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Judicial Elections as Popular Constitutionalism

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JUDICIAL ELECTIONS AS POPULAR CONSTITUTIONALISM

David E. Pozen*

One of the most important recent developments in American legal theory is the burgeoning interest in “popular constitutionalism.” One of the most important features of the American legal system is the selection of state judges—judges who resolve thousands of state and federal constitutional questions each year—by popular election. Although a large literature addresses each of these subjects, scholarship has rarely bridged the two. Hardly anyone has evaluated judicial elections in light of popular constitutionalism, or vice versa.

This Article undertakes that thought experiment. Conceptualizing judicial elections as instruments of popular constitutionalism, the Article aims to show, can enrich our understanding of both. The normative theory of popular constitutionalism can ground a powerful new set of arguments for and against electing judges, while an investigation into the states’ experience with elective judiciaries can help clarify a number of lacunae in the theory, as well as a number of ways in which its logic may prove self-undermining. The thought experiment may also be of broader interest. In elaborating the linkages between judicial elections and popular constitutionalism, the Article aims to shed light more generally on some underexplored connections (and tensions) among theories and practices of constitutional construction, democratic representation, jurisprudence, and the state courts.

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INTRODUCTION

Few schools of constitutional thought have commanded more attention in recent years than popular constitutionalism.¹ Renouncing the elitism and the court centrism of traditional constitutional theory, a diverse group of scholars has set out to redeem a central role for “the people themselves” in fundamental lawmaking. This is an urgent project, it is claimed, for the connection between ordinary Americans and their Constitution has become enervated. Popular sovereignty has given way to judicial supremacy, “the notion that judges have the last word when it

1. See Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 *Stan. L. Rev.* 213, 238 (2007) (“[P]opular constitutionalism . . . has taken constitutional theory by storm over the last decade.”); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 *Fordham L. Rev.* 1837, 1837 (2009) (calling popular constitutionalism “the most important and influential strand of recent constitutional theory”); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *Harv. L. Rev.* 1594, 1594, 1640 (2005) (book review) (describing popular constitutionalism as “the theory *du jour*”). Popular (or political) constitutionalism has likewise assumed a central role in debates over the legitimacy of judicial review in several Commonwealth countries. See Paul Craig, *Political Constitutionalism and Judicial Review*, in *Effective Judicial Review: A Cornerstone of Good Governance* 19, 19 (Christopher Forsyth et al. eds., 2010).

comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone.”² To sustain the democratic legitimacy of our legal order, scholars associated with popular constitutionalism urge that the people reassert their authority over the construction and enforcement of constitutional norms. From a different vantage point, a number of political scientists have also begun to offer sympathetic accounts of legal disputation and mobilization outside the courts.

In contrast to the tremendous amount of attention that has been devoted to popular constitutionalism as a theoretical project, hardly any attention has been paid to questions of institutional design. The scholarship is heavily normative but rarely pragmatic. Those who have championed popular constitutionalism, notes one commentator, “have said very little about the particular institutional mechanisms that would make their vision a reality in today’s world.”³ “The obvious question for robust popular constitutionalism,” Larry Alexander and Lawrence Solum remark in a leading critique, “is ‘How?’ How can the people themselves interpret and enforce the Constitution through direct action?”⁴ They conclude that there is no plausible way.⁵ Proponents of popular constitutionalism have started to raise similar questions. Larry Kramer, one of the movement’s principal figures (and the target of Alexander and Solum’s critique), threw down the gauntlet in the closing lines of a recent speech:

If there is an agenda for constitutionalism today, its first concern is not substantive. It is institutional. . . . We should . . . be asking what kind of institutions we can construct to make popular constitutionalism work, because we need new ones. We need to start rethinking and building institutions that can make democratic constitutionalism possible. And we need to start doing so now.⁶

2. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 125 (2004) [hereinafter Kramer, *The People Themselves*].

3. David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 *Chi.-Kent L. Rev.* 1069, 1069 (2006); see also Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 *Wash. U. L. Rev.* 313, 354 n.191, 321 (2008) (observing that “popular constitutionalists have not yet rallied behind specific proposals concerning the ways in which the American people might reveal their constitutional interpretations,” and asserting that “[t]hese are vitally important matters on which popular constitutionalists owe their critics a persuasive response”).

4. Alexander & Solum, *supra* note 1, at 1635. Robust popular constitutionalism, in Alexander and Solum’s taxonomy, is the view that “the court of popular opinion [ought to be] the tribunal of last resort—superior to the United States Supreme Court on issues of constitutional law.” *Id.* at 1621.

5. *Id.* at 1635–40.

6. Larry Kramer, *Response*, 81 *Chi.-Kent L. Rev.* 1173, 1182 (2006) [hereinafter Kramer, *Response*]. Note the slippage in Kramer’s statement between *popular* constitutionalism and *democratic* constitutionalism. The question of how popular constitutionalist practices relate to democratic ideals will be a central concern of this Article.

So, what kind of mechanisms could invigorate the practice of popular constitutionalism? Amending the Constitution through Article V will never suffice unless Article V is itself amended; formal revisions are much too rare and too difficult to ensure continuous popular control over the administration of fundamental law.⁷ If amendments were readily achievable, one would not find such anguish about judicial supremacy. Alternative possibilities recur throughout the literature. They range from the soft and discursive (civic education, norm contestation, advocacy movements, presidential rhetoric) to the blunt and disruptive (mobbing, defunding the courts, disregarding their rulings, stripping them of vast swaths of jurisdiction). The modest options are already in fairly broad use and have fairly broad support, but they are also the least efficacious. They take a long time, and ultimately a lot of political power, to achieve results. The radical options have not gained much traction, and for evident reason. Valorizing defiance of the courts risks serious harm to the stability, predictability, and rights-enforcing goods that we have come to expect from them. Is there any vehicle for achieving popular constitutionalism's ends that can be genuinely empowering without being anarchic, accessible to the masses yet mediated by professionals, transformative yet realistic?

This Article spills a secret: The answer is yes, and it is all around us. The United States already has a systematic and pervasive mechanism for popular constitutionalism of just this sort—at the state level. It has been in place for nearly two centuries. It is the institution of elective judiciaries.

By subjecting their judges to periodic elections, more than three quarters of the states give citizens a powerful tool with which to check the judges' interpretive outputs, as well as a recurring focal point with which to stimulate and structure constitutional deliberation. Without disturbing the finality of courts' judgments or the conditions of their work, elections can cement a link to the demos. They are "the most robust mechanism we currently have to connect the lay citizen to constitutional

7. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 380 (2007) [hereinafter Post & Siegel, *Roe Rage*]. Bruce Ackerman is sometimes classed as a popular constitutionalist, but his "constitutional moments" appear to be still rarer and more difficult to achieve than formal amendments, and the judiciary plays the lead role in interpreting and consolidating them during periods of normal politics. See generally 1 Bruce Ackerman, *We the People: Foundations* 288–90 (1991) [hereinafter Ackerman, *Foundations*]; 2 Bruce Ackerman, *We the People: Transformations* 350–82 (1998). Although the moments themselves may be signal achievements of popular constitutionalism, they are therefore even less suited to the task set forth by Kramer. See Larry D. Kramer, *Popular Constitutionalism*, circa 2004, 92 Calif. L. Rev. 959, 961 n.3 (2004) [hereinafter Kramer, *Popular Constitutionalism*] (stating that popular constitutionalism "refers," not to revolutionary acts of constitutional revision, but "to some idea that the people retain authority in the day-to-day administration of fundamental law"); Post & Siegel, *Roe Rage*, supra, at 380 ("And if twenty-seven constitutional amendments cannot ensure democratic accountability, neither can three or four discrete 'constitutional moments.'").

decisionmaking—enabling . . . public participation, dissolving the claims of the heroic judge, enshrining the people’s supremacy over the courts.”⁸

Why has no one drawn this connection before?⁹ Two possible reasons jump out immediately. First, constitutional scholars have been fixated on the federal courts, particularly the U.S. Supreme Court, the nonelective selection method for which is hard-wired into the Constitution.¹⁰ Focusing on the federal courts is a reasonable approach, consistent with the focus of legal scholarship generally. But it is an artificially limited approach. State courts resolve exponentially more cases; they operate at closer proximity to the people; they are at the cutting edge of constitutional law on issues ranging from same-sex marriage, to welfare rights, to education finance; and in many ways their substantive powers and the substantive reach of the state constitutions exceed those of their federal counterparts. State judges not only play a lead role in expounding their own various constitutions; they also play a significant, though constrained, role in interpreting and implementing the federal Constitution.¹¹

Second, despite the awesome power of the state courts, judicial elections have historically been low salience, low intensity affairs. Under the traditional model of judicial elections, campaigning was minimal and devoid of substantive content, incumbents almost always won, and few people voted or cared. In the past several decades, however, the sleepy old model has been overtaken by a spirited “new politics,”¹² in which campaigns for the bench routinely feature meaningful competition, sizeable turnout, and hard-hitting advertisements on legal issues.¹³ Popular con-

8. David E. Pozen, *The Irony of Judicial Elections*, 108 *Colum. L. Rev.* 265, 328 (2008) [hereinafter Pozen, *Irony of Elections*].

9. There is, to be sure, a large literature that evaluates judicial elections in light of communal and constitutional values. No previous work has offered any sustained analysis of the relationship between judicial elections and popular constitutionalism.

10. U.S. Const. art. II, § 2, cl. 2 (requiring presidential nomination and Senate approval); id. art. III, § 1 (providing that federal judges “shall hold their Offices during good Behaviour”).

11. See *infra* Parts II.A, III.D.2 (discussing significance of state courts and constitutions for popular constitutionalism).

12. A biannual series of reports by the Brennan Center for Justice, the Justice at Stake Campaign, and the Institute for Money in State Politics has popularized this label. See, e.g., James Sample, Lauren Jones & Rachel Weiss, *The New Politics of Judicial Elections* 2006 (Jesse Rutledge ed., 2007).

13. On the distinction between the old and new models of judicial elections, see Pozen, *Irony of Elections*, *supra* note 8, at 265–68, 296–306. The new model has not entirely supplanted the old; many races for the bench still fail to generate much public participation, discussion, or interest. Yet it is remarkable to learn that on at least two key metrics, challenger and retention rates, partisan state supreme court elections are now significantly more competitive than elections for the U.S. House of Representatives. Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections* 165, 182–83 (Matthew J. Streb ed., 2007).

stitutionalist potential was always latent in the soil of judicial elections. Now, it has begun to flower.

A third reason is more speculative but, to my mind, irresistible. If judicial elections really are such an obvious means of operationalizing some of popular constitutionalists' core commitments, as well as such an obvious framework for evaluating some of their claims, one wonders whether the failure to identify this connection betrays a certain anxiety about their project. Judicial elections, that is, suggest what a vigorous practice of popular constitutionalism might entail, and the theoreticians do not like what they see. It may be reckless to psychologize one's subjects, much less an entire line of scholarship, but the "repressive" reading of this hole in the literature is intriguing.

This Article begins to plug the hole by exploring the question of judicial selection through the lens of popular constitutionalism. Its primary goal is to demonstrate that judicial elections have the capacity to serve, and to some extent already have served, as highly consequential vehicles of popular constitutionalism. Its larger goal is to unpack what this insight can tell us about the institution of elective judiciaries and the project of popular constitutionalism. This exercise can help clarify some important questions the literature has scarcely addressed, such as whether a well-functioning regime of judicial elections might be vulnerable to criticism on democratic terms, and how a judicial system can preserve a commitment to higher-order law while simultaneously making that law more accessible to mass manipulation; the exercise can serve as a kind of case study on some of the problematics inherent in efforts to popularize a constitution. And to the extent that scholars like Larry Kramer would discount elections for breeding interpretive practices that are not "popular" or "constitutional" in the relevant sense, we will have learned something. We will begin to develop a better sense of what kinds of public participation they would be willing to recognize and why.

Part I summarizes the normative tenets of popular constitutionalism.

Part II explains how selecting judges through the ballot box could advance the theory's goals. In so doing, Part II explores another question that has received little scholarly treatment: whether a judge's selection method ought to have any bearing on how he or she decides cases. Elected judges, it contends, might claim a special license to incorporate public opinion into their decisional process, to engage in *majoritarian review*. Although rarely acknowledged by its practitioners, the evidence suggests this phenomenon is widespread.

Part III investigates whether and what sorts of popular constitutionalists should embrace judicial elections. It shows that, on a variety of levels, use of these elections is as liable to subvert as to serve many of the movement's underlying commitments—which calls into question the feasibility and coherence of the movement. The analysis thus has a chiasmic structure. In using the theory of popular constitutionalism to test and critique

elective judiciaries, the Article ultimately uses elective judiciaries to test and critique the theory.

* * *

A methodological note is warranted to clarify the nature and scope of this study. In the pages that follow, I map a broad normative theory (popular constitutionalism) onto a broad social practice (electing judges). To do this, the Article inevitably assumes a stylized model of both. The imaginary “popular constitutionalist” deployed here proxies for an agglomeration of views in the literature, associated with many scholars but not necessarily an accurate depiction of any one in particular. The “judicial elections” under consideration are generally contested races for a seat on a state high court. The Article does not have much to say, except by way of comparison, about the lower courts or about retention elections, merit selection, or the other methods of choosing judges. Nor does the Article address many of the myriad routes through which constitutional meaning is developed outside the courts.¹⁴ Although I hope to contribute to our understanding of this issue—and of “living constitutionalism” generally—by examining some of the microfoundations of popular influence over legal doctrine in an elective regime, my primary aim is to cast an old institution in a new critical light.

Thinking about judicial elections as instruments of popular constitutionalism, it turns out, can illuminate a wide range of matters at the intersection of constitutional construction, democratic representation, jurisprudence, and the state courts. It significantly complicates the popular constitutionalist account of, and reform agenda for, American legal practice, and it points the way to powerful new arguments both for and against electing judges. Or so I will try to show.

I. THE BASICS OF POPULAR CONSTITUTIONALISM: A BRIEF OVERVIEW AND TYPOLOGY

It can be difficult to get a firm grip on what people mean by “popular constitutionalism.” As many have observed, scholars invoking the idea typically have done so at a high level of abstraction. “A major frustration in discussing the body of scholarship arguing for popular constitutionalism,” Erwin Chemerinsky laments, “is its failure to define the concept with any precision.”¹⁵ “It is hard to know how popular constitutionalism would work,” Suzanna Sherry adds, “since few (if any) of its advocates make any concrete suggestions about how to implement popular constitutional interpretation.”¹⁶ The literature’s lack of institutional specificity

14. A vast descriptive literature, spanning several disciplines, explores this question. For an excellent overview, see Kramer, *Popular Constitutionalism*, *supra* note 7, at 967–74.

15. Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. Ill. L. Rev. 673, 676.

16. Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 *Const. Comment.* 461, 463 (2009); see also Barry Friedman, *Mediated Popular Constitutionalism*, 101 *Mich. L. Rev.* 2596, 2598 (2003) [hereinafter Friedman, *Mediated Constitutionalism*] (stating

mirrors a lack of theoretical detail about how, for example, popular sovereignty is to be realized while keeping lawlessness at bay and maintaining sufficient respect for the past.

Nevertheless, the core premise is comprehensible, the core variants identifiable. With apologies to the many important scholars whose distinctive views I scant—and with particular emphasis on the work of Larry Kramer and Mark Tushnet¹⁷—I sketch in this Part the basic normative concept of popular constitutionalism and the basic programmatic distinctions among its adherents. Those well versed in the literature may wish to skim or skip ahead.

A. *Popular Constitutionalism Generally*

To varying degrees, a half-dozen interrelated propositions underlie many conceptions of popular constitutionalism.¹⁸

The first is a background presupposition: Americans now live in an age of judicial supremacy, in which the people have largely abdicated their collective authority to determine constitutional meaning. Judicial supremacy has “become the norm,”¹⁹ citizen passivity its byproduct and enabler. The literature often stresses the contingency of this dynamic. American history is replete with examples of popular and governmental

that “the particulars” of popular constitutionalism “have not been worked out”). But cf. Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 *Chi.-Kent L. Rev.* 991, 996 (2006) [hereinafter Tushnet, *Political Law*] (defending “the inherent fuzziness of the category *popular constitutionalism*”).

17. I also draw heavily on the work of Robert Post and Reva Siegel, though it should be noted that much of their scholarship in this area is positive rather than normative, and their views diverge from Kramer’s and Tushnet’s in important ways. If my primary focus on Kramer seems methodologically suspect, I can say only that his writings have proven especially influential—they helped crystallize the perception of popular constitutionalism as a major school of thought—and that many have been interested in working out their implications. In condensing an “enormous” literature, Kramer, *Popular Constitutionalism*, supra note 7, at 961, the discussion sacrifices nuance in the hope of clarifying common themes.

18. For a lucid summary of recent critiques of judicial review, including but not limited to popular constitutionalists’, see Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 *U. Mich. J.L. Reform* 971, 974–82 (2010). The major charges against judicial review, in Aronson’s telling, are that it “is at odds with democratic rule”; funnels “morally-laden issues” to “professionally [in]adequate arbiters”; “impedes, numbs, and diverts political deliberation on constitutional issues”; and constitutes “an elitist mechanism for preserving the social structure.” *Id.* at 975. Aronson’s project, which aims to “break[] down th[e] monolithic concept of ‘the courts’ by shifting the focus to the lower levels of the judicial system,” *id.* at 971, echoes and complements my own. Aronson, however, rules out the possibility of incorporating state courts into his “inferiorizing” strategy—and he cites their typically elective nature as one of two reasons why. See *id.* at 973 n.2, 997 n.98. (The other reason is “extreme jurisdictional complexities.” *Id.* at 973 n.2.) I admire Aronson’s insightful analysis but find this an unfortunate limitation, because it severely limits the practical relevance of his project and because, as I will show, some of the same critiques of judicial review that motivate his work can be used to motivate a popular constitutionalist defense of elective judiciaries.

19. Kramer, *Popular Constitutionalism*, supra note 7, at 964.

resistance to judicial interpretations of the Constitution.²⁰ “Sometime in the past generation or so,” however, “Americans came to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others.”²¹

Critics of judicial supremacy reject the idea that the federal courts are sufficiently attuned to public preferences to compensate for this deficit. Notwithstanding the occasional decision that generates mass outrage, we now have ample evidence to show that their outputs are “not regularly or commonly outside the run of popular opinion.”²² Some set of mechanisms continues to connect judicial doctrine to the popular will. But the mechanisms are too weak, too slow, too fickle; their functional consequences cannot compensate for the feeling of the people that judges have the final say on all but the rarest of matters.

A second proposition sharpens the point: Judicial supremacy is the “enemy.”²³ Far too often, popular constitutionalists believe, judges in

20. See, e.g., Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 83–91, 266–67 (2009) [hereinafter Friedman, *Will of the People*] (providing notable examples from early 1800s and 1960s); cf. Lee J. Strang, *Originalism as Popular Constitutionalism? It Depends* 5 (Aug. 13, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1658549> (on file with the *Columbia Law Review*) (“The historical narrative frequently told by popular constitutionalists . . . argues that popular constitutionalism is the initial American form of constitutional interpretation.”).

21. Kramer, *The People Themselves*, supra note 2, at 229. “Constitutional history was recast—turned on its head, really—as a story of judicial triumphalism.” *Id.*

22. Friedman, *Mediated Constitutionalism*, supra note 16, at 2600; *id.* at 2606–13 (reviewing empirical literature on this issue from Robert Dahl’s canonical work forward).

23. Alexander & Solum, supra note 1, at 1608; Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 *Geo. L.J.* 897, 904 (2005); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *Calif. L. Rev.* 1027, 1027 (2004) [hereinafter Post & Siegel, *Popular Constitutionalism*]; see also Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 *N.C. L. Rev.* 773, 776 n.17 (2002) [hereinafter Whittington, *Extrajudicial Interpretation*] (cataloguing criticisms of judicial supremacy). I am using “judicial supremacy” in the sense articulated by Larry Kramer, among many others, as the notion that judges are the preeminent and ultimate arbiters of constitutional meaning for everyone. See supra note 2 and accompanying text; see also Keith E. Whittington, *Political Foundations of Judicial Supremacy* 6–7 (2007) (“A model of judicial supremacy posits that the Court does not merely resolve particular disputes It also authoritatively interprets constitutional meaning.”).

