47 Elected officials, including judges, strongly desire to keep their positions and must pay attention to public opinion in order to do so.

Empirical studies have demonstrated that judges facing election are affected by public opinion within their states. Whether facing partisan or non-partisan elections, or standing alone in a retention election, state judges are subject to the same accountability as other elected officials. 48

“[T]he empirical evidence shows that, as compared to state judges in appointive and merit selection jurisdictions, judges facing elections, particularly partisan elections, are more likely to decide cases in a manner consistent with majority opinion.” 49 A study of trial judge criminal sentencing decisions, where trial judges must run in an unopposed retention election every ten years, found that “judges become significantly more punitive the closer they are to standing for reelection,” 50 and another study found that state supreme court justices become significantly more likely to uphold death sentences in years preceding reelection. 51 Another

47 Cf. Lawrence Baum & Neal Devins, Why the Supreme Court Cares About Elites, Not the American People, 98 Geo. L.J. 1515, 1537 (2010) (“the views of social and economic leaders are likely to matter more to the Court than to popularly elected lawmakers (who must appeal to popular sentiment in order to win elections.”).
48 See Melinda Gann Hall, State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform, 95 Am. Pol. Sci. Rev. 315, 319 (2001) (“The fact of the matter . . . is that [state] supreme court justices [on the ballot] face competition that is, by two or three measures, equivalent if not higher to that for the U.S. House [of Representatives].”).
49 David Pozen, Judicial Elections as Popular Constitutionalism, 110 Colum. L. Rev. 2047, 2071-71 (2011); see also Robert M. Howard, Scott E. Graves & Julianne Flowers, State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties, 40 L. & Soc’y Rev. 845, 864 (2006) (“[State supreme court justices] are sensitive to the attitudes of the citizenry, and their sensitivity is enhanced by the use of competitive elections to retain justices.”)
51 Melinda Gann Hall, Electoral Politics and Strategic Voting in State Supreme Courts, 54 J. Pol. 427, 438-43 (1992). Another study on death penalty decisions found that public support for the death penalty has no effect on judicial decisions in non-elective states, and that higher support for death penalty in elective states results in lower
highly salient social issue was examined in a study of “abortion cases decided by state courts of last resort between 1980 and 2006” in states where justices faced competitive elections, comparing results with state public opinion and finding that even “nonpartisan elections will not insulate state supreme-court justices from political pressure on the issue of abortion.”52

Instead, the study found that judges without a partisan label are actually more likely to have to rely on making their rulings consistent with public opinion due to lack of an ideological signal of party label acting as a proxy for voters.53 Elected judges have also been found to suppress their own ideological and policy preferences when approaching an election.54

There is overwhelming empirical evidence that decisions by elected state judges are more affected by public opinion within their own electorates than are appointed judges who do not face elections.55 The next section will examine what this means for ideological decision making in state courts if they were to become the prime implementers of Supreme Court doctrine.

V. ORIGINALISM AND CONSERVATIVE JUDICIAL OUTCOMES: PUBLIC VERSUS ELITE OPINION


53 Id. at 63-64.

54 Elisha Carol Savchak & A.J. Barghothi, The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking, 7 State Pol. & Pol’y Quarterly 394, 399, 402-08 (2007) (examining merit selection states and finding that judges early in their terms are more likely to vote their own preferences but effect of citizen ideology on judicial decisions increases as retention election approaches).

55 See David Pozen, Judicial Elections as Popular Constitutionalism, 110 Colum. L. Rev. 2047, 2071-71 (“the empirical evidence shows that, as compared to state judges in appointive and merit selection jurisdictions, judges facing elections, particularly partisan elections, are more likely to decide cases in a manner consistent with majority opinion.”); Gregory A. Huber & Sanford C. Gordon, Accountability and Coercion: Is Justice Blind when It Runs for Office?, 48 Am. J. Pol. Sci. 247, 261 (2004) (examining trial judge criminal sentencing decisions, where trial judges must run in an unopposed retention election every ten years, and finding that “judges become significantly more punitive the closer they are to standing for reelection.”); Melinda Gann Hall, Electoral Politics and Strategic Voting in State Supreme Courts, 54 J. Pol. 427, 438-43 (1992) (finding state supreme court justices become significantly more likely to uphold death sentences in years preceding reelection); Brandice Canes-Wrone & Tom S. Clark, Judicial Independence and Nonpartisan Elections, 2009 Wis. L. Rev. 21, 41, 63-64 (2009) (examining “abortion cases decided by state courts of last resort between 1980 and 2006” in states where justices faced competitive elections, comparing results with state public opinion and finding that “nonpartisan elections will not insulate state supreme-court justices from political pressure on the issue of abortion,” instead that judges without a partisan label are actually more likely to have to rely on making their rulings consistent with public opinion due to lack of ideological signal of party label being capable of acting as a proxy); Elisha Carol Savchak & A.J. Barghothi, The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking, 7 State Pol. & Pol’y Quarterly 394, 399, 402-08 (2007) (examining merit selection states and finding that judges early in their terms are more likely to vote their own preferences but effect of citizen ideology on judicial decisions increases as retention election approaches); Robert M. Howard, Scott E. Graves & Julianne Flowers, State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties, 40 L. & Soc’y Rev. 845, 864 (2006) (“[State supreme court justices] are sensitive to the attitudes of the citizenry, and their sensitivity is enhanced by the use of competitive elections to retain justices.”); Paul Brace & Brent D. Boyea, State Public Opinion, the Death Penalty, and the Practice of Electing Judges, 52 Am. J. Political Science 367 (2008) (finding that public support for the death penalty has no effect on judicial decisions in non-elective states, and that higher support for death penalty in elective states results in lower probabilities of decisions reversing death sentences).
Conservatives largely promote the interpretive doctrine of originalism as the proper mode for judging. Because the most important parts of the U.S. Constitution were adopted in the late eighteenth and late nineteenth centuries, when the predominant views on economics were far more laissez faire than today, and views on crime and punishment, sexuality, and religion were far less liberal, interpreting textual provisions adopted during these periods according to their original meaning will tend to lead to conservative jurisprudential results.

Elite academic legal opinion is overwhelmingly hostile to originalism because of these results, which run counter to much of the modern liberal policy agenda. Popular opinion is both more hospitable to conservative views generally, but also to originalism as an interpretive method, than elite opinion.

---

56 Robin West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641, 648 (1990) (“Conservative constitutionalists . . . tend to advocate originalism, judicial restraint, or both, as guiding principles of constitutional adjudication).

57 See John O. McGinnis, The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein, 71 Tex. L. Rev. 633, 662 n.127 (1993) (“The failure of the Senate Judiciary Committee to mount an attack on the general jurisprudence of Souter or Kennedy (or Thomas for that matter) by invoking the noninterpretivist theories currently popular in the legal academy is good evidence that there is not substantial disagreement among the public about the proper role of the judiciary or the proper method of constitutional interpretation. Of course, it is easy for those working in the academy to be misled about the extent of public disagreement with generally interpretivist theories of constitutional interpretation given the general academic rejection of those theories.”).

58 See, e.g., Cass R. Sunstein, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 41, 72-73(2005) (arguing against using originalism for interpreting U.S. Constitution based on bad policy consequences it leads to); cf. Rexford G. Tugwell, Rewriting the Constitution: A Center Report, Center Mag., Mar 1968, at 18 (one of principal architects of New Deal admitting that post- “Switch-in-Time” Supreme Court rulings upholding constitutionality of New Deal programs were “tortured interpretations of a document intended to prevent them.”).