A still more perfidious enemy is “judicial sovereignty,” the notion that judges have not merely the final word but the *only* word in constitutional interpretation. Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 *Harv. L. Rev.* 4, 13 (2001); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *Yale L.J.* 1943, 2023 n.250 (2003). All of the criticisms of judicial supremacy and then some would apply to judicial sovereignty. I focus on the former because the term “judicial sovereignty” is not in widespread use, and because the idea that extrajudicial actors lack the authority even to partake in constitutional interpretation is not a plausible depiction of American constitutional practice: Just glance at the editorial pages of the *New York Times* or the *Wall Street Journal* after a major Supreme Court ruling, or at any issue of this journal. In this

America serve as the first and last expositors of constitutional meaning. Far too often, the adjudicated Constitution is equated with the actual Constitution. Our constitutional culture has become “juricentric.”²⁴ We conceptualize constitutional law in terms of the courts, we look to them to drive constitutional change, and we bow to their pronouncements. The Supreme Court’s self-aggrandizing and ahistorical position that “the federal judiciary is supreme in the exposition of the law of the Constitution”²⁵ must be rejected. The Constitution must to some significant extent be “taken away from the courts.”²⁶

In fact, very few popular constitutionalists seek to disestablish judges’ interpretive authority across the board. Almost everyone, for example, accepts that when a dispute is properly brought before an Article III tribunal, its judgment ought to bind the parties irrespective of what the public thinks.²⁷ Popular constitutionalists are not necessarily “anti-court,”²⁸ or even anti-judicial review (though some are). The key goal, rather, is to limit judicial supremacy in substantive and symbolic effect, so

regard, judicial sovereignty was a strawman in Kramer’s *Harvard Law Review* Foreword, and it is notable that he has not returned to the term.

24. Post & Siegel, *Popular Constitutionalism*, supra note 23, at 1029; Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *Ind. L.J.* 1, 2 (2003).

25. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Rehnquist Court took the Warren Court’s view of judicial supremacy further, articulating it more frequently and more stridently. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees.”). Particularly galling to many popular constitutionalists, the Court repeatedly invoked its own interpretive supremacy in curtailing Congress’s explicit grant of power to legislate under Section Five of the Fourteenth Amendment. See John F. Preis, *Constitutional Enforcement by Proxy*, 95 *Va. L. Rev.* 1663, 1725 (2009) (“Popular constitutionalists reserve their fiercest criticism for the Rehnquist Court’s ‘Section Five’ decisions . . .”). The judicial supremacist logic of *Cooper v. Aaron* has now found its way into the Supreme Court visitor’s guide. See U.S. Supreme Court, *Visitor’s Guide to the Supreme Court*, available at http://www.supremecourt.gov/visiting/guide_court.pdf (on file with the *Columbia Law Review*) (last visited Sept. 17, 2010) (“The Court stands as the final arbiter of the law and guardian of constitutional liberties.”).

26. Mark Tushnet, *Taking the Constitution Away from the Courts* (2000) [hereinafter Tushnet, *Taking the Constitution*]; see also Jamin B. Raskin, *Overruling Democracy: The Supreme Court vs. the American People* 224 (2003) (urging Americans “to outflank the new system of judicial supremacy”).

27. Abraham Lincoln famously defended this judicial supremacy floor in arguing that the Supreme Court’s *Dred Scott* decision was binding upon the parties—meaning Scott himself would have to remain a slave—but not upon Congress, the Executive, or the American people. Tushnet, *Taking the Constitution*, supra note 26, at 8–9. Above this floor, there is “intense controversy” over the extent to which extrajudicial actors ought to be bound by the principles and reasons of judicial opinions as well as by their specific holdings. Post & Siegel, *Popular Constitutionalism*, supra note 23, at 1040; see also William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1811–12, 1841–45 (2008) (summarizing views of leading scholars).

28. See Robert Post & Reva Siegel, *Democratic Constitutionalism: A Reply to Professor Barron*, 1 *Harv. L. & Pol’y Rev.* (Online) (Sept. 18, 2006), at <http://>

that disfavored constitutional rulings do not bind a mobilized opposition, or do not bind them for long. Judges still have a role to play in articulating and applying constitutional values; their views just “have no normative priority in the conversation.”²⁹

A third proposition motivates the second: Judicial supremacy has been a peculiarly debilitating force in American public life. Its harms include citizen passivity, elite rule, constitutional alienation, and judicial overreach. “The danger of judicial supremacy,” Robert Post and Reva Siegel write:

is not that the people will be deprived of the authority to decide a particular case, but rather that they will cease to maintain a vibrant and energetic engagement with the process of constitutional self-governance. Even if the people retain the last word on the meaning of the Constitution, which they undoubtedly will, they may nevertheless no longer feel entitled to disagree with the opinions of the Court and hence lose the vital motivation and will for civic participation.³⁰

Rarely are these harms conceptualized in instrumental terms. Popular constitutionalists do not tend to claim that judicial supremacy has diminished social welfare or social justice, though they occasionally draw attention to the Court’s propensity to thwart progressive legislation or to the fragility of constitutional commitments that lack a grounding in public support. The focus is on process and culture more than outcomes. As normative theorists, popular constitutionalists have stressed a nonconsequentialist point about the courts’ ability to impede collective self-determination. They believe that judicial supremacy threatens to sap the democratic legitimacy of American constitutional law and therefore the health of our legal-political order.³¹ Undergirding both the populist and civic republican strains in the literature is this belief in the intrinsic value of citizens’ identification with, and struggle over, the Constitution.³²

A fourth proposition, also normative, follows easily: We ought to rectify judicial supremacy by empowering the people, in their corporate capacity and as individuals, to reclaim the Constitution. Formal amend-

www.hlpronline.com/2006/08/post_siegel_01.html (on file with the *Columbia Law Review*) (refuting this charge).

29. Tushnet, *Political Law*, supra note 16, at 999. Although many non-popular constitutionalists would agree with Tushnet that judges should not have a monopoly on constitutional meaning, most American lawyers would depart from him in assigning the courts some degree of normative priority over other interpreters.

30. Post & Siegel, *Popular Constitutionalism*, supra note 23, at 1042–43 (internal quotation marks omitted) (recapitulating Larry Kramer’s thesis).

31. See Strang, supra note 20, at 5 (citing, as “clear favorite” normative argument of popular constitutionalists, idea that “by privileging Supreme Court constitutional interpretations, democracy is undermined and the Supreme Court’s countermajoritarian position is aggravated”).

32. Cf. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *Const. Comment.* 427, 461–66 (2007) (arguing that American people must recognize Constitution not only as “basic law” and “higher law” but also as “our law”).

ments to the document are well and good, but they cannot ensure “active and ongoing [popular] control over the interpretation and enforcement of constitutional law.”³³ Ordinary citizens must feel the Constitution to be *their* Constitution in an everyday sense. They must have the ability to create, modify, and apply constitutional norms continually and efficaciously, through an accessible political process.

This does not mean that public opinion may trump the text of the Constitution even if the latter clearly resolves a legal question. Popular constitutionalists still take themselves to be constitutionalists. No one in their ranks would (to my knowledge) endorse the view that the voters or their representatives may decide that certain U.S. states shall have three senators, rather than the allotted two,³⁴ without first having amended the written Constitution.³⁵ Likewise, no one in their ranks has endorsed the view that constitutional questions must ceaselessly be ratified by the present people. Popular constitutionalists accept that prior generations can bind future generations through constitutional commitments. They fear the “dead hand” not so much because it is dead—which would amount to a disdain for constitutionalism—as because of a second-stage concern about the democratic inadequacy of judicial interpretation of those commitments. Legal norms would continue to constrain the exercise of contemporary preferences in their ideal world; the two would just be more closely linked, the former more clearly subordinate to the latter.

A corollary of this stance is a fifth, basically empirical proposition: a progressive faith in the capacity of lay persons to interpret and implement the Constitution in a principled fashion.³⁶ The enemies of popular constitutionalism, on this account, are elitists and aristocrats. They dismiss “democratic politics as scary and threatening” and harbor “deep-seated misgivings about ordinary citizens.”³⁷ Popular constitutionalists, in contrast, accept that constitutional lawmaking can be loud, messy, and polycentric without being irrational, immoral, or anarchic. Indeed, they believe it must be quite loud, messy, and polycentric to be democratically

33. Kramer, *Popular Constitutionalism*, *supra* note 7, at 959.

34. U.S. Const. art. I, § 3, cl. 1.

35. No significant popular constitutionalist, that is, embraces what Larry Alexander and Lawrence Solum call “noninterpretive popular constitutionalism,” Alexander & Solum, *supra* note 1, at 1619–21, or what James Fleming calls “populist anti-constitutionalism,” James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 *Fordham L. Rev.* 1377, 1378–79 (2005).

36. See Pettys, *supra* note 3, at 339–58 (defending this view and noting that “popular constitutionalists share a deep faith in citizens’ ability to constrain themselves and their elected officials in the kinds of desirable ways that lead us to value the Constitution in the first place”).

37. Kramer, *The People Themselves*, *supra* note 2, at 242–44 (citing Jack Balkin, Richard Parker, Mark Tushnet, and Roberto Unger for having “similarly noted the profoundly anti-democratic attitudes that underlie modern support for judicial supremacy”); see also Whittington, *Extrajudicial Interpretation*, *supra* note 23, at 839 (observing that supporters of judicial supremacy “tend[] to assume that there is an inherent antagonism between populism and principle”).

legitimate. This insistence that the people be allowed to play a larger role in constitutional lawmaking, it bears noting, may sit uneasily with the fact that opinion polls and observational evidence consistently show Americans to be quite happy with judicial review as currently practiced.³⁸ Underneath the romantic gloss, one sometimes glimpses in the popular constitutionalism literature a hint of the view that judicial supremacy has bred a kind of false consciousness in the people, who no longer realize just how disempowered they are.

Finally, we come to the sixth core proposition, which can be the most difficult for lawyers to grasp: The lines between constitutional law and constitutional culture, between “higher” lawmaking and “normal” politics, are more fluid than is commonly realized. “[O]n the popular constitutionalist understanding,” David Franklin observes, “many things we are used to thinking of as questions of ordinary law or policy turn out to be constitutional questions.”³⁹ Presidential rhetoric about the proper role of judges, newspaper editorials blasting the latest Supreme Court decision, street protests about social conditions—each of these acts may be of constitutional dimension. The Constitution’s text and history leave many fundamental questions underdetermined; the Supreme Court, in turn, has left many (though perhaps not enough) of these questions unanswered.⁴⁰ Multifarious forces inevitably compete to fill the gap. In Keith Whittington’s influential formulation, many of our authoritative norms arise outside the judiciary through an “essentially political” process of “constitutional construction.”⁴¹

38. See Alexander & Solum, *supra* note 1, at 1637 (“[T]he idea that the judicial branch should act as the final and authoritative interpreter of the Constitution has been a profoundly popular one.”); Jamal Greene, *Giving the Constitution to the Courts*, 117 *Yale L.J.* 886, 910–11 (2008) (book review) (summarizing theoretical and empirical literature and “hypothesiz[ing] that members of the public, more than institutional political actors, have laid the foundations for judicial supremacy”); see also Kramer, *The People Themselves*, *supra* note 2, at 230–33 (acknowledging pervasive “[p]ublic acceptance of judicial supremacy”).

39. Franklin, *supra* note 3, at 1074.

40. Cf. Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* 45 (1996) (“The meaning of most provisions in the Constitution is . . . determined in the course of the interaction between the executive and legislative branches.”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212, 1213–20 (1978) [hereinafter Sager, *Fair Measure*] (arguing that courts systematically underenforce Constitution on account of institutional limitations and strategic concerns). Note that these claims are perfectly compatible with the originalist premise that the semantic meaning of a constitutional provision remains fixed from the time of its framing and ratification. See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *Nw. U. L. Rev.* 923, 944–47 (2009) [hereinafter Solum, *Heller and Originalism*] (identifying this “fixation thesis” as core tenet of originalism).

41. Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 6 (1999). Constitutional construction may legitimately be used, in Whittington’s view, when originalist interpretation does not resolve a question. Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 5–14 (1999).

This willingness to expand the horizons of the constitutional raises an *identification problem*: How do we distinguish genuine popular constitutionalism from simulacra or impostors thereof, “judgment[s] about constitutional meaning” from “policy-driven, constitution-blind” acts of opportunism or reform?⁴² Popular constitutionalists have generally declined to specify criteria to resolve this problem.⁴³ To cabin popular constitutionalism into neat procedural or phenomenological categories is to risk being elitist or formalistic, to overlook the political character of the Constitution and the boundless creativity with which Americans may struggle to make it their own.

B. *Three Models*

We are now in a position to consider several ideal types of normative popular constitutionalism. Having outlined the theory’s core premises and its interwoven themes of popular sovereignty, civic republicanism, and historical redemption, we can draw distinctions based on (i) how easy or difficult it ought to be for extrajudicial actors to overthrow judicial interpretations, and (ii) which actors ought to play the lead role in so doing.

1. *Modest Popular Constitutionalism*. — Modest popular constitutionalists generally reject the notion that the people or their representatives can ignore a judicial ruling because they disagree with it. They accept that courts may occasionally strike down statutes or contravene majority preferences as part of their constitutionally assigned role. However, to ensure that such events do not end the conversation—that judicial pronouncements do not displace popular mobilization as the engine of law-

Although this Article draws on Whittington’s basic idea of constitutional construction, it does not apply the distinction between “interpretation” and “construction” as it has been developed by so-called new originalists. See generally Solum, *Heller* and Originalism, *supra* note 40, at 973 (distinguishing interpretation, “[t]he activity of determining the linguistic meaning—or semantic content—of a legal text,” from construction, “[t]he activity of translating the semantic content of a legal text into legal rules”). To the extent that popular constitutionalists have shown an interest in the substance of constitutional exegesis, they have focused on questions of construction: When they insist that the people play a role in determining the Constitution’s “meaning,” they generally do not have the document’s semantic content in mind. Like the popular constitutionalism literature, this Article uses the term “interpretation” more loosely. My sense is that the interpretation/construction distinction raises a number of interesting questions for popular constitutionalism—both the democratic and consequentialist case for pluralizing interpretation, for instance, seem much weaker than the case for reducing judicial control over construction—but an exploration of those questions will have to wait for another day.

42. Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 *Stan. L. Rev.* 155, 207 (2007).

43. Those such as Bruce Ackerman who have tried to establish rigorous criteria have been cast out of the popular constitutionalist community for setting too high a bar. See Kramer, *Popular Constitutionalism*, *supra* note 7, at 961 n.3 (arguing that Ackerman’s theory of non-Article V amendments “does not in fact fit the concept” of popular constitutionalism in light of its “stringent rules of recognition”).

making—they insist that extrajudicial actors play an active, self-conscious role in the articulation, contestation, and codification of constitutional norms. Modest popular constitutionalism is popular constitutionalism because it valorizes political engagement with the Constitution. It is modest because it does not directly challenge the institution of judicial review or the finality of judicial outcomes.

Writers in this camp may still wish to hold out the possibility of popular resolve trumping judge-made law under certain conditions, as when the courts make a grievous mistake or “blatantly usurp their constitutional authority.”⁴⁴ (Though we have an identification problem here too: How to tell when a court has gone so far astray?) Primarily, however, modest popular constitutionalism seeks “a change in attitude.”⁴⁵ It calls upon the political branches to take constitutional interpretation seriously and to enforce their constitutional convictions with or without judicial instruction. It calls upon members of the public to reject the view of the Constitution as something legalistic, immutable, or beyond their ken. And it calls upon all extrajudicial actors to stop seeing the Supreme Court as “an oracle” with a monopoly on constitutional truth,⁴⁶ to follow the Court’s work more closely, to criticize it when they disagree, and to take action when they strongly disagree. In a phrase, it asks the American people to seize a fuller measure of the “active liberty” that the Framers sought to bestow upon them.⁴⁷

Modest popular constitutionalism entails a commitment to a certain kind of republican virtue. It is a “tonic” for the passivity and ignorance that permeate so much of our constitutional culture.⁴⁸

2. *Robust Popular Constitutionalism.* — Robust popular constitutionalism shrinks the domain of binding judicial interpretation. For writers in this camp, the interpretive authority of the people trumps that of the judiciary any time the people are sufficiently ready and willing to use it. Robust popular constitutionalism does not simply encourage lay persons to engage the Constitution in some active and sustained fashion; it assigns

44. Alexander & Solum, *supra* note 1, at 1624. The taxonomy offered here draws on Alexander and Solum’s but simplifies their categories. What they break out into “modest,” “trivial,” and “expressive” popular constitutionalism, *id.* at 1623–26, I lump together into “modest.” And whereas they see departmentalism as a “rival” to popular constitutionalism, *id.* at 1607–15, I see the latter as subsuming the former. While Alexander and Solum’s scheme offers attractive precision, it does not do a very good job of tracking the arguments that popular constitutionalists themselves make.

45. Franklin, *supra* note 3, at 1071.

46. Alexander & Solum, *supra* note 1, at 1626; see also Richard D. Parker, “Here, the People Rule”: A Constitutional Populist Manifesto 79, 87 (1994) (assailing legal culture’s “chronic fetishism of the Constitution, constitutional law, and the Supreme Court” and arguing that “‘higher’ law” rhetoric is “poisonous to our society and our polity”).

47. See generally Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005).

48. Franklin, *supra* note 3, at 1071. Franklin dubs this the “populist sensibility model” of popular constitutionalism, which he contrasts with models that aim to empower the people through strong forms of departmentalism or through direct action. *Id.* at 1071–77.

lexical priority to their views whenever they do so. It seeks to displace not only judicial supremacy but also judicial settlement as the prevailing norm in our constitutional culture. “It would return all constitutional decision-making to the people acting politically,”⁴⁹ “essentially substitut[ing] the people themselves for the Supreme Court as the ultimate interpreter and enforcer of the written text.”⁵⁰

How exactly a society could make this substitution is unclear. The paradigm case of robust popular constitutionalism would presumably involve a concerted effort by ordinary citizens to effectuate their constitutional beliefs, as through assemblies or mobs. Larry Kramer repeatedly and sympathetically refers to these mechanisms in *The People Themselves*,⁵¹ although in the years since he has pulled back from what some took as an endorsement.⁵² Mobs and assemblies might be effective at dealing with the odd, discrete legal question. But modern America is much too big and diverse, and political power much too entrenched, for direct action or direct democracy to supplant representative democracy. To realize their beliefs, the people will generally need to act through mediating institutions such as civic organizations, political parties, and the elected branches of government. To the extent that these institutions are seen as more responsive to the people than the Article III courts, robust popular constitutionalists may wish to shift the locus of interpretive authority in their direction. In this spirit, some prominent scholars have advocated the abandonment of judicial review,⁵³ which would leave the legislative and executive branches free to police their own views of what the Constitution requires. Others have called on Congress to be much more liberal in its use of retaliatory measures such as jurisdiction stripping, court packing, and budget cuts,⁵⁴ which at some point may amount to the functional equivalent.

49. Tushnet, *Taking the Constitution*, supra note 26, at 154.

50. Alexander & Solum, supra note 1, at 1621.

51. See Kramer, *The People Themselves*, supra note 2, at 27–28, 109–11, 128, 168.

52. See, e.g., Kramer, *Response*, supra note 6, at 1175 (“Mobs were fine in their context and in their time, but no one, least of all me, is suggesting that this is a good way to go about doing things today.”). Kramer has also clarified the departmentalist basis of his theory of popular constitutionalism. See *id.* at 1180 (describing “goal” of “restor[ing] a true departmental system” as envisioned by Madison and Jefferson).

53. See, e.g., Tushnet, *Taking the Constitution*, supra note 26, at 154–94; Jeremy Waldron, *Law and Disagreement* 282–312 (1999) [hereinafter Waldron, *Law and Disagreement*] (addressing judicial review of legislation); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346, 1376–406 (2006) [hereinafter Waldron, *Core of the Case*] (same); see also Parker, supra note 46, at 111 (advocating formal continuation but functional diminishment of judicial review, through norm “that it’s all right not only to criticize or even condemn constitutional argument enforced by judges, but also to disobey it”).