59 Robin West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641, 648 (1990) (“Conservative constitutionalists . . . tend to advocate originalism, judicial restraint, or both, as guiding principles of constitutional adjudication. Progressives, by contrast, argue that constitutional interpretation should be in some sense ‘open,’ . . . that the constitution is always open to multiple interpretations, which at least include interpretations capable of facilitating progressive causes and policies.”).

60 See Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Chi. L. Rev. 615, 625 & n.51 (2000) (noting that all ten Justices appointed by Republican Presidents between 1968 and 2000 were billed as conservatives, and that both Justices appointed by a Democratic President “were billed as centrist and balanced, which appears to be a coded way of saying that they were more conservative than, say, the center of gravity of the Democratic contingent in the House of Representatives.”).

61 See, e.g., Jon Cohen, Americans Split on How to Interpret Constitution, Wash. Post. 01/05/2011, http://voices.washingtonpost.com/behind-the-numbers/2011/01/americans_split_on_how_to_inter.html (visited September 4, 2012) (“There is a set text to the U.S. Constitution, but the public splits about evenly on whether the country’s courts should stick narrowly to its original meaning when deciding law. Exactly half of Americans say the Supreme Court should base its rulings on the framers’ original intent, but nearly as many – 46 percent – say the justices should instead rule on what the Constitution ‘means in current times.’”) (citing an October 2010 Washington Post-Kaiser-Harvard poll); Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 Harv. J.L. & Pub. Pol’y 769, 833-34 (2006) (advocating term limits for Supreme Court Justices to make them more responsive to public opinion, and arguing that “the general public is more likely than are nine life-tenured lawyers to interpret the Constitution in a way that is faithful to its text and history, ‘contrasting the public’s reverence for constitutional text and history with the “legal realist or post-modernist cynicism” dominant in the lawyer class’); id. at 852-53 (noting that elections since 1968 have seen Presidential candidates advocating originalist jurisprudence winning on that issue, and even Democratic Supreme Court nominees in modern times being well to the right of Earl Warren or William Brennan, and further commenting that when the Supreme Court issues opinions
This is because interpreting words according to their original meaning is the default rule for attempting to understand all communications, other than works of poetry or fiction. Professor Cass Sunstein, a noted critic of originalism in constitutional interpretation, concedes that originalism is the “ordinary thinking about interpretation. If your best friend asks you to do something, you’re likely to try to understand the original meaning of his words; you won’t select the interpretation that you deem best.” The powerful rhetorical appeal of originalism has recently led to one prominent academic switching from ardent critic to born-again supporter of originalism.

Just as with the question of whether the Supreme Court is influenced by public opinion or elite opinion, the question of whether originalism and conservative jurisprudential results are popular with the public is a relative one. This Essay does not claim that originalism or conservative jurisprudential results are clear victors in the arena of public opinion, only that the terrain there is markedly friendlier than that in elite legal academia. How that may affect implementation of Supreme Court doctrine in the event of a shift from inferior federal courts to the mostly elected state courts is addressed in the next section.

VI. INSTITUTIONAL EFFECTS OF SHIFTING IMPLEMENTATION OF SUPREME COURT DOCTRINE FROM LOWER FEDERAL COURTS TO STATE COURTS

If one accepts that (1) elite opinion disproportionately affects the Supreme Court, (2) that elite opinion’s influence moves the Court’s doctrine in a leftward direction compared to public opinion, and (3) that judges not subject to election are more likely to be an effective implementational tool of the results of such influence, then anything that fragments that power to

---

bring public opinion to bear on it would create a structure more amenable to originalist and conservative jurisprudential results.

The relationship among the Supreme Court and the inferior courts is key to understanding the Court’s ability to effectively move legal policy and to sustain those shifts over the long term. “The true power of Supreme Court doctrine lies in its ability to influence the vast mass of cases decided at lower levels of the judiciary.” A number of political scientists have studied this particular issue and found that Supreme Court doctrine does appear to significantly affect lower court decisions; the effect of vertical precedent is real.

Because it actually decides so few of the Nation’s cases, the Supreme Court’s real power is with the lower courts enforcing in analogous cases the doctrines enunciated in its opinions. The Court uses its virtually unlimited discretion to pick and choose cases it sees as appropriate vehicles to move doctrine.

The Court has a principal-agent relationship with the lower courts, and the incentives given to those courts can affect how much they see themselves as part of the Supreme Court “team” and to what extent they have other principals to also please. While inferior federal courts may see themselves as part of the federal judiciary, and have no other principals to satisfy, most state courts must also keep one eye on the electorate of their states, and often state political branches have more tools available to affect the state courts. State courts have multiple principals, whereas lower federal courts are more independent of influences other than the Supreme Court.

Just as horizontal precedents can be manipulated to facilitate ideological decision making in the Supreme Court or lower federal courts, they also leave room for state courts when

---

66 Id. at 526 (listing studies in particular areas of legal doctrine).
67 See Craig S. Lerner & Nelson Lund, Judicial Duty and the Supreme Court’s Cult of Celebrity, 78 Geo. Wash. L. Rev. 1255, 1266 (2010) (“Soon after enactment of the Judges’ Bill [of 1925], the Court seized the new mode of discretionary review – through the writ of certiorari – to limit not only the number of cases it would hear, but the nature of its review. Rather than considering an entire case, the Court soon began reviewing only narrow legal questions, leaving aside legal and factual issues in which the Justices were uninterested. This reflected a departure from pre-Evarts Act practice, and it obviously increased the Court’s discretion to shape its own agenda.”); id. at 1267 (“Congress eliminated almost all of the remnants of mandatory Supreme Court review in 1988.”)
68 See Sara C. Benesh & Wendy L. Martinek, Context and Compliance: A Comparison of the State Supreme Courts and the Circuits, 93 Marquette L. Rev. 795, 801 (2009) (“the milieu within which state supreme courts operate provides ample reason to expect less faithfulness on the part of the state supreme courts than is manifested in the lower federal courts. Simply put, while a focus on the vertical relationship between the Supreme Court and the lower federal courts makes sense in light of the fact that they are operating within a single legal code and as part of the American judicial system, such a singular focus in studying state supreme courts is untenable given the array of local forces with which state supreme courts must contend. State supreme courts are not only part of the American judicial system, they are constituent parts of individual state political systems as well. In other words, unlike judges in lower federal courts, state supreme courts are also embedded in state political environments that include other actors with the ability to influence their decisions.”); id. at 815 (finding that while both federal circuit courts and state supreme courts are influenced by U.S. Supreme Court precedent in confession cases, the federal courts are “more consistently and strongly attentive to the Court’s decisions in these cases.”).
applying Supreme Court precedent. State courts, however, are mostly elected and thus must often suppress their individual ideological or policy views when they conflict with popular opinion. Manipulation of precedents can be a survival strategy for an elected state judge to avoid making an unpopular ruling implementing Supreme Court preferences.

Lower courts are largely free to implement their preferences (which, in the case of elected judges, would include getting reelected and thus reflect public opinion) when there is an issue of first impression. Conversely, they also have more freedom as large numbers of precedents accumulate, providing multiple reference points and often contradictory language which can be latched onto to provide support for various outcomes.