54. See, e.g., Kramer, *The People Themselves*, supra note 2, at 249; Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 *Yale L.J.* 948, 953, 958 (2009).

Unlike modest popular constitutionalism, robust popular constitutionalism does not command significant support in the academy. It remains on the fringe. It is useful to mark its existence, though, because we will see that both camps may have reason to care about judicial selection.

3. *Departmentalism*. — Alluded to in the discussion above is an important adjunct to popular constitutionalism, which focuses not on “the people themselves” but instead on the political institutions they create. Departmentalism refers to the idea that the coordinate branches of government possess independent authority to interpret the Constitution. This authority might be divided, so that each branch exercises exclusive control over discrete interpretive areas, or it might be shared, so that the branches render overlapping and potentially conflicting interpretations on the same subjects.⁵⁵ For our purposes, it is not necessary to break down the many possible variants of departmentalism, just to note its basic aim of recognizing the legislative and executive branches as expositors of constitutional meaning and enforcers of constitutional norms.

Many have been attracted to departmentalism not for democratic or civic republican reasons but for reasons grounded in historical practice,⁵⁶ comparative institutional competence,⁵⁷ or the separation of powers.⁵⁸ Many departmentalists, that is, are popular constitutionalists only incidentally. Some have questioned whether departmentalism really is popular constitutionalism, given that it relocates political control from ordinary citizens to their representatives in government.⁵⁹ Yet as we have already seen, only the most stringent and impractical form of popular constitutionalism would reject any mediation between the populace and the levers of power. Scholars sympathetic to popular constitutionalism are liable to embrace departmentalism on two alternate grounds. First, departmentalism diversifies and amplifies the debate over constitutional meaning by introducing potent new voices into the mix. Second, it empowers the people in the debate by augmenting the interpretive role of their elected agents as against that of the unelected Supreme Court.⁶⁰

Departmentalism can be modest or robust. Modest departmentalism does not elevate the political branches to a higher station than the appointed judiciary on account of their electoral pedigree, and to the con-

55. Alexander & Solum, *supra* note 1, at 1609–15.

56. See, e.g., Edwin Meese III, *The Law of the Constitution*, 61 *Tul. L. Rev.* 979 *passim* (1987).

57. See, e.g., Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 *Geo. L.J.* 347, 348 (1994).

58. See, e.g., Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* ch. 7 (1992).

59. See Alexander & Solum, *supra* note 1, at 1609 n.37 (“Departmentalism places ultimate constitutional authority in the hands of the departments . . . whereas popular constitutionalism insists that the people have the final say over constitutional interpretation . . .”).

60. Popular constitutionalists have had little to say about the unelected components within the political branches, such as the heads of executive agencies.

trary expects them to abide by the logic of judicial rulings except perhaps when a profoundly wrong decision justifies retaliatory action. Robust departmentalism does elevate the political branches above the Court, and would reassign to the former much of the interpretive authority that the latter currently wields. By curtailing judicial review or doing away with it altogether, robust departmentalism would effectively make Congress and the President the supreme institutional interpreters of the Constitution.

A simple diagram may help synthesize the distinctions sketched above. In the debate over how constitutional law is to be made, we have identified two basic axes of dispute. The horizontal axis reflects the preferred *locus of constitutional lawmaking authority*, ranging from politically insulated Article III judges, to the elected branches, to the people themselves. The vertical axis reflects the *degree of exclusivity* with which the primary lawmakers may determine the content of constitutional law. (Although I have placed all of the categories in discrete boxes for convenience, they can be better conceptualized as points on a continuum.) Those scholars in the leftmost, "Juricentrism" column are the antagonists of popular constitutionalism; many if not most constitutional lawyers can be found here. The farther east and north one travels on this matrix, the closer one comes to the paradigm case of popular constitutionalism.

TABLE I. HOW CONSTITUTIONAL LAW SHOULD BE MADE

	Juricentrism	Departmentalism	Populism
Robust	Judicial sovereignty	Legislative or executive supremacy	Direct democracy (e.g., assemblies), direct action (e.g., mobs)
Medium	Judicial supremacy, routinely and confidently asserted	Each branch acts on its own interpretations of the Constitution	Social and political movements drive constitutional change
Modest	Judicial supremacy, rarely and cautiously asserted	Each branch interprets the Constitution	Civic engagement, norm contestation

II. HIDING IN PLAIN SIGHT: JUDICIAL ELECTIONS AS VEHICLES OF POPULAR CONSTITUTIONALISM

Imagine an America in which federal judges can be removed not just for misbehavior but also for deciding cases in ways the public does not like. A removal option is regularly put before the people. It is not mediated in any way by the House or the Senate, much less by trial proceedings. A simple majority of those paying attention can unseat a judge on their own initiative. They do this all the time.

Sound fantastical? Although the removal analogy is imperfect, this dynamic is already familiar in most U.S. states, where general jurisdiction and appellate judgeships are determined by recurring popular elec-

tions.⁶¹ If enough voters are unhappy about what a court has been doing, they can reconstitute its membership come the next election cycle. The use of judicial elections is one of the most striking features of the nation's legal system;⁶² no other advanced democracy has anything like it.⁶³ Yet popular constitutionalists have been incurious about this distinctively American practice. They have overlooked the single most populist institution associated with our courts.⁶⁴

This Part sketches a positive theory of judicial elections as engines of popular constitutionalism. Section A explains why state courts merit consideration. Section B explains how their elections can advance the popular constitutionalist project *beyond* the courthouse, by inspiring and empowering members of the public to engage constitutional questions. Section C explains how judicial elections can advance the popular constitutionalist project *within* the courthouse, by inspiring members of the judiciary to internalize norms of deference to public opinion. In drawing these connections between the institution of elections and the aspirations of popular constitutionalism, I do not mean to assert that every connection is likely to be forged in every campaign for the bench. This is not an exercise in empiricism. The goal, rather, is to show what judicial elec-

61. Popular elections currently play some role in the selection or retention of approximately ninety percent of these judgeships, across thirty-nine states. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 *Geo. L.J.* 1077, 1105 app. 2 (2007) [hereinafter Schotland, *New Challenges*]. Election methods vary significantly across the states: Some elections are "competitive" (i.e., multicandidate) whereas others are for retention purposes only; some are "partisan" (i.e., candidates run under party labels) whereas others forbid party affiliation; some recur annually whereas others take a decade or more; some apply stringent campaign contribution limits whereas others do not apply any. See generally Am. Judicature Soc'y, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (2009), available at <http://ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf> (on file with the *Columbia Law Review*); Schotland, *New Challenges*, supra, at 1084–86, 1104 app. 1. Any attempt to evaluate "judicial elections" as a collective phenomenon therefore entails a simplifying conceit. The analysis that follows generally assumes competitive, partisan elections—"the strongest case for defending the democratic nature of judicial elections," Mariah Zeisberg, *Should We Elect the US Supreme Court?*, 7 *Persp. on Pol.* 785, 787 (2009)—though much of it holds up for nonpartisan elections as well.

62. See Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 *S. Cal. L. Rev.* 1995, 1996 (1988) ("To the rest of the world, the American adherence to judicial elections is as incomprehensible as our rejection of the metric system."); Adam Liptak, *Rendering Justice, with One Eye on Re-election*, *N.Y. Times*, May 25, 2008, at A1 (examining judicial elections as part of "American Exception[alism]" series).

63. See Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 *DePaul L. Rev.* 423, 431 (2007) (stating that judicial elections are used outside United States only in several Swiss cantons and in Japan for its high court retention elections).

64. Juries are the only plausible rival. Yet their role in the system is intermittent and highly constrained—by judges, no less—and does not involve explicit legal interpretation. A robust practice of jury nullification, however, could upend the balance of interpretive power between judge and jury.

tions are capable of—to clarify a plausible ideal against which they might be evaluated and in pursuit of which they might be engineered.

In Part III, I will critically reevaluate many of the claims made here: The popular constitutionalist case for judicial elections, I will show, is beset by deep conceptual as well as practical difficulties. It is useful, first, to develop a richer understanding of why and how elective systems may hold appeal.

A. *Taking State Courts Seriously*

The task I have set for myself might seem quixotic. Judicial elections are used only at the state level, after all, and it is the federal Constitution and the federal Supreme Court that have commanded the attention of popular constitutionalists. Moreover, campaigns for the bench may focus on issues about the candidates' personalities or local politics that would seem to have nothing to do with the Constitution. These are not good reasons for the popular constitutionalist to write off judicial elections, for at least five reasons.

First, state courts play a major role in interpreting and enforcing the federal Constitution. State high courts, in particular, not only apply U.S. Supreme Court precedents but also help stimulate and supplement them, as when they rule on issues the Court has yet to decide or when they exceed a constitutional floor the Court has established. Recent scholarship demonstrates that in many areas of law, "state courts, as a practical matter, have the ability . . . to determine what the Constitution means with little or no oversight by the Supreme Court."⁶⁵ If state courts do not always seize the full measure of this interpretive power,⁶⁶ and if they have

65. Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 *Nw. U. L. Rev.* (forthcoming 2010) (manuscript at 2) (on file with the *Columbia Law Review*); see also Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 *Stan. L. Rev.* 1629, 1636 (2010) [hereinafter Devins, *State Constitutionalism*] (describing "volume and import of state supreme court decision-making" as "truly awesome" and identifying examples of state high courts "paving the way for Supreme Court decisions expanding constitutional protections"). Professor Mazzone concludes that given this functional "sharing" of interpretive authority, "we should worry less about the Supreme Court, and more about what is happening to federal constitutional law as it is developed and implemented in the state courts and in other venues." Mazzone, *supra* (manuscript at 2).

66. See Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 *Notre Dame L. Rev.* 1065, 1075 (1997) ("Even now, state courts [that] have no doubt of their power to disagree with the Supreme Court often do not wish to use this power after the Supreme Court has already visited the issue . . ."). But see William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 *N.Y.U. L. Rev.* 535, 549 (1986) (asserting that, in interpreting their own constitutions, "state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority").

failed more generally to develop their own constitutional discourses,⁶⁷ that is all the more reason for the popular constitutionalist to attend to them.

Second, state courts play a lead role in interpreting and enforcing their own constitutions,⁶⁸ which often include positive rights and regulatory norms for which there is no federal analogue.⁶⁹ Many of these courts and these constitutions have become deeply implicated in controversies over education finance, welfare entitlements, and same-sex marriage, among other issues, and “now stand as key elements in activists’ strategies for legal, political and social change.”⁷⁰ “Over the past thirty years,” Neal Devins contends, “state courts have eclipsed the U.S. Supreme Court in shaping the meaning of constitutional values, both in their home states and throughout the nation.”⁷¹ There is nothing essential to most theories of popular constitutionalism that would confine it to a national constitution. To the contrary, the imperative of reconnecting ordinary citizens to fundamental law could be seen as particularly urgent within smaller units of governance. Because state courts are closer to the people, their operations may be critical to “popular constitutionalism’s objective of reasserting democratic control over [constitutional] meaning.”⁷²

Third, campaigns for the bench are no longer sleepy or parochial affairs across many parts of the country. In the “new era” of judicial elections, candidates have begun to stake out positions on disputed legal and political questions, including questions of constitutional interpretation,

67. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 *Mich. L. Rev.* 761 (1992). “[S]tate constitutional law today,” in Gardner’s subtle formulation, “is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.” *Id.* at 763.

68. See *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (“Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.”).

69. See Gardner, *supra* note 67, at 818–19; Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 *Harv. L. Rev.* 1833, 1876–905 (2001) [hereinafter Hershkoff, *Passive Virtues*]; Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 *Va. L. Rev.* 389, 391 (1998).

70. Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 *Rutgers L.J.* 871, 873 (1999). See generally Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 *Val. U. L. Rev.* 421, 421 (1996) (heralding “renaissance in state constitution jurisprudence [that] has extended for nearly a generation”); Robert F. Williams, *Juristocracy in the American States?*, 65 *Md. L. Rev.* 68, 68–73 (2006) [hereinafter Williams, *Juristocracy*] (describing post-1960s emergence of state courts as “major policymakers” and constitutional interpreters).

71. Devins, *State Constitutionalism*, *supra* note 65, at 1635; see also *Traylor v. State*, 596 So. 2d 957, 961, 962 (Fla. 1992) (asserting that “state courts and constitutions have traditionally served as the prime protectors of their citizens’ basic freedoms” and that “[s]tate courts function daily as the prime arbiters of personal rights”).

72. Helen Norton, *Reshaping Federal Jurisdiction: Congress’s Latest Challenge to Judicial Review*, 41 *Wake Forest L. Rev.* 1003, 1023 (2006).

and then to urge voters to select them on the basis of these positions.⁷³ It seems plausible to expect that constitutional law will play an increasingly explicit role in judicial races in the years to come.

Fourth, even if judicial candidates do not cite particular constitutional cases or provisions in their interactions with voters, it does not follow that those interactions are devoid of constitutional import. Popular constitutionalism invites us to broaden our understanding of the constitutional, to “remov[e] the conceptual blinders that higher law constitutionalism has placed” on our legal imaginations,⁷⁴ and see how everyday struggles over distributional arrangements and social values contribute to the development of authoritative norms, if not also to the evolution of constitutional text and doctrine. When candidates for the bench use a campaign ad to decry or defend legalized abortion—a common occurrence⁷⁵—they may be “doing” popular constitutionalism even if they never once mention the Constitution.⁷⁶

Finally, the federal Constitution is not immutable. If elections really do have a claim to being superior vehicles of popular constitutionalism, then its proponents ought to consider whether and how to advocate amendment of the Constitution’s judicial selection procedures. They ought to try to learn from the states.⁷⁷

B. *Judicial Elections Outside the Courthouse*

Let us consider first what judicial elections may entail for the world beyond the courthouse. We can posit a variety of interrelated mechanisms through which they can advance the popular constitutionalist agenda.

1. *Elections as “Critical Moments for Expressing the People’s Active, Ongoing Sovereignty.”*⁷⁸ — Most basically, elections provide a mechanism—the paradigmatic mechanism—for enshrining popular control over the institution in question. Elections bring that institution into the sphere of ordinary politics, inviting voters to conceptualize the individuals selected as

73. See Pozen, *Irony of Elections*, supra note 8, at 265–68, 297–302.

74. Reed, supra note 70, at 892.

75. James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 *Law & Soc’y Rev.* 899, 910 (2008).

76. Cf. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4, 8–9 (2003) (“The boundary between culture and constitutional culture is quite indistinct . . . [Lay persons] can fervently believe that the federal government ought to have plenary power, or that abortion is murder, without ever connecting these views to a conclusion about the nature of the Constitution.”).

77. Although the idea of electing U.S. Supreme Court Justices has never gained substantial political traction, it continually resurfaces. See, e.g., Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process 201–06* (1994) (proposing hybrid system of presidential nomination and electoral ratification); Friedman, *Will of the People*, supra note 20, at 182–83 (summarizing Progressive Era proposals).

78. Kramer, *The People Themselves*, supra note 2, at 197.

agents and representatives, rather than autonomous actors or distant technocrats. They invite voters to think about the substantive powers wielded by the institution, and whether they would like to see those powers wielded differently. In assigning identical weight to each participant's judgment, and zero weight to all other inputs, majoritarian decisionmaking systems have an intuitive claim to being consistent with political equality and procedural fairness.⁷⁹

Elections are special moments, then, for the realization of popular sovereignty. When the elections involve judgeships, they are special moments for affirming our collective commitment to popular sovereignty with respect to the application of law. To be sure, the "popular" nature of any given election may be marred by interest group capture, incumbent advantages, low turnout, or other pathologies. And executive and legislative appointments can be seen as popular acts, too, in that the selecting officials are themselves selected by the public; America's appointive jurisdictions are still a long way away from the career judiciaries of certain Asian and continental European nations, in which prospective judges are groomed in special schools, vetted in technical competitions, and, once on the bench, promoted in large part by more senior colleagues.⁸⁰ But in an appointive system the connection to the demos is mediated, attenuated. The people have no necessary role to play. Elections hold out the promise of a more authentic mode of representation. However imperfectly, they clarify the democratic basis of judicial authority and help legitimate that authority by grounding it in repeated public consent.

Judicial supremacy may still exist in an elective system to the extent that extrajudicial actors believe themselves bound by the logic of court rulings. As a cultural construct, "'a matter of sensibility,'"⁸¹ judicial supremacy cannot necessarily be dispelled by any particular institutional arrangement. Yet it is hard to think of another selection method that could more forcefully instill the counternotion that judges are not supreme⁸²—not infallible luminaries, not Platonic guardians, not invulnerable to popular pressure. Of all the selection methods in use, only elec-

79. See Waldron, *Law and Disagreement*, *supra* note 53, at 113–14. According to Professor Waldron, "it is well known, as a matter of decision-theory, that the principle of majority-decision and only the principle of majority-decision" permits each member of a community to have his or her voice count equally in a common settlement. Jeremy Waldron, *A Majority in the Lifeboat*, 90 *B.U. L. Rev.* 1043, 1055 (2010).

80. See Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* 34–67 (2002) (discussing European civil law systems); David M. O'Brien, *The Politics of Judicial Selection and Appointments in Japan and Ten South and Southeast Asian Countries*, in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* 355 (Kate Malleon & Peter H. Russell eds., 2006) (discussing Asian systems).

81. Kramer, *The People Themselves*, *supra* note 2, at 241 (quoting Parker, *supra* note 46, at 4).

82. Hard, but not impossible: Judicial selection by random lottery would do so even more forcefully.

tions tell members of the public that the resolution of legal questions is not “something that should be left to others,”⁸³ at least not entirely. They demonstrate that the courts serve the people in a community, and not just some antiquated legal text or esoteric professional code. They make it clear that ordinary citizens are entitled to disagree with their judges. Elections can help disestablish judicial supremacy as a sociological and expressive norm.

2. *Elections as Accountability Mechanisms.* — Elections are not merely symbolic vehicles for affirming the people’s active, ongoing sovereignty over the Constitution and the officials who apply it. They are also practical instruments for translating that sovereignty into concrete outcomes, for ensuring that the adjudicated Constitution remains aligned with public opinion. By giving citizens a means and a forum with which to register dissent, if not also to elicit pledges from judicial aspirants, elections give them a tool with which to shape the trajectory of legal doctrine.

Elections are special in this regard as well. Every judicial selection and retention system incorporates various forms of popular accountability. When the governor or the legislature controls reappointments, judges are judged by the people’s representatives. Life-tenured federal jurists are checked by their desire for approbation and efficacy, commitments elicited during the appointment process, the potential for promotion, and Congress’s ability to control jurisdiction, remedies, and salaries. Although causation remains obscure, these sorts of mechanisms have consistently prevented the outputs of the U.S. Supreme Court from straying beyond “the mainstream of public opinion.”⁸⁴ Yet the mainstream of opinion can be a broad current, encompassing a range of controversial viewpoints; the Court’s structural independence and diffuse support allow its positions to lag behind or deviate from majority preferences for many years. And while no American judge is insulated entirely from the voters’ perspective, only elected judges stake their jobs on it. Elections entail the crudest and most potent form of public discipline of all the selection methods. They effectuate the popular will most directly.

It should not be surprising to learn, then, that states that use elections have granted their judges significantly shorter terms than states that use appointments.⁸⁵ For the choice to hold elections reflects a commitment to popular accountability that demands continual satisfaction.⁸⁶ Nor should it be surprising that 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

83. Kramer, *The People Themselves*, supra note 2, at 229.

84. Friedman, *Mediated Constitutionalism*, supra note 16, at 2613. Even definitive proof that Supreme Court decisions always track public opinion would not dispel the procedural critiques of judicial supremacy outlined in Part I, though it might take the edge off.

85. Pozen, *Irony of Elections*, supra note 8, at 284–85.

86. *Id.* at 285–86 & n.91, 312–13, 329.

decide cases in a manner consistent with majority opinion.⁸⁷ Elections appear to be forcing faster and fuller correspondence between judicial outputs and communal preferences. They can help disestablish judicial supremacy as a functional norm, without necessarily breeding defiance of any particular judicial ruling.

When one recalls that state judges routinely decide (and decline to decide) constitutional questions, these considerations take on a popular constitutionalist tint. Imagine an elected state supreme court that rules, by four votes to three, that under the equal protection clause of the state constitution and/or the federal Constitution—both grounds are available—same-sex couples must be afforded the right to marry on identical terms as opposite-sex couples. Imagine, too, that many citizens of the state strongly oppose this outcome on constitutional grounds: They are outraged. Elections give these citizens a means to operationalize their outrage as soon as the next election cycle comes around. Challengers can try to vindicate this sentiment by championing an alternative interpretation of the Constitution. Those four justices in the majority put their jobs on the line the moment they signed the opinion. So did the dissenters.⁸⁸

3. *Elections as Constitutional Change Agents.* — In tying the substance of judicial outputs to the views of the people, elections can thus operate to preserve the status quo against unwanted incursion from independent judges. They can also help see to it that, when gaps open up between the governing legal regime and the strongly held views of the electorate, the former is moved in the direction of the latter. They can serve as engines of constitutional change.⁸⁹

87. Research on this question has exploded in the past decade. For summaries of the literature with citations to leading studies, see David F. Levi & Mitu Gulati, *Judging Measures*, 77 *UMKC L. Rev.* 381, 397–99 (2008); Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 *J. Legal Stud.* 169, 174–76 (2009); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 *Harv. L. Rev.* 1061, 1064–65 (2010) [hereinafter Shugerman, *Economic Crisis*].

88. Take another example: A watershed event in the modern history of judicial elections occurred in 1986, when Chief Justice Rose Bird and two of her colleagues on the California Supreme Court were unseated after an aggressive campaign attacked their low rate of affirmance in death penalty cases. No California justice had ever lost a retention election before; a new breed of judicial elections had arrived. The legal establishment responded with indignation at the affront to judicial independence. See Pozen, *Irony of Elections*, *supra* note 8, at 287 & n.99. To the popular constitutionalist, however, the moral of the story could easily be flipped. Justice Bird and her colleagues consistently declined to uphold death sentences in a jurisdiction that had legislated their use. Having witnessed their constitutional beliefs defied for too long, the people rose up to assert their sovereign authority. They also bothered, for once, to take an interest in what their courts were doing and to come out to vote. This was accountability in action.

89. By “constitutional change,” I mean to refer to changes in the official doctrines, statutes, regulations, and practices that interpret and implement the Constitution. I do not mean to take any position on the relative significance, legitimacy, or canonicity of such

It is now banal to observe that constitutional law may evolve even if the constitutional text remains static. This explains why so many care so much about the President's picks for the Supreme Court. By placing on the Court one or more Justices with a sympathetic worldview or jurisprudential style, a President can increase the odds that the Court's doctrine will move in the direction of positions he and his constituents favor.⁹⁰ For the popular constitutionalist, such executive efforts to influence the elaboration of law through "transformative appointments"⁹¹ are all to the good. They help deal with one of the foundational problems to which popular constitutionalism responds: the slowness and difficulty of formal constitutional change and the concomitant empowerment of judges to manage the interregna. To sustain the democratic legitimacy of constitutional law, "more persistent and nuanced forms of exchange" than those offered by Article V are needed to root that law in the beliefs of an energized public.⁹²

Elections are at least superficially more dynamic vehicles for popular constitutional change than presidential appointments. They occur not episodically and idiosyncratically but quickly and regularly. They involve a qualitatively more direct form of democracy. And in competitive jurisdictions, they put many more candidates—many more potential authors of transformative opinions—before the people. Consider again the same-sex marriage example. If the U.S. Supreme Court reached that same ruling, and the American public likewise despised the result, it could easily take several decades before constitutional doctrine caught up with popular sentiment.⁹³ Judicial elections can effectuate this same change over one or two election cycles, without the contingency of vacancies arising and like-minded executives holding office. Elections "mean that controversial decisions and judges can become rallying cries for an activist and mobilized citizenry, who seek to resist the constitutional interpretations advanced by judges."⁹⁴

Even this example may undersell the potential comparative advantage of elective judiciaries as instruments of constitutional change, for such change can be creative and additive rather than defensive and pre-

developments as compared to an Article V amendment—an issue on which the popular constitutionalism literature is all but silent.

90. See Griffin, *supra* note 40, at 42 ("Many different observers have accepted the thesis that judicial interpretation has been the primary means of adapting the Constitution to change outside Article V."); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1066–83 (2001) (arguing that "constitutional revolutions" occur through partisan entrenchment of federal judges).

91. Bruce A. Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1164 (1988).

92. Post & Siegel, *Roe Rage*, *supra* note 7, at 380; see *supra* notes 7, 33, and accompanying text (explaining insufficiency of Article V amendment process for popular constitutionalism).

93. See Friedman, *Will of the People*, *supra* note 20, at 383 (discussing "stickiness" of Supreme Court's constitutional decisions).

94. Reed, *supra* note 70, at 887.

servative. Elections are disruptive events. They foist upon communities a periodic reevaluation of the status quo, and thereby invite new ideas for a better society. In the judicial context, they invite what might be termed *constitutional competition*: the presentation by candidates of alternative visions of a good constitutional order. Judges can campaign on the basis of particular constitutional understandings they wish to advance—say, that a health insurance mandate is impermissible or that every citizen is entitled to a decent income—and then, when an appropriate case comes along, seek to apply them. In the vernacular of political scientists, candidates for judicial office can serve as constitutional “entrepreneurs.” The campaign gives them a platform as well as an incentive to mobilize support for specific substantive reforms or general interpretive approaches—to seek a competitive advantage by translating abstract concepts into tractable messages, exploiting policy windows, reframing the terms of debates, dislodging old legal norms and moving society toward new ones.⁹⁵

Appointments and merit selections cannot generate the same kind of constitutional competition or entrepreneurship. They are comparatively insulated, elite affairs, yoked to the prevailing norms of the legal establishment. Their choices may reflect the influence of popular movements, but the institutions themselves are unlikely to spark any.

4. *Elections as Dialogue.* — Judicial elections are also comparatively noisy. Merit selection panels labor in obscurity before proffering their slate of candidates to the appointing authority. Governors and presidents vet potential nominees behind closed doors before introducing the selections as a *fait accompli*. Although confirmation hearings can generate public discussion about the candidates and their views on the Constitution, they do so in a highly structured, performative, and time-bounded way. In practice, confirmation hearings at the federal level have rarely achieved any significant level of constitutional debate.⁹⁶ I have not seen any research on confirmation hearings at the state level, but my sense is they have proven equally if not more devoid of substantive content.

Judicial election campaigns, by contrast, increasingly generate political speech on the order of a legislative or executive contest. Candidates develop distinctive themes and narratives and seek to communicate them through the media and through direct appeals. This is the defining feature of the “new era”: As campaign conduct codes have been weakened

95. See generally David E. Pozen, *We Are All Entrepreneurs Now*, 43 *Wake Forest L. Rev.* 283, 300–10 (2008) (explaining related concepts of policy entrepreneurship and norm entrepreneurship).

96. See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 *Yale L.J. Pocket Part* 38, 44–51 (2006), at <http://www.thepocketpart.org/images/pdfs/27.pdf> (urging more robust discussion of nominees’ views, especially on previously decided cases); Richard Brust, *No More Kabuki Confirmations*, *A.B.A. J.*, Oct. 2009, at 38 (reporting widespread dissatisfaction with Justice Sotomayor’s confirmation hearings). But see Tushnet, *Taking the Constitution*, *supra* note 26, at 64 (discussing “public edification” value of Robert Bork hearings).

and attack ads, interest groups, and big money have flooded the market, judicial races have become “nastier, noisier, and costlier.”⁹⁷

Despised by critics, these same attributes of judicial races can serve popular constitutionalist ends. Competitive elections can render the work of the courts more salient and comprehensible. They facilitate public discourse about previous judicial decisions and potential future decisions. They encourage judges to communicate with the people, and the people to communicate with each other, about the methods and consequences of legal interpretation. They encourage ordinary citizens to try to become judges.⁹⁸ They serve as agenda setters and focal points that help citizens coordinate opposition to or support for government policy. They create a kind of marketplace of constitutional ideas. They reward active political participation and persuasive norm contestation at the expense of passivity. They have, in short, the potential to transform a constitutional culture from one that is apathetic, sterile, and professional into one that is active, vibrant, and popular. The nastier, noisier, and costlier they are, the greater their transformative potential.⁹⁹

This transformation may have spillover effects that undermine the influence of judges well beyond the close of the election cycle. Even if judicial supremacy remains accepted on a case-by-case basis, in the sense that extrajudicial actors continue “to give way in the face of judicial interpretations of the Constitution and embrace the logic of those judicial interpretations,” the dialogic aspect of elections can illuminate possibilities for engaging the Constitution “prior to and in the interstices of judicial interpretation.”¹⁰⁰ By injecting questions of constitutional law into the political arena, these campaigns may inspire members of the public and the other branches to take their role as constitutional exegetes and advocates more seriously. Every popular constitutionalist (and every departmentalist) would celebrate this development.

5. *Elections as Teaching Moments.* — Finally, elections can contribute to popular constitutionalism beyond the courthouse by educating members of the public about the content of the state and federal constitutions,

97. Roy A. Schotland, Comment, *Law & Contemp. Probs.*, Summer 1998, at 149, 150 [hereinafter Schotland, Comment].

98. Cf. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 *J.L. Econ. & Org.* 290, 327 (2010) (finding that elected judges are “more politically involved, more locally connected, more temporary, and less well educated than appointed judges,” and hence “are more like politicians and less like professionals”).

99. In line with this hypothesis, Melinda Gann Hall and Chris Bonneau recently found that increased spending on judicial elections leads to increased voter turnout. Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 *Am. J. Pol. Sci.* 457, 467–68 (2008). “[E]xpensive campaigns,” Hall and Bonneau conclude, thus “strengthen the critical linkage between citizens and [judges] and enhance the quality of democracy.” *Id.* at 457, 458, 468.

100. Keith E. Whittington, *Give “The People” What They Want?*, 81 *Chi.-Kent L. Rev.* 911, 913 (2006).

as written and as interpreted, and about the work of the courts. This “teaching” function of judicial elections is made explicit whenever the supervising authorities publish voter information guides. It is made even more pointed when these guides incorporate measures of “judicial performance,” as they increasingly do.¹⁰¹ Any time a judicial candidate takes to the airwaves, puts up a billboard, or mails out a flyer, an opportunity arises for her to comment on the Constitution, in a format and register designed to be accessible to the lay person. Some candidates may decline to engage constitutional questions; some may transmit misleading or sensationalistic messages. But others will take this opportunity in earnest. Mobilized groups of citizens can likewise try to inform and persuade the masses.

If Supreme Court rulings still have the capacity to provide a “vital national seminar” on important legal issues,¹⁰² state court races have the capacity to distribute the CliffsNotes to the millions of Americans not enrolled. While confirmation hearings may serve a teaching function as well, the lessons are filtered through representatives and ignored by most citizens. As dialogue, judicial elections can facilitate a democratic debate about constitutional questions. As teaching moments, they can clarify and vivify the stakes.

Given the traditional antipathy of the legal establishment toward elective judiciaries, it was remarkable to find a U.S. Supreme Court Justice, Anthony Kennedy, invoking this line of argument in a recent concurrence:

A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates.¹⁰³

Justice Kennedy pulled back at the critical moment, however, when he suggested that the topic of conversation would be “judicial excellence.” That is just the tip of the iceberg. Experience indicates that elective systems are liable to stimulate discussion not only about the personal qualities of the candidates, but also about the substantive views they es-

101. Inst. for the Advancement of the Am. Legal Sys., Univ. of Denver, Shared Expectations: Judicial Accountability in Context 19–61 (2006), available at <http://www.du.edu/legalinstitute/pubs/SharedExpectations.pdf> (on file with the *Columbia Law Review*).

102. Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 208 (1952). It is conventional wisdom among political scientists that the Court’s rulings do not in fact have this capacity. See, e.g., Gerald R. Rosenberg, Romancing the Court, 89 B.U. L. Rev. 563, 564 (2009) (“[F]or decades social science researchers have repeatedly found that judicial opinions neither educate nor teach. Ordinary people do not know about them, are unlikely to find out about them, and are not interested.”).

103. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring). Only Justice Breyer joined Kennedy’s concurrence. *Id.* at 209.

pouse.¹⁰⁴ As in legislative and executive contests, competitive judicial races prime voters to demand results. The teaching moments and the dialogue they foster will inevitably come around to the consequences of judicial decisionmaking, to questions regarding what kind of interpretive outcomes the candidates seem likely to deliver. And one assumes that for many popular constitutionalists, though perhaps not for Justice Kennedy, this is exactly as it should be.

C. *Judicial Elections Inside the Courthouse*

We have seen that judicial elections have the potential to transform a constitutional culture in ways that empower ordinary citizens and that, compared to other methods of selection and retention, they might claim a special democratic legitimacy on account of the public accountability, civic discourse, and legal education they promise. Whether or not they have come—and ever could come—anywhere close to fulfilling this promise is a controversial question, on which political scientists have generally taken a more optimistic view than lawyers. We will return to this question in Part III. More subtle, but perhaps more consequential, are the ways in which use of an elective system can transform judicial rulings from the inside out.

1. *Judicial Restraint*. — What's a popular constitutionalist judge to do?

Although some prominent (robust) popular constitutionalists reject judicial review altogether,¹⁰⁵ that position remains a minority view. A much larger camp accepts that judges should continue to invalidate legislative and executive action for trenching upon the Constitution. These modest popular constitutionalists just want judges to tread more softly, to show greater respect for the role of extrajudicial actors in interpreting the Constitution.¹⁰⁶ Let us group these jurisprudential views, crudely, under the heading of *judicial restraint*. As used here, the term refers not so much to a theory of constitutional interpretation as to a theory of the judicial function, a regulative ideal, aimed at minimizing interference with the political process.

Judicial restraint could take many forms. It might involve relaxed scrutiny of decisions made by the other branches, liberal use of the political question doctrine and the constitutional avoidance canon, a minimal-

104. Indeed, an opinion that Justice Kennedy joined half a decade earlier, Republican Party of Minnesota v. White, 536 U.S. 765 (2002), foreclosed state efforts to concentrate discussion on the candidates' qualities by preventing them from announcing their views on disputed legal and political issues. *Id.* at 788 (striking down Minnesota Code of Judicial Conduct's prohibition on such announcements as violation of First Amendment).

105. See *supra* note 53 and accompanying text.

106. See Whitington, *Extrajudicial Interpretation*, *supra* note 23, at 780 ("Critics of judicial supremacy . . . are united in the view that nonjudicial actors should be active constitutional interpreters whose interpretations are entitled to respect and deference from the courts.").

ist approach that seeks common moral ground and narrow legal holdings, special solicitude for legislative achievements borne of mass popular mobilization, or simply a less grandiose self-presentation.¹⁰⁷ Each of these techniques can serve to qualify judicial supremacy from within Article III. Many popular constitutionalists identify themselves as political progressives. Yet in connecting the vision of a more vibrant constitutional democracy to prescriptions for a more limited judicial role, their project resonates with themes that have in recent decades been seen as conservative in American legal thought.

Will an elective system be more or less likely than alternative systems to produce judges who are restrained in these ways? The answer is far from clear. It depends upon, among other things, what the selecting and reselecting authorities want and what the judges think those authorities want. Although we can posit mechanisms through which elective systems will conduce to greater restraint than life tenure or merit selection, a system of gubernatorial or legislative reappointment may be superior to all of these.¹⁰⁸

First, restraint may be forced upon the judiciary at the voting booth, through the types of jurists favored by the electorate. If a stable majority of voters in any given state desires judges who will practice Thayerian minimalism and grant legislation the highest presumption of constitutionality,¹⁰⁹ the composition of that state's judiciary will, assuming minimal voter competence, come over time to reflect this jurisprudential trait. In political cultures that brand less deferential judges "activists" or "legislators in robes," judicial elections may likewise tend to produce and reward candidates who already believe, in advance of being selected, that courts should have a modest constitutional footprint. Still, it may be unrealistic to think that the average electorate will value such

107. See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *Nw. U. L. Rev.* 719, 723–24 (2006) (summarizing "concrete legal proposals" that popular constitutionalists have offered).

108. The limited empirical evidence we have on this question is somewhat mixed. Focusing on abortion cases, Paul Brace, Melinda Gann Hall, and Laura Langer found that judges subject to competitive reelections are less likely to overturn statutes than merit-selected judges and judges with life tenure; that gubernatorial and legislative retention procedures lead to the fewest invalidations; and that the latter result is driven by judges' declining to hear challenges rather than rejecting them on the merits. Paul Brace, Melinda Gann Hall & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 *Alb. L. Rev.* 1265, 1291–95 (1999). More recently, Joanna Shepherd found "that no statistically significant difference exists among retention methods in judges' likelihood of overturning statutes," but "that judges facing gubernatorial reappointment become less likely to overturn statutes as retention approaches." Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 *Duke L.J.* 1589, 1616–23 (2009). Shepherd further found that state high court justices facing gubernatorial or legislative reappointment are more likely to vote for litigants from the other branches in civil cases, and that they do so with increasing frequency as their reappointment date approaches. *Id.* at 1616–22.

109. See generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893).

restraint as much as the average legislature or executive, the bodies that will most often be its direct beneficiaries.

Second, elected judges may be induced to practice restraint because they anticipate this is what the voters and opinionmakers desire, and they wish to preserve their jobs. The empirical literature has largely borne out the rational choice assumption that a key strategic objective of elected judges, like all other elected officials, is to get selected and reselected: "Judges want to secure the job and keep it."¹¹⁰ The literature has further indicated that, "[w]hile voters in judicial elections generally are uninformed, . . . judges nonetheless perceive their positions to be at risk, and therefore adjust their behavior when deciding controversial cases."¹¹¹ Members of the public do not actually need to say or do anything to curb what election supporters see as "the blatant display of judicial preferences" permeating our courts.¹¹² "There is ample empirical and anecdotal evidence demonstrating that [elected judges], 'regardless of how safe their positions are[,] . . . often fear voters.'¹¹³

Elected judges might reasonably assume, for example, that any statute passed by the legislature and signed by the governor is likely to command the support of voters, and that striking it down will incur a political cost. They might therefore be loath to do so. Systems of legislative or gubernatorial retention create even more obvious incentives to avoid statutory invalidations: The nineteenth-century movement away from these systems was spurred in large part by a desire to make courts less beholden to the political branches, and the first generation of elected courts struck down more laws than their appointed predecessors.¹¹⁴ In the present day, however, the relative force of these incentives has been dimmed by the close connections that many elected judges have to political parties, along with the long terms of office and strong norms of reappointment

110. Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in *Judicial Independence at the Crossroads: An Interdisciplinary Approach* 9, 26 (Stephen B. Burbank & Barry Friedman eds., 2002); see also *supra* note 87 and accompanying text (discussing empirical literature).

111. Brace, Hall & Langer, *supra* note 108, at 1271 n.34.

112. Melinda Gann Hall, *The Controversy over Electing Judges and Advocacy in Political Science*, 30 *Just. Sys. J.* 284, 286 (2009) [hereinafter Hall, *Controversy over Electing*].

113. Devins, *State Constitutionalism*, *supra* note 65, at 1664 (alterations in original) (quoting Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 *Am. Pol. Q.* 485, 488 (1995)). The most familiar piece of anecdotal evidence is former California Supreme Court Justice Otto Kaus's oft-repeated remark that ignoring the potential political consequences of one's decisions, as an elected judge, is "like ignoring a crocodile in [one's] bathtub." Julian N. Eule, *Crocodiles in the Bath tub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 *U. Colo. L. Rev.* 733, 739 (1994).

114. See Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *Am. J. Legal Hist.* 190, 207–19 (1993) (discussing reformers' motivations); Shugerman, *Economic Crisis*, *supra* note 87, at 1066–68, 1097–105, 1143–44 (discussing reformers' motivations and analyzing invalidation rates).

that prevail in the appointive jurisdictions.¹¹⁵ Judicial elections may have originally been touted as a “weapon” for empowering courts to stand up to the other branches, but in practice they have become a tool for “weaken[ing] state courts” against politicians and voters alike.¹¹⁶

Elected judges might further assume that recognizing new constitutional rights that benefit a minority group, and deciding novel or nonessential legal questions more generally, risks generating popular backlash. Consciously or subconsciously, they may therefore aim to steer clear of such outcomes, even if they could be persuaded in the abstract that the relevant constitutional text and case law are best read to support them. Through ex post incentives as well as ex ante selection effects, self-interested motives as well as high-minded principles, it is plausible that judicial elections will tend to foster judicial restraint.