---

69 See Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 819 n.8 (1994) (noting that lower courts “know how to mouth the correct legal rules with ironic solemnity while avoiding those rules’ logical consequences.”); Edward A. Purcell, Jr., Reconsidering the Frankfurtian Paradigm: Reflections on Histories of the Lower Federal Courts, 24 L. & Soc. Inquiry 679, 724 & nn. 119-23 (1999) (discussing the ways in which trial courts expand and shift Supreme Court precedent); Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 648 (1994) (“Direct quotes from previous cases do not always control; lawyers argue that such quotes are taken out of context and they strain to distinguish the cases in which the quotes first appeared.”); Richard A. Posner, Judicial Behavior and Performance: An Economic Approach, 32 Fla. St. U. L. Rev. 1259, 1274 (2005) (“appellate judges can conceal the role of personal preferences in their decisions by stating the facts selectively so that the outcome seems to follow inevitably or by taking liberties with precedents.”); Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the Judicial Power, 80 B.U. L. Rev. 967, 986 (2000) (lower court defiance of Supreme Court precedent by “reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as dicta, is not unusual.”); Brannon P. Denning & Glenn H. Reynolds, The New Commerce Clause Jurisprudence Encounters the Lower Courts, 55 Ark. L. Rev. 1253, 1256 (2003) (“lower courts have considerable power to shape constitutional doctrine through their implementation (or lack thereof) of Supreme Court decisions. While they are bound to apply Supreme Court precedent, what that means in practice depends, in large part, on how precedent is construed.”); id. at 1299 (noting that “Even if courts are unwilling to advertise their ideological dissatisfaction with a Supreme Court case, political scientists have long recognized that lower courts had a variety of means at their disposal to frustrate the full implementation of a superior court’s mandate.”); Walter F. Murphy, ELEMENTS OF JUDICIAL STRATEGY 24 (1964) (noting the opportunities, arising from compromises in high court opinions which leave room for discretion in lower courts and inclination of judges to indulge their own policy preferences over the doctrines of higher courts, to “hamper execution of high-level policy decisions” as “an everyday occurrence in the judicial process.”)

70 Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 831 (1982) (“One implication of the inevitability of inconsistency [in Supreme Court doctrine] is that, as time goes on and the stock of precedents grows, the Court is likely to assert broader powers to review the substantive decisions of the other branches. The availability of inconsistent precedents allows the Justices to ‘prove’ anything they like, without fear of contradiction. The Court then either must return to first principles (disregarding its precedents) or decide cases on the basis of noninterpretive methods, such as beliefs about social consensus or the Justices’ own fundamental values (the only course left open by the conflicting precedents). It is unlikely that the Justices would do the former.”); Stefanie A. Lindquist & Frank B. Cross, Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent, 80 N.Y.U. L. Rev. 1156 (2005) (finding that judges are more free to decide cases based on ideological preferences where no precedents on the issue exist, but the more precedents accumulate on an issue also increases discretion in judges to so decide); J.M. Balkin, Taking Ideology Seriously: Ronald Dworkin and the CLS Critique, 55 UMKC L. Rev. 392, 430 (1987) (“the materials of the law already contain justifications supporting every variety of liberal and conservative positions”); Jeffrey A. Segal & Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUINAL MODEL REVISITED 77 (2002) (“Precedents lie on both sides of most every controversy, at least at the appellate level.”).
Valerie Hoekstra has examined state supreme court decisions on maximum hour and minimum wage laws between 1900 and 1940. These topics were highly salient, controversial issues during that time, much like cultural and social issues today, and 89% of these cases involved justices who faced partisan or nonpartisan elections. Hoekstra found that “[a]ll else equal, when the U.S. Supreme Court is supportive of this kind of labor legislation, state high courts are more likely to uphold. When the high court is opposed, so too tend to be the state high courts.”

This indicates that vertical precedent does indeed have an effect in transmitting Supreme Court doctrine through the state courts. However, “among courts whose judges face the electorate for reelection, the wider and deeper the support for progressive policies within a state, the more likely the state court is to uphold the legislation. Among the same judges, when there is little support, the state court judges will likely reject the legislation.” Hoekstra’s findings are that both vertical precedent and public opinion have a statistically significant effect on elected state supreme court decision making. Notably, if support for progressive policies by the public in the state is very intense, elected state supreme court justices were more likely to uphold the legislation even in the face of Supreme Court doctrinal opposition. “Thus, the Supreme Court’s ability to see its decisions implemented is not wholesale – intra-state constraints may, at some times, be more salient to judges.”