2. *Judicial Populism.* — It is not obvious why popular constitutionalism should prize only restraint in jurisprudence, especially when the judges are selected in the same basic manner as the officeholders to whom they are meant to be deferring. A commitment to any such principle will resolve only a fraction of cases; the commitment itself may be an artifact of the federal courts’ structural independence. Consider a widely noted passage from the final paragraph of Larry Kramer’s *The People Themselves*:

What presumably would change [after a transition to popular constitutionalism] is the Justices’ attitudes and self-conception as they went about their routine. In effect . . . Supreme Court Justices would come to see themselves in relation to the public somewhat as lower court judges now see themselves in relation to the Court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions—an actual authority, too, not some abstract “people” who spoke once, two hundred years ago, and then disappeared.¹¹⁷

115. See Pozen, *Irony of Elections*, supra note 8, at 283–85 (contrasting term lengths and reselection practices in elective versus appointive systems).

116. Shugerman, *Economic Crisis*, supra note 87, at 1064, 1067; see also Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 *Geo. L.J.* 1349, 1401 (2010) [hereinafter Shugerman, *Twist of Long Terms*] (citing, as factors weakening elective judiciaries since nineteenth century, increase in cost of campaigns and power of political parties and special interests, and decrease in average term lengths).

117. Kramer, *The People Themselves*, supra note 2, at 253; see also *id.* (suggesting that Court invites disaster when it “pa[ys] too little mind to the public’s view of things”); Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America*, at xiii (2006) (contending that federal judges should aspire to “reflect the constitutional views of national majorities” in their decisions); Preis, supra note 25, at 1726 (stating that popular constitutionalism entails that judges “listen[] to the populace in setting constitutional meaning”). Some have read Barry Friedman’s recent work to make a similar point. See, e.g., Justin Driver, *Why Law Should Lead*, *New Republic*, Apr. 8, 2010, at 28, 29, 32 (book review) (arguing that Friedman’s *The Will of the People* valorizes “view of the Supreme Court . . . as an instrument for transforming popular sentiment into law,” and “seems to

Consider, too, this sympathetic passage from Richard Posner's latest book on judging:

[A]s long as the populist element in adjudication does not swell to the point where unpopular though innocent people are convicted of crimes, or other gross departures from legality occur, conforming judicial policies to democratic preferences can be regarded as a good thing in a society that prides itself on being the world's leading democracy.¹¹⁸

What, exactly, would it mean for a judge to adjust her attitude and self-conception in light of the people's superior authority or to conform her policies to democratic preferences? Kramer and Posner do not elaborate. One possibility is that the judge ought to practice the deference techniques described above and cede as much ground as possible to the coordinate branches. This is the standard prescription of popular constitutionalists. Lurking in their theory, however, is another possibility: that the judge ought to incorporate into her decisionmaking calculus the beliefs of the citizenry, to the extent she can perceive them, irrespective of what the legislature or executive has done. She ought to proactively see to it that judicial doctrines "mirror popular views."¹¹⁹ Just as the lower court judge in Kramer's analogy must ask herself how the Supreme Court would resolve the case, the Supreme Court Justice must ask herself how the people would want her to rule.

The leading academic defenders of judicial elections, political scientists Chris Bonneau and Melinda Gann Hall, recently made the point forthrightly: The democracy-respecting judge ought to "draw upon public perceptions and the prevailing state political climate when resolving difficult disputes."¹²⁰ It is a great virtue of elected judges, for Bonneau and Hall, that they have shown themselves more likely to do this. Let us call this approach—the manipulation of interpretive outcomes to promote what the public appears to desire—*majoritarian judicial review*.¹²¹

admonish" Justices "to spend less time reading precedents and more time parsing polling data").

118. Richard A. Posner, *How Judges Think* 136–37 (2008) [hereinafter Posner, *How Judges Think*].

119. Friedman, *Mediated Constitutionalism*, *supra* note 16, at 2598 (describing popular constitutionalist agenda).

120. Chris W. Bonneau & Melinda Gann Hall, *In Defense of Judicial Elections* 15 (2009); see also Hall, *Controversy over Electing*, *supra* note 112, at 286 (suggesting that "judges should adjust their behavior to constituency preferences in matters where they have discretion"). I devote greater attention to Bonneau and Hall's book, and to Hall's normative turn more generally, in a companion piece to this Article. David E. Pozen, *Are Judicial Elections Democracy-Enhancing?*, in *What's Law Got to Do with It? What Judges Do and Why It Matters* (Charles Gardner Geyh ed., forthcoming 2011).

121. This label is also crude. "The people," of course, are not necessarily coextensive with a majority of the people, nor do majorities always get their way. And as we will see, numerous difficulties may confound any judicial effort to follow the "prevailing" view. Bonneau & Hall, *supra* note 120, at 15. Notwithstanding its crudeness, I can think of no better label. Like politics itself, majoritarian judicial review may not reflect a purely numbers-driven calculus in practice. But in theory, at least, those who have urged judges

Although explicit theorizing about “popular constitutionalism” is fairly novel, this prescription is not. Jed Rubenfeld identifies Christopher Tiedeman as the most influential postbellum exponent of the view that, for democratic reasons, judicial interpretations of the Constitution ought to track popular preferences.¹²² The judge “who would interpret the law rightly,” Tiedeman wrote in 1890, “need not concern himself so much with the intentions of the framers of the Constitution.”¹²³ Rather, “as soon as we recognize the present will of the people as the living source of law, we are obliged, in construing the law, to follow, and give effect to, the present intentions and meaning of the people.”¹²⁴ If Tiedeman’s formulation now looks a little archaic in its intentionalism and its suggestion of a collective will, Rubenfeld shows further, his basic idea lived on in the work of the many late twentieth-century judges and scholars, from William Brennan, to Terrence Sandalow, to Harry Wellington, who would have courts look to contemporary attitudes and practices in interpreting the Constitution.¹²⁵ These are theorists who reasoned from “the implicit premise . . . that constitutional law can achieve democratic legitimacy only if interpreted responsively to popular will.”¹²⁶ They laid the groundwork for the popular constitutionalism of today.

to draw upon public sentiment appear to agree that judges should attend primarily to the *most widely held* sentiment; there is an irreducibly majoritarian basis to the literature’s popular theories of judging. It is useful, furthermore, to draw the rhetorical contrast with the so-called “countermajoritarian” theories of judicial review that predominate in academic discussions of the U.S. Supreme Court.

122. Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 57–58 (2001). Tiedeman is far from an isolated example in earlier American legal thought. To take just one other, Justice Benjamin Cardozo, while serving as an elected judge on the New York Court of Appeals, argued that when the legal answer is unclear, the judge has “a duty to conform to the accepted standards of the community” and may depart only in rare circumstances. Benjamin N. Cardozo, *The Nature of the Judicial Process* 108 (1921); see also Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* 125–27 (2010) [hereinafter *Tamanaha, Beyond the Divide*] (providing additional explication of Cardozo’s views and noting widespread assent they received from contemporaneous judges).

123. Christopher G. Tiedeman, *The Unwritten Constitution of the United States* 151 (1890).

124. *Id.* at 154.

125. Rubenfeld, *supra* note 122, at 58.

126. *Id.* As Rubenfeld sees clearly, nothing about these interpretive commitments leads inherently to a “restrained” judicial philosophy. *Id.* at 58–59. Majoritarian review also shares affinities with “dynamic statutory interpretation,” the interpretive method championed by William Eskridge whereby judges adapt the meaning of statutes in light of changed circumstances and political preferences. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); cf. Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation *passim** (2008) (arguing that courts should aim to maximize satisfaction of “current enactable preferences” when statutory text is unclear). Yet, whereas Eskridge’s dynamic interpreter uses her discretion primarily to pursue justice or the common welfare—to pursue what she thinks would be good *for* the public—the majoritarian jurist aspires, in the first instance, to do what the public appears to wish for itself.

Strange though it may sound to the modern ear, majoritarian review can (at least in theory) promote popular sovereignty values without being lawless, unprincipled, or perverse. First, it is important to bear in mind that, at the state level, many judges already have extensive experience as policymakers. The state judges considered here are common law generalists, and the constitutional structures in which they operate frequently envision that they will issue advisory opinions, engage political questions, perform administrative functions, and participate in decisions on budgetary matters and access to government services.¹²⁷ In light of these background characteristics, the idea that a state judge would possess the competence and authority to advance popular preferences might sound less far-fetched.

Second, judges who adopt this approach need not be mere conduits for public opinion. As in many respectable theories of political representation, they could lead as well as follow—within limits—when they believe their constituents lack relevant information or ought to take a different tack.

Third, these judges need not run roughshod over the other branches. If the legislature and executive have settled on a view, that will usually serve as a pretty good proxy for what the people want. For the majoritarian jurist, the fact that the other branches have taken a certain position is, in itself, incidental; yet it may be highly relevant for the insight it provides into the content of public opinion.¹²⁸

Fourth, and most important, these judges need not act wantonly or extralegally. They can confine their populism to cases in which the legal answer seems uncertain, while public sentiment seems clear, widespread, and of constitutional dimension (however this is gauged). The people's views would remain irrelevant to the application of, say, a fixed numeric rule, but they might be consulted in construing a vague standard such as "equal protection" or "due process." Public opinion could be used to supplement or gloss the traditional interpretive aids; it could be reserved for when the original meaning of a provision is obscure or when the orthodox legal materials are in equipoise; it could be given more or less weight depending on context; and so forth. Just as there are many different types of judicial restraint, there are many different types of majoritarian review, and I wish to be agnostic among them. As used here, majoritarian review entails only that the judge assigns public opinion some meaningful role in the decision calculus, either as an external source of value, like justice or welfare, or as an independent source of

127. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *Harv. L. Rev.* 1131, 1179–82 (1999) [hereinafter Hershkoff, *Positive Rights*]; Hershkoff, *Passive Virtues*, *supra* note 69, at 1842–76.

128. In outcome terms, accordingly, the distinction between judicial restraint and judicial populism may collapse in a substantial number of cases. Majoritarian jurists may turn out to be modest jurists; elected judges may be deferential so as to be popular.

legal meaning.¹²⁹ At the least, the majoritarian jurist can aim to avoid the least popular options within the range of plausible alternatives, within what Judge Posner calls the “zone of reasonableness.”¹³⁰

An analogy to *Chevron*¹³¹ may help clarify this last point. At step one, the judge described here, like all judges, asks whether the relevant legal materials are unambiguous or decisively point in one direction. If the answer is yes, her job is done; she must apply the law. If the answer is no, however, she proceeds to step two—except as the voters’ agent, her touchstone is not which interpretive option would best comport with original public meaning, common law precepts, or any other retrospective standard, but rather which permissible interpretation would best comport with the will of the current electorate. While the answers to these questions will in many cases be the same, they can diverge when relevant social norms or conditions have changed, or when the previous lawmakers have done something unwise or unpopular as applied to the instant case.

3. *Role Fidelity*. — Judicial elections have a special relationship to majoritarian review, not only in their expected outputs but also in their structural logic. To see this, we need to consider a more general, and surprisingly undertheorized, normative question: Should the fact that a judge is selected by any particular method have any bearing on how he or she decides cases? The traditional view of lawyers has been an emphatic no, for “[t]o expect judges to take account of political consequences . . . is to ask judges to do precisely what they should not do.”¹³² Regardless of how they came to hold office, judges should decide cases solely on the basis of their own legal judgment; they must “resist public clamor and criticism” and “make decisions impartially and independently of their constituents.”¹³³ This kind of interpretive independence, Kathleen Sullivan observes, “ensures the rule of law by ensuring that courts decide

129. Judges might also look to public opinion not as a distinct end or source of meaning, but rather as a guide to the “correct” interpretation of a constitutional provision, with correctness determined by other criteria. See generally Sunstein, *supra* note 42, at 183–95, 206–12 (discussing and critiquing proposition that, in virtue of its numbers and heterogeneity, populace is more likely than any given judge to be “right” about questions of interpretation). This kind of epistemic weighting of public opinion, in the service of an objectively best answer that does not itself depend on public opinion, is a separate enterprise from majoritarian review. Similarly, it does not count as majoritarian review when a judge uses public opinion to inform a pragmatic inquiry into the expected effects of a ruling. This judge cares about the people’s views only instrumentally, as a variable in a consequentialist equation, and not for their own sake.

130. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 *B.U. L. Rev.* 1049, 1053, 1065–66 (2006).

131. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

132. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 920 (2004) (Scalia, J., denying motion to recuse).

133. Symposium, *The Debate over Judicial Elections and State Court Judicial Selection*, 21 *Geo. J. Legal Ethics* 1347, 1357 (2008) (remarks of Professor Geyh) (describing “traditional[]” model of judging).

cases in accord with the law and facts, uninfluenced by judges' political affiliations . . . or other improper skewing factors."¹³⁴

There is, however, a plausible alternative to this traditional understanding, and it is one that complements the theory of majoritarian review. It is the idea that jurisprudential norms *should* change when the selection and retention methods change, that there is no global ideal of judicial craft that exists independent of judicial structure. Whereas appointive systems with life tenure reflect a societal aspiration for judges who will follow the law and the law alone, elective systems might legitimize a different conception of the judicial role: They might "send a signal to judges that sensitivity to public opinion is part of the job description."¹³⁵ Drawing on Robert Cover's analysis of antislavery judges in the antebellum North,¹³⁶ Jed Shugerman has recently described this idea under the rubric of "role fidelity."¹³⁷ Many states adopted judicial elections in the nineteenth century in a concerted effort to strengthen judges' ties to the voting public.¹³⁸ The advent of elections created a new personal narrative for those who attained the bench, Shugerman hypothesizes, in which the judge came to see it as her duty to incorporate considerations of "constituency and conscience" into the panoply of legal materials used to decide cases.¹³⁹ She came to see herself, that is, more like a legislator.

On this view, even if an elected judge is about to retire and will never face another vote, role fidelity demands that she nevertheless attend to constituent preferences in each and every case of public concern. When critics such as Kathleen Sullivan decry the "improper skewing factors" that prey upon elected judges,¹⁴⁰ they are impliedly equating these judges with federal judges. They are overlooking the possibility that what would be an improper skewing factor in the federal context, might be an appropriate factor in a state context. We have seen, however, why it is not self-evident that elected judges ought to approach cases in the same manner as appointed judges, in that public opinion may (the theory goes) legitimately exert a larger influence on the decisional process of the former. If the very notion that a judge should attend to public opinion

134. Kathleen M. Sullivan, *Republican Party of Minnesota v. White*: What Are the Alternatives?, 21 *Geo. J. Legal Ethics* 1327, 1334 (2008); see also Note, *The Rule of Law in the Marketplace of Ideas: Pledges or Promises by Candidates for Judicial Election*, 122 *Harv. L. Rev.* 1511, 1525–26 (2009) (tracing intellectual lineage of view that judges should "stand outside public opinion").

135. Pozen, *Irony of Elections*, *supra* note 8, at 277.

136. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975).

137. Shugerman, *Twist of Long Terms*, *supra* note 116, at 1396–401.

138. *Id.* at 1379–85, 1396–97. Elections, the theory went, could reduce the corrupting influence of party machines and special interests at the same time that they realigned judicial incentives with popular preferences. *Id.*

139. *Id.* at 1399. In conceptualizing the elected judge's role fidelity (or role morality) in these terms, Shugerman is thus inverting the standard conception of judicial role fidelity as *precluding* considerations of public opinion.

140. Sullivan, *supra* note 134, at 1334.

sounds heretical, recall that this notion has been with us for a long time,¹⁴¹ and that many state courts already “play an active policymaking role in ways that would be unimaginable for federal courts.”¹⁴²

It seems safe to assume that majoritarian review is already pervasive (though perhaps often subconscious) among our elected state judges. In addition to the evidence that these judges tend to decide cases in more voter-friendly ways,¹⁴³ we already know, for example, that they become significantly more punitive in criminal sentencing as their reelection date approaches.¹⁴⁴ This research is particularly notable because it deals with what Brian Tamanaha has dubbed the “rule of law baseline” problem: the problem, which cripples empirical analysis of the determinants of judicial decisionmaking, that it can be virtually impossible to confirm the “correct” legal answer in any given case, and consequently to measure deviations therefrom.¹⁴⁵ The sentencing evidence is so powerful because it suggests that elected judges systematically deviate from their *own* views of what the correct legal answer is.

They do this, one assumes, because they understand that voters tend to favor harsh criminal sentences and that the availability heuristic renders recent decisions more salient than older ones. They are afraid their next opponent will accuse them of being soft on crime. In the vernacular of political scientists, judges who are facing reelection make sentencing decisions “strategically” rather than “sincerely.”¹⁴⁶ It does not follow that elected judges are more likely than other types of judges to deviate from the guidelines or to make objective errors in sentencing determinations. Sentencing is an area in which legislatures have given courts discretion to choose among a range of outcomes. Elected judges appear to be guided

141. See *supra* notes 121–126 and accompanying text (discussing pedigree of theory of majoritarian review).

142. Devins, *State Constitutionalism*, *supra* note 65, at 1651; see *supra* note 127 and accompanying text (discussing policymaking and administrative functions of state judges).

143. See sources cited *supra* note 87.

144. See, e.g., Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 *Am. J. Pol. Sci.* 247, 253–62 (2004) (finding Pennsylvania trial court judges give significantly longer sentences for aggravated assault, rape, and robbery convictions as retention-election date draws nearer); Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing* 15 (Aug. 2009) (unpublished manuscript), available at http://isites.harvard.edu/fs/docs/icb.topic613697.files/Thursday_01_Paper_01_Berdejo_10-01.pdf (on file with the *Columbia Law Review*) (finding in Washington Superior Court “essentially the same defendant . . . having committed the same crime, facing the same judge, receives 10 percent more time in prison if he is sentenced at the end of the judge’s political cycle rather than the beginning”); see also 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 immediately preceding reelection).

145. Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 *B.C. L. Rev.* 685, 751–53, 757 (2009).

146. See, e.g., Brace, Hall & Langer, *supra* note 108, *passim*.

in those choices by popular preferences, at least in the years preceding reelection.

There are plenty of reasons why one might denounce this kind of cyclical behavior in the administration of justice. Proponents of judicial elections must find a way to justify these findings, however, and it is not available to them to pretend that majoritarian review is not occurring or that it is equally likely to occur in appointive and merit selection jurisdictions. Elective systems create demonstrably superior incentives to reach popular outcomes. The proponents' strongest move, I submit, is to accept this charge and then seek to flip it—to draw on the theory of popular constitutionalism and the concept of role fidelity and to praise, rather than discount, the possibility of judges who will *not* resist public clamor and criticism.

The vast majority of judicial election supporters have done no such thing. They have accepted the traditional view that judges should ignore constituent preferences in reaching decisions, and then tried to show that elections do not pose a special threat to this ideal.¹⁴⁷ They have accepted that judges should always act as if they have life tenure, even when they have nothing of the sort. If this was ever a plausible line of argument, it will become increasingly untenable as the new model of judicial elections comes to supplant the old, and campaigns for the bench become more salient and competitive. The notion of majoritarian review, by contrast, holds out the possibility that courts should flexibly interpret the law to reflect the contemporaneous beliefs of the people. The notion of role fidelity, furthermore, holds out the possibility that elected courts have special license to do this. Taken together, they can collapse much of the distinction between deciding cases strategically and deciding them sincerely, as the vindication of public opinion becomes part of the elected judge's professional duty.

Popular constitutionalism thus helps provide a vocabulary and an analytic framework with which to celebrate, rather than downplay, the inevitable ways in which elected judges will deviate from the traditional ideal. Elected judges, their supporters should exclaim, are giving the people what is rightfully theirs!

III. DEFECTIVE VEHICLES?

Popular constitutionalism might be critiqued from many angles. The most obvious antagonists are those who see judges as uniquely privileged actors in our constitutional order, those who esteem courts as “forums of principle” and celebrate their ability to check majoritarian abuses

147. See, e.g., Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. Ky. L. Rev. 267, 271 (2005) (“It would appear indisputable, though distasteful to many observers, that elected judges do take public opinion into account. Nevertheless, there is no reason to criticize judicial elections for that fact while ignoring the effect of public opinion on *appointed* judges.”).

precisely because of their comparative insularity from the rough-and-tumble of ordinary politics.¹⁴⁸ These theorists may believe that the (appointed) judiciary is more likely than the mobilized masses and the political branches to reach correct legal answers, to generate desirable consequences, to vindicate civil liberties, or to hold Americans to commitments made in periods of higher lawmaking. Less pointed antagonists are those who do not make particularly strong claims about the virtues of courts, but nevertheless assign greater normative weight to the settlement function that judicial finality provides, as compared to the democratic goods that popular constitutionalism promises.¹⁴⁹ Subtler antagonists still might be those theorists who, like popular constitutionalists, fret about the countermajoritarian difficulty and the quality of current democratic processes, yet who look to the courts to perfect those processes against entrenchment, prejudice, and other such debilitating forces¹⁵⁰ or to provide an additional screen against government infringement of fundamental rights.¹⁵¹ All of these scholars may have good reason to fear any political program that would undermine the interpretive authority of judges or the stability of judicially enforced constitutional principles.

These objections to popular constitutionalism echo some of the standard objections to elective judiciaries, which should not be surprising now that we have uncovered the many connections between the two. Choosing judges through elections, it is often said, poses serious threats to individual and minority rights, to the quality and impartiality of judges, and to the norms of professional legal reason more generally. It elevates personality over competence, passion over justice, politics over law.

Rather than rehash old debates, this Part will put aside many of these critiques and approach the rest from a new angle. Now that we have seen how elective systems might conceivably advance certain popular constitutionalist goals, this Part will ask whether those insights add up to an appealing argument to someone who subscribes to such goals. Because popular constitutionalism and the democratic ideals that underlie it offer one of the strongest grounds on which to defend elections, a contrary answer may go a long way toward eroding their appeal—and thereby toward advancing the “endless” debate over judicial selection.¹⁵²

The exercise can also shed new light on popular constitutionalism. Scrutinizing elective judiciaries from within the popular constitutionalism framework, we will see, can help to clarify some important questions not

148. See, e.g., Ronald Dworkin, *The Forum of Principle*, 56 *N.Y.U. L. Rev.* 469 (1981).

149. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359 (1997).

150. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

151. See, e.g., Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 *Harv. L. Rev.* 1693 (2008).

152. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 *Geo. J. Legal Ethics* 1259 (2008).

yet addressed by its advocates and to suggest some ways in which its logic may prove self-undermining.

A. *Formal Constitutional Change in the States*

Before we consider what a popular constitutionalist ought to seek in a judicial selection system, however, we need to take a step back. We need to consider the broader context in which the state courts operate. When we do this, we find constitutional orders that are dramatically different from the federal order in which they are nested, on at least three dimensions.

First, state constitutions are much more easily and frequently amended. At the federal level, the enumerated procedures to revise the Constitution are among the most onerous of any democratic country,¹⁵³ rendering the document “practically unamendable.”¹⁵⁴ At the state level, by contrast, constitutional amendments “are relatively ordinary events in . . . political life.”¹⁵⁵ The reasons for this are both structural and cultural. Structurally, many states employ mechanisms such as initiatives, referenda, and simple majority voting through which the legislature and the electorate can change the text of the constitution without having to overcome the multistage, supermajority burdens imposed by Article V.¹⁵⁶ Culturally, many states never developed a sharp distinction between “higher,” constitutional lawmaking and “ordinary,” statutory lawmaking. State constitutions never attained any mythic status; they tend to be regarded not as “a framework of permanent principles” but instead as a “kind of superstatute” that can and should be adapted to changing values and circumstances.¹⁵⁷ The result is a quantitatively as well as qualitatively

153. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 *Am. Pol. Sci. Rev.* 355, 362–64 (1994).

154. Henry Paul Monaghan, *Doing Originalism*, 104 *Colum. L. Rev.* 32, 35 (2004).

155. Hershkoff, *Positive Rights*, *supra* note 127, at 1163; see also *id.* (describing state constitutions as “more plastic and porous”); Hershkoff, *Passive Virtues*, *supra* note 69, at 1902 (discussing “conditional nature of state constitutional decisionmaking”).

156. See Devins, *State Constitutionalism*, *supra* note 65, at 1641–43 (summarizing variation in constitutional amendment procedures across states); William B. Fisch, *Constitutional Referendum in the United States of America*, 54 *Am. J. Comp. L.* 485, 493–94, 498–99 (2006) (indicating that more than one-third of states use simple majority thresholds for legislative votes on constitutional amendments, as do most states that allow popular constitutional initiatives); Robert F. Williams, *Rights*, in *3 State Constitutions for the Twenty-First Century: The Agenda of State Constitutional Reform* 7, 11 (G. Alan Tarr & Robert F. Williams eds., 2006) (“It might initially seem odd that by a mere majority vote of the electorate, a constitutional amendment can be ratified or a new constitution adopted that can change state constitutional rights guarantees. . . . Yet this is a fundamental feature of state constitution making.”); *infra* notes 160–164 and accompanying text (explaining initiatives and referenda).

157. Griffin, *supra* note 40, at 34; see also Gardner, *supra* note 67, at 818–20 (noting that average state constitution is nearly four times as long as federal Constitution and deals with fairly pedestrian policy details); G. Alan Tarr, *Introduction*, in *Constitutional Politics in the States*, at xiii, xv (G. Alan Tarr ed., 1996) (“Far from viewing their constitutions as

disparate model of constitutional reform: Whereas the U.S. Constitution has been amended roughly two dozen times in more than two centuries, by 1995 state constitutions had been amended some 6,000 times and replaced altogether some 100 times.¹⁵⁸ If sclerosis has characterized the American experience of formal constitutional change, “amendmentitis” may be the more plausible diagnosis for the states.¹⁵⁹

Second, “direct democracy” plays a significant role in state and local lawmaking. Twenty-seven states, the District of Columbia, and roughly half of the nation’s cities allow citizens to vote on policy issues through initiatives, referenda, or both.¹⁶⁰ Eighteen of these states allow citizens to propose and enact constitutional amendments through initiatives,¹⁶¹ and sixteen allow them to amend the constitution without any legislative or executive review.¹⁶² Constitutional initiative laws vary significantly in their procedural requirements and utilization rates across jurisdictions.¹⁶³ Everywhere they exist, though, they provide a streamlined means for a submajority of the population to force a vote on amending the constitution, and in many cases for a one-time simple majority to approve it. Initiative and referendum laws exert a major influence on the legal development and political economy of the states that have them.

sacrosanct and above politics, the states have treated them as political documents to be changed in accordance with the shifting needs and opinions of their citizens.”)

158. Robert L. Maddex, *State Constitutions of the United States*, at vii (1998); see also Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 *Rutgers L.J.* 799, 803–05 (2002) (contrasting state and federal patterns of constitutional change). Throughout the 1970s and 1980s, “the average state amended its constitution 2.0 times per year.” Daniel Berkowitz & Karen Clay, *American Civil Law Origins: Implications for State Constitutions*, 7 *Am. L. & Econ. Rev.* 62, 63 (2005).

159. Kathleen M. Sullivan, *Constitutional Amendmentitis*, *Am. Prospect*, Sept. 21, 1995, at 20; cf. John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 *Rutgers L.J.* 983, 1019–38 (2007) (reviewing post-1960s criticism of rate of constitutional amendment in states).

160. Initiative & Referendum Inst., *State-by-State List of Initiative and Referendum Provisions*, at http://www.iandrinstute.org/statewide_i&r.htm (on file with the *Columbia Law Review*) (last visited Sept. 17, 2010). Initiatives permit a specified number of citizens to petition to place a legislative proposal or constitutional amendment on the ballot. Referenda permit citizens to approve or disapprove a measure the legislature has already passed. Twenty-one states use both initiatives and referenda. *Id.*

161. *Id.* Every state except for Delaware requires a popular vote to approve constitutional amendments. *Id.*

162. Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 *Cornell J.L. & Pub. Pol’y* 295, 302–04 & fig.1.1 (2008). A different set of eighteen states allow public officials to be “recalled,” following a successful petition drive and vote, before the next regular election. Nat’l Conference of State Legislatures, *Recall of State Officials* (Sept. 23, 2010), at <http://www.ncsl.org/programs/legismgt/elect/recallprovision.htm> (on file with the *Columbia Law Review*). At least twenty-nine states allow recall of officials at the local level. *Id.*

163. See Shaun Bowler & Todd Donovan, *Measuring the Effect of Direct Democracy on State Policy: Not All Initiatives Are Created Equal*, 4 *St. Pol. & Pol’y Q.* 345, 348–51 (2004) (comparing and contrasting states’ constitutional initiative processes); Krislov & Katz, *supra* note 162, at 310–20 (same).

Notwithstanding the legions of critics who fault direct democracy for its informational and deliberative deficits, its susceptibility to manipulation by special interests and wealthy donors, and its insensitivity to minorities, use of these mechanisms now stands at the highest level in over a century.¹⁶⁴

Third, judicial rulings are more easily and frequently overridden at the state level. As many commentators have noted, state courts and legislatures engage in “dialogue” with one another in a richer fashion than their federal counterparts.¹⁶⁵ Numerous state constitutions expressly provide for judicial review of legislative and executive action,¹⁶⁶ and state legislatures tend to be attuned to the work of their appellate judges, all of whom exercise substantial common law lawmaking powers and many of whom perform explicit policymaking and administrative functions. In practice, it appears that state legislatures have been significantly more active than the federal Congress in reversing disfavored rulings.¹⁶⁷ Where initiatives are allowed, private citizens can take matters into their own hands. These reversals are not limited to statutory interpretation. Court-overturning constitutional amendments, John Dinan has shown, “have been an enduring feature of the state constitutional tradition and have been particularly prominent in the . . . post-1970 era.”¹⁶⁸ In this tradition, the exercise of judicial review is not nearly so fraught psychologically, structurally, or consequentially,¹⁶⁹ relative to the national culture of judicial supremacy, modest departmentalism and popular constitutionalism both thrive.

Taken together, these three features of state practice—the mutability of constitutional text, the prevalence of direct democracy, and the frequency of legislative and popular reversal of judicial interpretations—

164. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 *Vand. L. Rev.* 395, 396 (2003); see also *id.* at 401–12 (summarizing standard critiques of direct democracy).

165. See Hershkoff, *Positive Rights*, *supra* note 127, at 1163 & n.183 (invoking dialogue metaphor and providing citations to commentators doing same).

166. Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 *N.Y.U. L. Rev.* 1601, 1605 (2001); Williams, *Juristocracy*, *supra* note 70, at 80–81.

167. See Alex B. Long, “If the Train Should Jump the Track . . .”: Divergent Interpretations of State and Federal Employment Discrimination Statutes, 40 *Ga. L. Rev.* 469, 500–02 (2006) (observing that state legislatures are more likely to “be aware of and able to respond to the decisions of [their] courts,” and that “state judges may approach statutory interpretation with a higher expectation that the legislature will step in and ‘correct’ their work). Curiously, I have not seen any systematic empirical study of this question, just impressionistic comparisons.

168. Dinan, *supra* note 159, at 1038; accord Reed, *supra* note 70, at 889 (“[P]opular reversals of judicial interpretations of state constitutional provisions have become increasingly common . . .”).

169. According to one state supreme court justice, “[i]n the more than two hundred years since judicial review was first introduced, there has been very little controversy or debate about the legitimacy of the practice of judicial review in the state context.” Durham, *supra* note 166, at 1605.

yield a fundamentally different model of constitutionalism. State constitutionalism tends to be more polycentric than juricentric, more politicized than professionalized. It may be the case that, “in the minds of many, state courts are the authoritative interpreters of state constitutions exactly as the federal courts [are for] the national Constitution.”¹⁷⁰ Yet any such sentiment has not bred a comparable extrajudicial quiescence. The fluidity, tempo, and broadly participatory nature of state constitutional lawmaking substantially “reduce[] the risk of . . . politically unacceptable constitutional interpretation by state judges.”¹⁷¹ It is debatable whether the United States suffers at the national level from an excess of judicial supremacy, dead hand rule, or constitutional elitism, notwithstanding the many informal pathways of constitutional change that have emerged and the strong tendency of federal judicial decisions to stay “within a range of acceptability to a majority of the people.”¹⁷² It begins to strain credulity to think we suffer from such afflictions at the subnational level. There, on a routine basis, the people rule.¹⁷³

In light of these differentials, it becomes harder to see why elective judiciaries would *also* be needed to ensure adequate realization of popular constitutionalism. Perhaps one might fear that nonelective judiciaries will be more likely to thwart direct democracy, as through overly stringent applications of the single subject rule.¹⁷⁴ Yet so long as the constitution at issue can realistically be, and often is, amended by a motivated citizenry, the fundamental precondition of popular constitutionalism would appear to be satisfied: The people are exercising continuous control over the elaboration of fundamental law. It becomes harder to see why judicial supremacy over constitutional interpretation would be so worrisome,¹⁷⁵ or how it even exists in any meaningful sense.

170. Aaron Jay Saiger, *Constitutional Partnership and the States*, 73 *Fordham L. Rev.* 1439, 1457 (2005). Saiger goes on to undercut this claim by recounting notable examples of popular and governmental resistance to judicial constructions of state constitutions, in particular a Vermont Supreme Court school finance equalization decision. *Id.* at 1459–62.

171. Shepard, *supra* note 70, at 442.

172. Friedman, *Mediated Constitutionalism*, *supra* note 16, at 2606.

173. The allusion is to Richard Parker’s influential manifesto, “*Here, the People Rule*,” the title of which he attributes to President Gerald Ford. Parker, *supra* note 46, at iii.

174. Common to many state constitutions, this rule limits ballot propositions to one “subject.” The rule is notoriously “difficult to apply,” and has been used by state courts to invalidate a wide range of direct democracy measures in recent years. Michael D. Gilbert, *How Much Does Law Matter? Theory and Evidence from Single Subject Adjudication* 2, 9–10 (July 22, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1433796> (on file with the *Columbia Law Review*). Two noted scholars recently found that judges’ partisan affiliation is highly correlated with enforcement rates of the single subject rule. John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 *Election L.J.* (forthcoming 2010) (manuscript at 28–29) (on file with the *Columbia Law Review*).

175. Cf. Kramer, *The People Themselves*, *supra* note 2, at 251 (suggesting without explication that “a strong case can be made for easing the difficulty of [formal constitutional] amendment” as remedy for judicial supremacy).

Consider California. In May 2008, the California Supreme Court, whose members are appointed by the governor for twelve-year terms and then put to retention elections, ruled by a 4-3 margin that same-sex couples must be allowed to marry.¹⁷⁶ In November 2008, less than six months later, voters in California passed Proposition 8, amending the state constitution to prohibit same-sex marriages.¹⁷⁷ Wholly independent of the state's judicial selection system, which lies toward the Article III side of the spectrum in the amount of job protection it gives to the justices, these voters effected a dramatic victory for popular constitutional decisionmaking. Not only did they rise up to repudiate a novel constitutional interpretation rendered by their high court, but the anti-Proposition 8 campaign also declined to spend any significant amount of time or money arguing that the court's judgment was entitled to respect in virtue of its pedigree.¹⁷⁸ The notion that ordinary folks ought to defer to the considered view of their supreme court justices—that the justices might have any special competence or authority to determine the meaning of equal protection—played no discernable role in a campaign to affirm what those justices had held. To the contrary, the organized opposition to Proposition 8 ran as far as it could from the taint of constitutional elitism.

I doubt that many popular constitutionalists in the academy would celebrate Proposition 8 on the merits. As a matter of process, however, it is hard to see why its passage would not be cause for celebration; it is hard to imagine a more direct repudiation of judicial constitutional lawmaking. The experience of Proposition 8 brings into focus not only the standard questions about whether direct democracy unduly threatens minority rights and substantive principles of justice, but also a more discrete question about the normative relationship between a judicial selection method and the broader constitutional context. Many states already have a relatively vigorous tradition of popular constitutionalism outside of their judicial selection regime.¹⁷⁹ Where these background conditions

176. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

177. Cal. Const. art. I, § 7.5 (codifying Proposition 8, passed Nov. 4, 2008). The California Supreme Court subsequently sustained Proposition 8 against a variety of legal challenges. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

178. This argument appeared nowhere, for example, on the websites of leading advocacy groups such as Equality for All, at <http://www.noonprop8.com> (last visited Sept. 17, 2010), and Equality California, at <http://www.eqca.org> (last visited Sept. 17, 2010), or in most newspaper editorials urging rejection of the ballot proposition, see, e.g., Editorial, *The Myths of Prop. 8*, L.A. Times, Nov. 2, 2008, at A31; Editorial, *Preserve Marriage Rights*, S.F. Chron., Oct. 1, 2008, at B8. But see Editorial, *Preserving California's Constitution*, N.Y. Times, Sept. 29, 2008, at A20 (“[T]he majority in the 4-to-3 ruling was acting to protect a vulnerable group from unfair treatment. Enforcing the state's guarantee of equal protection is a job assigned to judges.”).

179. Some who equate popular constitutionalism with popular outcomes have suggested that the former is alive and well at the national level, too, notwithstanding the glacial rate of constitutional amendment and the rise of judicial supremacy. See, e.g., Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257, 322 (2005) (“For

obtain, the argument for tightening the link between judges and voters may begin to look less urgent, and more perverse. Whether or not judicial elections are in themselves good vehicles for popular constitutionalism—the question to which we will now turn—even the committed popular constitutionalist has to consider whether there can be too much of a good thing.

B. *Efficacy, Voter Capacity, and Soundbite Democracy*

Part II painted a fairly rosy picture of judicial elections outside the courthouse, more in the spirit of charitable reconstruction than of dispassionate observation. The immediate concern that will arise for some readers is whether “the people” are up to the task—whether we can trust voters to exercise their power over judicial selection, and transitively over the development of constitutional law, in reasoned and responsible ways. Skeptical commentators have questioned the capacity of lay persons to fulfill the popular constitutionalist enterprise.¹⁸⁰ Americans today, they argue, are too clueless, too apathetic, and too easily manipulated when it comes to legal matters. Voter ignorance has reached scandalous levels. Decades of survey research establishes that the majority of Americans lack “even basic” political comprehension; nearly one-third are “political ‘know nothings’ who possess little or no useful knowledge of politics.”¹⁸¹ Judicial elections, it might be feared, will only exacerbate these concerns. They force citizens to engage yet another domain of governance, involving judges and jurisprudence, about which they know even less.¹⁸² And

positive scholars, the whole debate [over popular constitutionalism] is overplayed; they believe that constitutional law typically reflects popular values, albeit at some ill-understood remove.”). As Part I explained, however, many popular constitutionalists deny this equivalence; if anything, the literature has been more concerned with the manner in which constitutional law gets made than with its content.

180. The most developed argument to this effect belongs to Doni Gewirtzman. Gewirtzman, *supra* note 23, at 911–37; see also Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 *Drake L. Rev.* 971, 993 (2007) (arguing that “[p]olitical ignorance and irrationality could easily reduce the quality of constitutional change” that bypasses supermajority mechanisms of Article V); Neal Devins, *The D’oh! of Popular Constitutionalism*, 105 *Mich. L. Rev.* 1333, 1335 (2007) (book review) [hereinafter Devins, *Popular Constitutionalism*] (arguing that “the people are uninterested in the Constitution and the Supreme Court” and that consequently “it makes no sense for the Court to sort out the Constitution’s meaning by looking to the American people”).

181. Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *Iowa L. Rev.* 1287, 1304–05 (2004); see also *id.* at 1304–14 (summarizing recent research).