In light of this, state courts would likely use the “play in the joints” of Supreme Court precedents to facilitate their reelections. Although no judge likes to be reversed by a higher court, it is unlikely that the chance of reversal would loom larger to a judge facing election than making an unpopular judicial decision that could result in the loss of his office. There is some indication that elected state courts are seen as less likely to robustly implement Supreme Court doctrine than the inferior federal courts.

---

72 Id. at 324.
73 Id.
74 Id. at 317 (“The results show that [U.S.] Supreme Court precedent does have a statistically significant effect on state courts in this area, but also state [public] ideology has a significant effect, but only when state judges are tied to the electorate through elections.”).
75 Id. at 327.
76 See Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1, 14-15 (1993) (arguing that appellate judges don’t like to be reversed by the Supreme Court, but that the possibility “does not figure largely in the judicial utility function” because Supreme Court review is very rare and reversals primarily reflect ideological differences rather than incompetence and are thus not perceived as criticism and, furthermore, don’t affect promotion); Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719, 748 (2010) (“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 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 cases from the state high courts each year.”).
77 See Amanda Frost & Stefanie Lindquist, *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719 (2010) (analyzing U.S. Supreme Court cases reviewing state court decisions from 1960 to 2005 and finding that the Court was more likely to reverse decisions from states with partisan elected state supreme courts compared to those with nonpartisan elected courts of appointed courts, and that state courts are more likely to be reversed than lower federal courts).
Fragmenting the Judiciary

Is there a problem with encouraging subtle defiance of a robust, aggressive implementation of controversial Supreme Court doctrines? Given the vastly increased power the Court has accumulated over the last century (including assertions of judicial supremacy and exclusivity regarding interpretation of the Constitution\(^\text{78}\)), and the withering of the original political checks on the power of the federal courts (such as impeachment and jurisdiction-stripping), devolution of doctrinal implementation to the state courts could be seen as a necessary corrective.\(^\text{79}\) Just as the increase in presidential power over the last century has led to attempts by Congress to fragment the unitary executive power by creating agencies within the executive branch independent of centralized presidential control,\(^\text{80}\) so too does Congress have a legitimate interest in countering the accumulation of power by a rival department where the judiciary is concerned.\(^\text{81}\)

Because of the greater reception of popular opinion to conservative results and originalism as an interpretive method, increasing the influence of that opinion relative to the elite opinion (which is overwhelmingly hostile to those results and that method) should push jurisprudence rightward, back toward the political center.\(^\text{82}\)

Because the state courts are more easily subject to the accountability of public opinion, the abolition or dramatic reduction in the jurisdiction of the inferior federal courts in favor of state court implementation should have this effect. As described above, studies have shown that state judges are affected by the political environment at the time of their taking office, and are more affected by the constituency charged with retaining them in office than that which originally placed them on the bench.

As Supreme Court precedent is always subject to a variety of interpretations by lower court judges, and the Supreme Court can only police a very small number of cases, elected state judges will be more likely to reach conservative or originalist results regarding highly salient


\(^\text{79}\) Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the Judicial Power*, 80 B.U. L. Rev. 967, 1009-11 (2000) (noting salutary effects of lower courts providing a check on the Supreme Court, which has accumulated significant unchecked power).

\(^\text{80}\) See Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62 (1990) (noting rise in congressional delegation of executive authority outside the control of the President, including to the states and private groups and individuals).

\(^\text{81}\) This is not to say that fragmenting the executive department – by granting executive officials more independence from the President – is as legitimate as fragmenting the judiciary by granting inferior courts more independence from the Supreme Court. The text and structure of the Constitution would seem to make fragmenting the judiciary more licit than fragmenting the executive. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1175-94, 1212-13 (1992).