182. *Cf. id.* at 1308 (reporting finding from 2000 that only eleven percent of Americans could identify post held by Chief Justice William Rehnquist); Michael C. Dorf, *Whose Constitution Is It Anyway? What Americans Don’t Know About Our Constitution—and Why It Matters*, FindLaw (May 29, 2002), at <http://writ.news.findlaw.com/dorf/20020529.html> (on file with the *Columbia Law Review*) (reporting finding from 2002 that “sixty-nine percent of respondents either thought that the United States Constitution contained Marx’s maxim, [‘From each according to his ability, to each according to his needs,’] or did not know whether or not it did”).

particularly as they become “nastier, noisier, and costlier,”¹⁸³ judicial races may tend to reduce complex issues to soundbites and caricatures, to magnify the influence of wealthy and well-organized interests, and generally to degrade rather than elevate a constitutional culture.

These criticisms pose a serious but ultimately inconclusive challenge to the popular constitutionalist case for electing judges. A first line of rebuttal is empirical. Recently, a small band of political scientists has begun to push back on the notions that the American public is clueless about the work of the Supreme Court,¹⁸⁴ indifferent to judicial races,¹⁸⁵ and incapable of evaluating judicial candidates.¹⁸⁶ Thus far, this research has shown only that judicial elections can meet minimal criteria of efficacy, that they are not destined to be arbitrary or trivial affairs. It has not shown that these elections actually generate any of the evaluative, deliberative, or educational benefits described in Part II: Conspicuously absent from the positive literature is any account of a judicial race that came remotely close to facilitating reasoned public dialogue on issues of judicial duty or constitutional interpretation. To the contrary, campaign rhetoric has frequently devolved into low content attack ads¹⁸⁷ and outright efforts at misdirection.¹⁸⁸ Nevertheless, this literature provides a partial corrective to the “profoundly anti-democratic attitudes”¹⁸⁹—the professional self-regard and the reflexive mistrust of the masses—that undoubtedly animate some of the legal establishment’s antipathy toward both elective judiciaries and popular constitutionalism.

These criticisms, moreover, may prove too much. If the people really cannot be bothered to learn or “care about constitutional principles”¹⁹⁰ and “simply want nothing to do with constitutional culture,”¹⁹¹ then we have a much larger problem on our hands. The Constitution lays out the basic institutional and normative framework within which

183. Schotland, Comment, *supra* note 97, at 150.

184. See, e.g., James L. Gibson & Gregory A. Caldeira, *Citizens, Courts, and Confirmations* ch. 2 (2009) (using survey data to argue that public knows significantly more about Supreme Court than is commonly assumed).

185. See, e.g., *supra* note 13 (noting Melinda Gann Hall’s research showing partisan state supreme court elections are now significantly more competitive than elections for U.S. House of Representatives in terms of challenger and retention rates).

186. See, e.g., Bonneau & Hall, *supra* note 120, at 96–103 (finding that voters are more likely to select candidates who have previous judicial experience as against candidates who lack it and asserting that, in light of these findings, “[j]udicial reform advocates need to rethink traditional notions that the electorate is incapable of responding to candidate stimuli”).

187. See Sample, Jones & Weiss, *supra* note 12, at 8–11 (providing noteworthy examples).

188. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009) (describing coal company executive’s funneling of judicial campaign contributions through shell organization named “And For The Sake Of The Kids”).

189. Kramer, *The People Themselves*, *supra* note 2, at 242.

190. Devins, *Popular Constitutionalism*, *supra* note 180, at 1335.

191. Gewirtzman, *supra* note 23, at 934.

government officials exercise power. Not just popular constitutionalism but virtually all theories of constitutional democracy take its legitimacy to depend, at least in part, upon its societal acceptance as well as its capacity to be collectively revisited and refined over time. Why select *any* set of officials by popular election, indeed why have democracy at all, if the people are utterly ignorant and impassive about the terms of their own self-rule? Furthermore, in assessing the merits of judicial campaigns, it is useful to keep in view the legislative and executive baseline against which they might be compared. Legislative and executive races in America today are hardly paragons of reflective discourse and republican virtue, yet most of us accept without reservation that these officials ought to be selected at the ballot box.

Finally, these criticisms raise a circularity problem. If the people have sometimes shown themselves to be “irresponsible” in engaging the Constitution, Akhil Amar observes, this may be because “they have not been given responsibility, and trained themselves in its exercise,” leaving their “constitutional muscles to atrophy through disuse.”¹⁹² Judicial supremacy, on this account, is not an exogenous response to the people’s interpretive limitations so much as their causal agent. Likewise, if the people have sometimes failed to pay attention to judicial elections or to make reasoned choices, as in the infamous race in which voters flocked to the candidate with the same name as a movie star,¹⁹³ this may be because the campaigns have not given them the necessary means. In the traditional model of judicial elections, recall, candidates hardly ever discussed their views on disputed legal and political questions; in numerous jurisdictions, they were prohibited from doing so.¹⁹⁴

Hence, it cannot be a dispositive critique of judicial elections, or of popular constitutionalism more generally, to demonstrate the ways in which they have heretofore fallen short. None of this is to say that levels of public knowledge, deliberation, or participation would be unimportant to the popular constitutionalist, just that a finding of even very low current levels could not in itself defeat the case for elective judiciaries—not without some account of why the selection of judges, in contrast to constitutional interpretation, is inherently beyond the capacity of ordinary citizens.

The most developed statement of such an account appears in a new article by political theorist Mariah Zeisberg.¹⁹⁵ Zeisberg argues that be-

192. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1101 (1988).

193. “A man named Gene Kelly once won a Texas primary against a far more experienced and widely endorsed candidate, without campaigning. His opponent in the general election was able to eke out a victory only after spending nearly all of his funds on advertisements saying, ‘He’s Not That Gene Kelly.’” Pozen, *Irony of Elections*, *supra* note 8, at 267.

194. *Id.* at 266–67, 297–300, 311.

195. Zeisberg, *supra* note 61.

cause of the special nature of the judicial role, political parties and campaigns cannot supply the galvanizing messages, structured cleavages, and information shortcuts needed to enable voters to register discernable policy choice. The reason for this, Zeisberg asserts, is that the work of judges is too complex factually and methodologically to be reduced to digestible chunks; partisan cues, biographical information, and campaign slogans will tend to “mask[] instead of illuminate[]” the central dynamics of judicial decisionmaking.¹⁹⁶ “What does it mean to belong to the Federalist Society?” Zeisberg asks rhetorically.¹⁹⁷ “When the Supreme Court allows for restrictions on protests outside abortion clinics . . . has the Court rendered a decision that is ‘liberal’ or ‘conservative?’”¹⁹⁸ The only way in which judicial elections could achieve “the imperative of communicative transparency,” Zeisberg concludes, is if judges were to be wholly results-oriented in their approach to deciding cases, with results evaluated according to the political commitments of the parties structuring the elections.¹⁹⁹ Yet this approach would violate basic principles of legality that lead us to use judges in the first place.

Zeisberg raises challenging questions, but a popular constitutionalist has the resources to mount a colorable rebuttal. To begin with, it might be argued, political parties and interest groups can supply relevant deliberative and motivational goods in judicial elections. They can do this because it is possible to distinguish among judicial candidates on the basis of their substantive and methodological views, and because the Democratic and Republican parties *do* represent distinctive visions of constitutional interpretation and the judicial function.²⁰⁰ Avowing an “originalist” jurisprudence, running on the Republican ticket, belonging to the Federalist Society, securing endorsements from various advocacy organizations or prominent individuals—each of these may provide a valuable heuristic for the otherwise clueless voter. Research showing that judicial candidates have been more successful when identified on the ballot as having prior judicial experience, suggests that voters will respond to heuristics when made aware of them.²⁰¹ So long as there really is such a thing as a Democratic or Republican style of judging, partisan affiliation

196. *Id.* at 787.

197. *Id.* at 792.

198. *Id.* at 793.

199. *Id.* at 794.

200. See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *Fordham L. Rev.* 545, 568–69 (2006) (describing rise of originalism as conservative political practice, in contrast with “the idea of living constitutionalism that has been at the core of progressive constitutional thought since the 1970s”); L.A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 *Tex. L. Rev.* 855, 884–86 (2005) (book review) (arguing that Larry Kramer overlooks extent to which “the party system of the past several decades has found its own method of embracing its adherents’ views of the Constitution,” via appointment of Supreme Court Justices). Zeisberg acknowledges that her argument would not hold if “major party divisions [were to] occur along jurisprudential lines.” Zeisberg, *supra* note 61, at 794.

201. See *supra* note 186.

holds especial promise for increasing the coherence of voter decision-making, given the familiarity of the party label and the parties' ability to exert discipline over wayward officials.²⁰²

Zeisberg overlooks the extent to which the work of legislatures and executives is similarly opaque to the average citizen. As compared to, say, the legislative appropriations process, there is nothing so complex about the adjudicative process as to disable meaningful public comprehension. There is no need for judges to be even partially results-oriented to reach systematically different interpretive conclusions in certain types of cases and thereby to attract or repel systematically different types of voters.

Zeisberg also overlooks the extent to which a few high-salience issues—issues of constitutional dimension such as abortion or same-sex marriage—can determine a judicial race. Judges usually agree. When Justices Ruth Bader Ginsburg and Antonin Scalia were colleagues on the D.C. Circuit, they voted with each other ninety-five percent of the time they sat on a panel together during the 1983 Term.²⁰³ Yet everyone knew that Ginsburg was the “liberal” and Scalia the “conservative” jurist; it would have been unthinkable, in the modern era of ideologically inflected nominations, for President Reagan to have chosen Ginsburg for the Supreme Court or for President Clinton to have chosen Scalia. All of the action is in the remaining five percent. Voters, pundits, and other groups might reasonably focus on this domain of disagreement in comparing the two as candidates for the bench.²⁰⁴ Moreover, this domain is liable to be larger in state supreme courts as compared to the lower federal courts, because the former have substantial control over their dock-

202. Cf. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 *J.L. & Pol.* 419, 426–27, 465–67 (2007) (discussing potential for partisan heuristic, coupled with reforms designed to increase competition and elicit information, to improve quality of decisionmaking in local elections). If the partisan heuristic is seen as irredeemably arbitrary or otherwise undesirable in the judicial election context, more radical reforms might be contemplated to deal with the problem of low information voters: for instance, assigning some role in the selection process to citizen assemblies. See generally Heather K. Gerken & Douglas B. Rand, *Creating Better Heuristics for the Presidential Primary: The Citizen Assembly*, 125 *Pol. Sci. Q.* 233 (2010) (advocating use of citizen assemblies to deal with this problem in situation where partisan heuristic is unavailable).

203. Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 *U. Colo. L. Rev.* 619, 645 *tbl.IV* (1985).

204. Cf. 151 *Cong. Rec.* S10,366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama on nomination of John Roberts to Supreme Court) (“[W]hile adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon.”).

ets and so can decline to hear cases that present only clear-cut legal issues.²⁰⁵

Finally, Zeisberg's argument is, as she acknowledges, contingent on there being low levels of information in the judicial election environment, which leads to "the overwhelming significance of accurate cues for structuring voter choice."²⁰⁶ If campaigns for the bench could be engineered to generate robust information about the candidates and their views, it would become increasingly untenable to insist that voters nonetheless lack the ability to make rational decisions.

The contingency of Zeisberg's argument brings us back to the circularity problem and to the question that motivated this Article, the question of how to realize popular constitutionalism in practice. The basic insight this section has developed is that, from the popular constitutionalist perspective, many of the concerns about voter competence, deliberation, and participation in the judicial election context might be recast as issues of institutional design. The traditional allegations of public ignorance and apathy could be seen to reflect bugs in the traditional model of judicial elections, rather than inescapable features of an elective system.

If, as Doni Gewirtzman suggests, "popular constitutionalism need[s] . . . a certain level of political participation in order to legitimize interpretive preferences,"²⁰⁷ states might pursue reforms aimed at increasing voter interest: for instance, permitting judicial candidates to affiliate with political parties and liberalizing codes of conduct so they can issue pledges on how they will approach certain types of cases. Few states have yet to take either step.²⁰⁸ If, to borrow from Thomas Jefferson, the people are "not enlightened enough" to choose judges wisely, states might seek "to inform their discretion by education."²⁰⁹ States could augment the foregoing reforms by disseminating voter information guides, linking judicial campaigns to broader educational outreach programs, or, more ambitiously, holding public events or assemblies. No state, as far as I can tell, sponsors public debates among its candidates for high court judgeships, presumably out of a fear that such events will lead to inappropriate comments on pending cases or otherwise degrade the image of the judiciary. Yet, by orienting debates toward the big constitutional ques-

205. See Devins, *State Constitutionalism*, supra note 65, at 1649 (explaining that "most state supreme courts retain substantial," though far from plenary, "discretion over which cases to hear").

206. Zeisberg, supra note 61, at 797.

207. Gewirtzman, supra note 23, at 910.

208. See Brennan Ctr. for Justice, *Chart of State Canons of Judicial Conduct*, at http://www.brennancenter.org/page/-/d/download_file_9221.pdf (on file with the *Columbia Law Review*) (last visited Sept. 17, 2010) (identifying eleven state codes of judicial conduct that allow judges to engage in any form of partisan political activity, and ten that allow candidates to issue pledges or promises on how they will decide cases).

209. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in *10 The Writings of Thomas Jefferson 1816-1826*, at 160, 161 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899).

tions of the day, states could help thousands of listeners develop meaningful interpretive preferences. If these debates have the additional effect of dissolving the perception of the omniscient and infallible judge, so much the better.

In sum, although we may have deep concerns about the efficacy of judicial elections and the quality of the associated discourse, these concerns are not necessarily responsive to the popular constitutionalist program and might potentially be ameliorated by self-conscious reform. To some extent, they are already being ameliorated unselfconsciously by the rise of “new-style” campaigns.²¹⁰ Those who oppose elective judiciaries may need to look elsewhere to convince our popular constitutionalist.

C. Institutional Quality and Integrity

Critics have long charged that elections breed judges who are lower in quality or captured by donors. A related line of attack charges elections with diminishing public trust in and respect for the courts. As big money has flooded judicial races, advocacy groups have increasingly focused on these concerns.²¹¹ Their point might be broadened. In the new era of more vigorous races, there is a growing risk that elected judges will play favorites not only with donors but also with important interest groups (because of their clout with voters), political parties (because even judges in nonpartisan jurisdictions will be aligned more closely with one side), political incumbents (because sitting judges are incumbents, too, who stand to lose from antientrenchment measures), and popular litigants and legal positions generally (because voters will be primed to punish rulings seen as too generous to disfavored groups or causes).²¹² Campaign cash is just one of many mechanisms through which elections can corrode the independence of the courts, and with it the due process rights of litigants and the competitiveness of broader political processes.

Some readers may find these claims alarmist. Appointed and merit-selected judges are hardly immune from extralegal pressures. And surely any judge, these readers might say, would never flout the basic strictures of her role. At most, we will see an increasing tendency for elected judges to privilege the more popular options within the “zone of reasonable-

210. See Pozen, *Irony of Elections*, supra note 8, at 296–300 (elaborating ways in which “new era” may enhance deliberative, participatory, and representative character of judicial elections).

211. See Brief for Justice at Stake et al. as Amici Curiae Supporting Respondent at 5, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (No. 08–205) (“Funding of judicial elections . . . has emerged as a central concern for groups seeking to enhance the effective administration of justice.”). The focal point of much recent discussion was the case of *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), in which the Supreme Court used an egregious set of facts to clarify the due process limitations on judges’ hearing disputes that involve campaign contributors. For a lucid overview and defense of *Caperton*, see James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 *Syracuse L. Rev.* 293 (2010).

212. Pozen, *Irony of Elections*, supra note 8, at 319–24.

ness,²¹³ a tendency which, as explained earlier, might plausibly be claimed as a victory for democracy rather than a mark of institutional failure.²¹⁴ Surely, we will not find judges routinely tipping the scales of justice on account of professional self-interest, political affiliation, or other such factors that almost anyone would find illegitimate.

These readers ought to review the evidence on sentencing described above, which shows that, all else being equal, elected judges become significantly more punitive as their reelection date approaches.²¹⁵ They ought to consider Eric Helland and Alexander Tabarrok's findings that elected judges are more likely to redistribute wealth from out-of-state defendants to in-state tort plaintiffs,²¹⁶ and the Conference of Chief Justices' assessment that partisan elections lead to decisions "explainable only by partisanship."²¹⁷ And they ought to consult Joanna Shepherd's new research showing "a strong relationship between campaign contributions and judges' voting,"²¹⁸ along with the survey results showing that four out of five business leaders believe their contributions have at least "some influence" on judges' rulings,²¹⁹ and that one in four state judges agrees.²²⁰

In light of these data, as well as the increasingly politicized tenor of campaigns, it cannot be taken for granted that elected judges will remain within the zone of reasonableness in any given case—that they will not, for example, pervert legal texts, defy the Supreme Court on federal law, or scant the rights of litigants when doing so would placate an important interest or avert the risk of electoral backlash. It may still be a distant cloud, but the specter of lawlessness, of barely concealed favoritism and presentist populism run amok, looms over the new era of judicial elections.

Is any of this a problem for popular constitutionalism? The key to seeing why the answer is yes, and perhaps to reframing the debate over elective judiciaries, is to see that these criticisms raise not only lawyerly concerns but also democratic ones. For if elections really do tend to de-

213. See *supra* note 130 and accompanying text.

214. See *supra* Part II.C.3.

215. See *supra* note 144 and accompanying text.

216. Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 *Am. L. & Econ. Rev.* 341, 356–68 (2002); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 *J.L. & Econ.* 157, 177–87 (1999).

217. Brief for Conference of Chief Justices as Amicus Curiae Supporting Respondents at 14, *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (No. 99–4021) [hereinafter CCJ Brief]; see also *id.* at 13–14 (arguing that partisan elections can lead to "links with party leaders that interfere with the administration of the courts and justice").

218. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 *Duke L.J.* 623, 669 (2009); see also *id.* at 651 (summarizing prior empirical research on this question).

219. Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 4–5 (2007).

220. Greenberg Quinlan Rosner Research, Inc. et al., *Justice at Stake—State Judges Frequency Questionnaire* 5 (2002). Nearly half of the 2,428 judges surveyed said they believed campaign contributions have at least "a little influence" on judges' decisions. *Id.*

grade the technical merits, basic fairness, or perceived legitimacy of judicial processes, they may also tend to decrease a society's capacity for efficient exchange, rational planning, inclusive governance, and collective action generally. Among the many other goals they are meant to serve, the state courts play a critical role in channeling and resolving disagreements. They also play a critical role in supervising the administration of *nonjudicial* elections.²²¹ Like the Constitution itself, the state courts, when they do their job reasonably well and are seen as transcending regular politics, help "make [that] politics possible."²²²

The point here is simple but often overlooked. Inasmuch as elective judiciaries stand in tension with principles of legality, equity, and efficiency, they also—and consequently—stand in tension with the demands of self-government. Seen in a different light, many of the rule-of-law-type critiques of elective judiciaries can be recast as popular sovereigntist critiques. Although they oppose judicial supremacy, popular constitutionalists still have a compelling interest in maintaining basic standards of judicial quality and integrity, if it is correct that some amount of professional competence, public confidence, and decisional independence in an adjudicatory system is a necessary precondition to a flourishing politics in the world beyond. Popular constitutionalists may be particularly concerned that elected judges will not cater to the values of "the people" so much as to the desires of supporters, special interests, and marginal voters.²²³

If it is easy enough to see why popular constitutionalists would disapprove of judicial decisionmaking based on factors such as campaign contributions or partisan affiliation—factors that are often uncorrelated or even negatively correlated with the general will—it is a little harder to see why they would disapprove of decisionmaking based on a naked desire to please one's constituents. No popular constitutionalists have endorsed any such jurisprudence, so far as I know.²²⁴ They have accepted that judges ought to apply settled law when it provides a clear answer, even if the people would prefer that the judges do otherwise: for instance, by giving a death sentence to an especially heinous murderer in a jurisdiction that has legislatively banned executions, or by upholding an abortion restriction that plainly runs afoul of Supreme Court precedents.

It may seem trivial to observe that popular constitutionalists are not *so* populist that they would go further,²²⁵ but I do not believe that it is. In

221. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 *Harv. L. Rev.* 29, 44, 78–80 (2004).

222. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *Nw. U. L. Rev.* 549, 554 (2009) (discussing function of constitutions).