\(^\text{82}\) There is some evidence that state supreme courts are to the right of the U.S. Supreme Court, which may be indicative of the general theory articulated here that public opinion, which affects elected state courts more significantly than federal courts, is to the right of elite opinion. See Robert M. Howard, Scott E. Graves & Julianne Flowers, *State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties*, 40 L. & Soc’y Rev. 845, 864 (2006) (finding that “only 20% of the state courts in our 13-year [from 1982 through 1993], 49-state sample fell to the left of the [U.S. Supreme Court].”).
social issues than inferior federal judges because of their increased accountability to public opinion.

Three other long-term consequences of this state of affairs could also reinforce a move to the political center. First, the lack of federal appellate judges would take away the source of the vast majority of Supreme Court nominations of the modern era: the United States Court of Appeals. State court judges would be more likely to be the future source of nominations to the Supreme Court. Second, the close working relationship likely to develop among the state judges and Supreme Court Justices could lead to indirect influence of public opinion on the Court itself through a sort of reverse osmosis.

Third, federalism interests could be advanced by increasing the relative power of state judges. When the Progressives succeeded in ratifying the Seventeenth Amendment to the Constitution, the states as entities lost their direct control over the selection of U.S. Senators. By taking away the lower federal courts’ power, the implementation of Supreme Court doctrine would be through instruments of state governments. Empirical studies have shown that the loss of control over the selection of U.S. Senators coincided with a large increase in nullification of state laws compared to federal laws, and the reforms outlined here could apply counter-pressure to that trend.

As state judges are part of the machinery of their state governments, federalism interests could be more salient to them. The loss of state control over the selection of U.S. Senators resulted in a serious weakening in the structural protections of federalism. The most direct effect was the loss of the Senate as a veto point over legislation harming the institutional interests of the states. But more relevant to our inquiry, the Senate’s role in the confirmation of federal judges, including those on the Supreme Court, provided the states as institutions with a protection against the federal judiciary. That was lost with the Seventeenth Amendment, but forcing the Supreme Court to rely on state judges – who are part of, and accountable to, state governments – would re-right the balance while still ensuring that the national Supreme Court would be able to step in to look out for federal interests.

VII. CONCLUSION

83 U.S. Const. amend. XVII.  
84 See Donald J. Kochan, State Laws and the Independent Judiciary: An Analysis of the Effects of the Seventeenth Amendment on the Number of Supreme Court Cases Holding State Laws Unconstitutional, 66 Alb. L. Rev. 1023 (2003); see also Valerie Hoekstra, Competing Constraints: State Court Responses to Supreme Court Decisions and Legislation on Wages and Hours, 58 Pol. Research Quarterly 317 (2005) (noting that “at least in recent times, the Supreme Court appears more likely to overturn legislation when the state is a party than when the federal government is a party.”)  
85 Sara C. Benesh & Wendy L. Martinek, Context and Compliance: A Comparison of the State Supreme Courts and the Circuits, 93 Marquette L. Rev. 795, 800 (2009) (“The state supreme courts . . . may be inclined to separate themselves from the federal system, thereby strengthening their position as major players in their respective state governments.”); Cf. John O. McGinnis, Justice Without Justices, 16 Const. Comment. 541, 546 n.16 (1999) (“The optimal constitutional provision might well also have permitted Congress to choose state supreme court judges on a random basis to ride to the Supreme Court. Their service would create yet another force for preserving federalism.”).
Public opinion is more open than elite legal opinion to conservative jurisprudential outcomes and originalist methods of interpretation. By forcing the Supreme Court to rely on mostly-elected state court judges to implement its doctrine, Congress could provide a check on the Supreme Court’s ability to push constitutional and statutory interpretations favored by legal elites. Disempowering the lower federal courts would provide upward hydraulic pressure from public opinion below by fragmenting the Supreme Court’s ability to have its doctrines implemented aggressively. The result would be U.S. Supreme Court doctrine that is more centrist and more reflective of the political and legal values of the American citizenry.