223. Cf. Shugerman, *Economic Crisis*, *supra* note 87, at 1064–65, 1143–44 (suggesting judicial elections have failed to live up to their popular constitutionalist potential because of special interest and partisan influences).

224. Cf. *supra* note 35 and accompanying text (noting that popular constitutionalists remain committed, at minimum, to following Constitution's clear textual commands).

225. As an exercise in unconstrained populism, judging would lose any claim to authority. The whole enterprise of adjudication would collapse.

rejecting the idea that judges should be ciphers for public opinion, popular constitutionalists have conceded that law should constrain popular will and that courts should apply these constraints.²²⁶ This concession entails the conceptual and practical problem of demarcating the precise extent to which judges ought to feel so constrained. It accepts an authoritative role for the Supreme Court within the judicial system on federal questions, and therefore a unitary and nationalistic conception of judicially enforceable federal constitutional law. And it suggests that, in the service of popular sovereignty, it can prove unhelpful if not counterproductive to submit every decision to the people themselves. The faint-heartedness of popular constitutionalists, their unwillingness to transgress basic legal norms, undercuts their ostensible premise that decisionmaking by reference to current majoritarian preferences inherently promotes political equality and procedural fairness.

Still, we have not scored a decisive blow against elective judiciaries. Most importantly, although the empirical evidence supporting the criticisms outlined above is probative, it is far from conclusive.²²⁷ Unelected judges have also acted in inappropriate or unprincipled ways, and their heightened independence from the public creates a heightened concern that they will act in “arrogant” or unpredictable ways.²²⁸ There is a spe-

226. It might be argued that a popular constitutionalist should want judges to follow the law for instrumental reasons relating to their limited institutional capacity, as a second-best strategy for approximating the popular will. This argument has not featured in the popular constitutionalism literature, so far as I am aware, and it fails to account for the many cases in which the legal answer is unclear or in which deviating from the best legal answer is likely to satisfy more people in a particular community than following it.

227. Comparative measures of judicial quality remain especially crude. Among the most notable results, see Choi, Gulati & Posner, *supra* note 98, at 308–19 (finding, *inter alia*, that partisan-elected judges tend to produce more opinions than appointed and merit-selected judges, but that former group’s opinions are cited less often by out-of-state courts); Schotland, *New Challenges*, *supra* note 61, at 1087–88 (presenting evidence that initially elected judges have been disciplined more frequently than initially appointed judges). On public perceptions, compare Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for State Courts*, 36 *Am. Pol. Res.* 297, 316 (2008) (finding that “[c]itizens’ views of their state courts diminish as they are exposed to ‘new style’ state judicial election races” featuring policy-oriented campaigning and high information content), with James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 *Am. Pol. Sci. Rev.* 59, 69–70 (2008) (finding that public faith in judicial impartiality is not diminished by candidates’ policy pronouncements, though it is by campaign contributions and, to lesser extent, by attack ads). The evidence on judicial diversity is also mixed. See Lawyers’ Comm. for Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Creating a More Diverse Judiciary* 17 (2005), available at <http://www.abanet.org/buslaw/2005minoritylawyer/materials/jdr.pdf> (on file with the *Columbia Law Review*) (reviewing empirical literature and asserting that no “definitive conclusions” can be reached as to which selection method best promotes diversity on bench).

228. Bonneau & Hall, *supra* note 120, at 7, 139. Bonneau and Hall’s further charge that nonelective systems “promote the unfettered exercise of personal preferences,” *id.* at

cial risk that judges facing retention decisions made by the legislature or governor will skew case outcomes to please those bodies.²²⁹ Absent a true descent into lawlessness, a committed popular constitutionalist may not find the threat of some additional improper behavior, by some elected judges, sufficient to overwhelm all of the pro-election arguments made in Part II.

Furthermore, incremental reform is possible. Judicial independence can be safeguarded to an extent by measures short of switching from elections to appointments or merit selection. To mitigate the influence of campaign contributions, for example, states can enhance their recusal rules or apply stricter contribution limits.²³⁰ Term lengths can be increased. It is at least conceivable that an elective system could be engineered to provide sufficiently robust competition, accountability, and debate to excite popular constitutionalists, while also providing sufficiently robust protections for judicial independence and public confidence to placate their legalist foes.

Conceivable, but in my view exceedingly unlikely. For as I have argued elsewhere, the rule-of-law-type concerns sketched in this section interact in paradoxical ways with the efficacy and capacity concerns noted in the previous section.²³¹ Many of the reforms that would be best suited to enhancing the deliberative, participatory, and representational character of judicial races—reforms such as holding elections more frequently and permitting candidates to affiliate with parties, to promise to reach certain outcomes, or to debate each other in public—also carry the greatest danger of politicizing the courts. The very same measures most likely to enhance the democratic credibility of judicial elections, that is, are the ones most likely to undermine the integrity of the judiciary as a distinctively legal institution. Popularize the courts' "norm articulation" function too much, and a state will invariably degrade their adjudicative function.²³²

Take one important example: Allowing candidates to run as Democrats or Republicans is arguably essential for generating meaning-

137, is never substantiated—and indeed seems downright bizarre in light of the judiciary's practical inability to enforce its own judgments, the relative ease and frequency with which state supreme court rulings are overturned, and the voluminous literature showing that even appointed, life-tenured federal judges rarely stray from mainstream opinion. *All judging is fettered*. The relevant questions concern by whom, to what degree, and through which mechanisms.

229. See *supra* note 108 (noting Joanna Shepherd's recent findings on this question). All but three of the nonelective states deny their justices any form of life tenure. *Am. Judicature Soc'y*, *supra* note 61, at 4–11.

230. See Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 *Washburn L.J.* 503, 525–34 (2007) (outlining possible recusal reforms).

231. Pozen, *Irony of Elections*, *supra* note 8, at 310–24.

232. Cf. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *Wm. & Mary L. Rev.* 639, 643–46 (1981) (explicating dual functions of "norm articulation" and "dispute resolution" served by common law courts).

ful voter choice in judicial elections, just as in legislative and executive elections. Maybe more so, given that the vast majority of nonlawyer voters are unequipped to evaluate the records of judicial candidates on their own. No other heuristic is as salient or informative as the partisan label; the democratic defender of elective judiciaries is virtually compelled to support its use.²³³ Yet, by bringing judges into the fold of the parties, this reform also creates a powerful new set of extralegal influences on judicial behavior in any case with potential political valence. It risks subverting the perception and reality of a just legal system by biasing the courts against unsympathetic litigants and unpopular views, increasing judges' dependence on donors,²³⁴ and generating decisions "explainable only by partisanship."²³⁵ To find this an attractive state of affairs, one would have to embrace an unusual theory of the role of courts in a democracy.

D. *Structural Concerns*

The criticisms outlined in the preceding sections can contribute to what might be termed the democratic case against elective judiciaries. If valid, they suggest reasons why making judicial selection more democratic, in the sense of being more open and accessible to the people, does not necessarily make the legal system as a whole more democratic, in the sense of being more responsive to deliberative public opinion or conducive to moral and effective self-government.²³⁶ The empirical case for these criticisms has yet to be proven, however. And the alternative selection methods come with their own problems. Let us grant, then, that in a properly structured system, elections can be reasonably efficacious without doing too much collateral damage to the quality or integrity of the courts. Bracketing these issues allows us to focus on structural concerns more specific to popular constitutionalism.

1. *Overinclusiveness*. — Judges, of course, do many things besides interpreting the constitution. They preside over trials and appeals, construe statutes and regulations, adjudicate private disputes, sentence

233. See *supra* notes 200–202 and accompanying text.

234. See Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. Rev. (forthcoming 2011) (manuscript at 1) (on file with the *Columbia Law Review*) (finding "a statistically significant relationship between campaign contributions and judicial decisions in favor of contributors' interests *only for judges elected in partisan elections*, not nonpartisan ones," and hypothesizing that this discrepancy reflects parties' unique ability to facilitate contributions and to punish or reward judicial performance).

235. CCJ Brief, *supra* note 217, at 13. Holding elections more frequently would enhance popular control over the judiciary while exacerbating these risks. Hold elections often enough, and we would no longer have to worry about cyclical behavior in criminal sentencing. See *supra* note 144 and accompanying text (summarizing empirical evidence). Judges would instead be punitive all the time.

236. I outlined some additional grounds on which to build a democratic case against elective judiciaries in Pozen, *Irony of Elections*, *supra* note 8, at 317–24, and I will outline several more *infra* Parts III.E.3–5.

criminals, and so on. State judges often execute various administrative and policymaking functions as well.²³⁷ When they do engage constitutional questions, lower courts are bound to follow the precedents of higher courts, and on federal questions all are bound to follow the precedents of the U.S. Supreme Court.²³⁸

The complication this raises is that even if judicial elections can foster desirable forms of popular constitutionalism—enshrining the people's control over constitutional meaning, stimulating constitutional debate, helping ensure that judicial interpretations of constitutional ambiguities track social values—that is not all they do. They can also align judicial incentives more closely with electoral preferences in any matter of potential public concern. By popularizing the work of the courts, Steven Croley has observed, judicial elections may dissolve the counter-majoritarian difficulty but raise a “majoritarian difficulty.”²³⁹

How should a popular constitutionalist feel about a judicial selection system that enables greater popular influence over the administration not only of constitutional law, but of every other type of law as well? This would be a nonissue if either of two conditions holds. First, if voters were to select judges solely on the basis of their constitutional views, then elected judges would feel no pressure to satisfy popular opinion on any other dimension. The problem with this condition is that it is unrealistic. Although certain judicial races may turn on a hot-button constitutional issue (as when the incumbent recently voted to grant or deny same-sex marriage rights), and although these races can be engineered to place greater emphasis on constitutional questions (as through candidate debates), history suggests that nonconstitutional issues will often predominate. “Only a handful of cases will interest a significant portion

237. See *supra* note 127 and accompanying text.

238. The idea that lower courts and state courts should not be so bound, that a kind of vertical departmentalism should complement horizontal departmentalism, does not appear in the popular constitutionalism literature, so far as I am aware. One assumes that the potential costs of intrajudiciary interpretive anarchy are seen as too steep in relation to any possible democratic benefits. The idea has appeared in the legal literature, however. See, e.g., Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 *J.L. & Religion* 33, 77–88 (1989) (contending that lower court judges are not obligated to follow higher court precedents when confident precedents are fundamentally wrong).

239. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. Chi. L. Rev.* 689, 713–28 (1995). Majoritarian judicial review, to which I will return *infra* Part III.E, can be seen as a partial determinant of the majoritarian difficulty. The former provides an (incomplete) explanatory theory of how elected judges decide cases when the orthodox legal materials underdetermine outcomes. The latter provides a normative critique of how elected judges can undermine the rule of law, not only in the legal interpretations they render but also in the character of the justice they dispense, the social messages they transmit, and the internal perspective they adopt. Pozen, *Irony of Elections*, *supra* note 8, at 279–90. Majoritarian review is just one of several mechanisms through which elective judiciaries may generate the majoritarian difficulty.

of the electorate,” Judge Posner contends, and those cases “primarily . . . involv[e] notorious crimes.”²⁴⁰

Second, this would be a nonissue if we simply deny the normative distinction between constitutional law and nonconstitutional law so that, for instance, a judge’s approach to sentencing criminals is deemed to have comparable significance to her approach to construing the Equal Protection Clause. The problem with this condition is that it is incompatible with any plausible substantive account of constitutionalism. It is unfaithful to constitutional law’s motivating premise that it comprises a special domain in which a polity sets forth fundamental commitments and constitutive rules of government. Popular constitutionalists may challenge the boundaries of the constitutional, but they must accept some distinction between lower- and higher-level law, “between present-day preferences and more enduring values,”²⁴¹ or else they are no longer operating within the framework of constitutionalism. Even if one believes that the ambit of “the constitution” extends well beyond the document’s written text and judicial construction, one must draw the line somewhere.

So, the overinclusiveness question cannot be avoided. The practice of electing judges privileges candidates who have a taste and facility for electoral politics, and it makes courts more responsive to constituent preferences on a wide swath of issues. Constitutional law, even when conceptualized expansively, is just a fraction of what state judges do and of what a selection method implicates.

Although it is impossible to answer the question satisfactorily without knowing (or stipulating) more about the normative content of popular constitutionalism, it is relatively easy to see why a proponent might celebrate the seepage of populism into the nonconstitutional aspects of the adjudicative process. She might do this because she believes that much of the courts’ work has a constitutional dimension, because many citizens do not respect the constitutional/nonconstitutional distinction, or because her belief in majoritarianism as political fairness extends to all matters in which judges have decisional or procedural discretion.²⁴² As Ernest Young has observed, while it may be quite difficult in modern society to separate constitutional norms from nonconstitutional ones, “this is only a serious problem if something important turns on being able to mark that boundary with precision.”²⁴³ For the popular constitutionalist, it is not clear that anything does. Inasmuch as popular constitutionalism reflects an undifferentiated commitment to present popular rule, we may have

240. Posner, *How Judges Think*, *supra* note 118, at 135.

241. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1, 78 (1998).

242. Moreover, overinclusiveness is to some extent inevitable in any governmental vehicle of popular constitutionalism. The departmentalists’ preferred institutions, the legislative and executive branches, also make countless nonconstitutional decisions.

243. Ernest A. Young, *The Constitution Outside the Constitution*, 117 Yale L.J. 408, 454 (2007).

simply added another argument to the positive side of the ledger in evaluating elective judiciaries. The majoritarian difficulty, on this view, is not difficult at all.

Inasmuch as popular constitutionalists wish to distinguish the truly constitutional from the merely legal, however, the sweep of the election mechanism may substantially diminish its appeal, for two basic reasons. First, it dilutes “public authorship,”²⁴⁴ or ownership, over the content of constitutional law. Because judges fulfill so many tasks apart from resolving constitutional controversies, it will often be hazy or overdetermined why an electorate has selected or rejected any particular candidate. Was it because of her dissent in the major constitutional case from the previous term? Because of how she handled or reviewed a notable trial? Because of the unflattering photograph in the local paper? Because the political winds in the state have shifted? One can never be sure; perhaps each of these factors played a role. Judicial elections compass so many possible issues that the connection between their returns and any particular constitutional ruling becomes highly attenuated, if not entirely obscure.

Second, and relatedly, the sweep of these elections risks collapsing constitutional politics into ordinary politics, constitutional law into ordinary law. Prominent popular constitutionalists have generally disclaimed this goal.²⁴⁵ To the contrary, scholars such as Larry Kramer have sought to preserve the idea of popular engagement with the Constitution as something qualitatively distinct from and more momentous than other forms of civic activity, even if each is recognized as fundamentally political in character.²⁴⁶

Judicial elections do not honor this distinction. In the type of speech they elicit and the accountability they foster, these races seamlessly intermix the constitutional and the nonconstitutional, the “sacred”²⁴⁷ and the mundane. They flatten the legal landscape. By forcing voters to weigh their constitutional convictions alongside everything else they might seek in a judge, elections can contribute to a culture and a jurisprudence that do not specially attend to—and so do not specially

244. Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 315 (2001) (discussing role of social movements in shaping constitutional meaning).

245. Richard Parker is a notable exception. In his 1994 *Constitutional Populist Manifesto*, he denies that there is any such thing as “constitutionalism,” as distinct from ordinary politics or lawmaking. Parker, *supra* note 46, at 115.

246. See, e.g., Kramer, Popular Constitutionalism, *supra* note 7, at 961 n.3 (distancing himself from Akhil Amar’s early work on non-Article V amendments). The “dualist” distinction between normal politics and higher lawmaking is central to Bruce Ackerman’s theory of American constitutionalism and to his defense of judicial review. See Ackerman, *Foundations*, *supra* note 7, ch. 1.

247. Post, *supra* note 76, at 9 (arguing that authority of Constitution derives in part from its “‘sacred’” status (quoting Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. Legal Educ. 167, 169 (1987))).

empower the people to fashion the laws that bear on—the great questions of institutional structure and political morality. They can also compound the vulnerabilities of politically weak groups, further alienating them from the Constitution and the justice system. In an era of widespread voter ignorance and soundbite-fueled campaigns, the ecumenism of judicial races threatens to conflate the articulation of essentially contested constitutional principles with the application of basic legal craft, thereby trivializing both. It exacerbates the identification problem inherent in popular constitutionalism,²⁴⁸ whereby the notion of higher law loses its salience as a focal point, if not also its conceptual integrity.

On multiple grounds, then, a popular constitutionalist who wants to disestablish judicial supremacy specifically on matters of constitutional law may have reason to fear the broader implications of judicial elections. The popular constitutionalist who instead embraces their spillover effects has adopted a perfectly coherent position—just an extreme one. It would take a fairly radical commitment to present popular rule to maintain that judges should draw upon the prevailing community sentiment every time they resolve a high-profile dispute or sentence a criminal.²⁴⁹ It is less radical to think they should do so every time they issue a constitutional ruling that could bind society for decades to come. Yet it is the former sorts of decisions that occupy more of the state courts' time and that, at least at present, are more associated with the risk of electoral backlash.

Inasmuch as the extraconstitutional aspects of judicial elections are seen to detract from (yet not eclipse) their popular constitutionalist appeal, a practical lesson might also be gleaned: These elections ought to be limited to the supreme court, or at least the appellate court, level. Compared to lower court judges, state high court justices rule on constitutional issues more frequently and on nonconstitutional issues less frequently, and they do so with substantially greater discretion. They do not administer trials or sentence criminals. And they exercise binding interpretive authority within their own judicial systems. Selecting these judges through elections could yield the greatest popular constitutionalist benefits with the fewest subconstitutional spillovers—although when these spillovers do occur, they may be more consequential.

2. *Federalism.* — It might be argued that judicial elections are overinclusive in an additional sense, in that they implicate questions of state constitutional law, whereas popular constitutionalism, properly understood, involves only federal constitutional law. I explained above why

248. See *supra* note 42 and accompanying text.

249. Even if we accept that uncodified public sentiment ought to be relevant in the context of criminal sentencing, we might wonder why the judge should be the one to channel it, when a jury of the defendant's peers may also be sitting in the room. An enhanced role for juries would seem to provide a procedurally, substantively, and symbolically more efficacious means of integrating the views of the community into the operation of the criminal justice system.

popular constitutionalists have ample reason to care about state courts and constitutions, independent of their federal analogues.²⁵⁰ However, some prominent theorists of state constitutionalism have argued that the development of a vigorous, self-conscious model threatens to subvert the operations of federal constitutionalism, and that the project therefore ought to be discarded.²⁵¹ Some have further suggested that significant portions of state constitutional texts lack “constitutional dimension.”²⁵²

Because scholars identified with popular constitutionalism have largely ignored the states,²⁵³ I cannot purport to channel their views on these arguments. But the arguments seem unlikely to persuade anyone so inclined. Popular constitutionalism extols “diffuseness and decentralization” in the construction of constitutional norms;²⁵⁴ state law profoundly affects the daily lives of Americans. If judicial elections can spark more robust public dialogue around fifty different constitutions, if they can inspire greater allegiance to a plurality of constitutional traditions, if they can democratize state constitutional law and culture, all this would appear to be cause for celebration.

To the extent that state constitutions deal with distinct issues not treated by the federal Constitution—and they deal with very many of these²⁵⁵—there is no risk of direct conflict between the two. To the extent that the constitutions deal with overlapping concerns, the potential arises for state judges to apply corresponding provisions in ways that go beyond or diverge from the prevailing federal understanding. Barring outright defiance, this too seems cause for celebration. Such diversity in constitutional interpretation may compensate for the federal courts’ “underenforcement” of many constitutional norms;²⁵⁶ it provides an additional and more accessible platform for collective deliberation; it facilitates exit and voice in constitutional lawmaking; and it holds up a mirror to the national model. In a federated and heterogeneous polity such as ours, most popular constitutionalists would, I suspect, follow Lawrence

250. See *supra* notes 9–13, 61–77 and accompanying text.

251. Gardner, *supra* note 67, at 823–30.

252. Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 *Harv. L. Rev.* 1147, 1159 n.52 (1993). Unsurprisingly, this view was roundly criticized by state judges, as was Professor Kahn’s call to turn away from “unique state sources” in favor of a national perspective. See Hans A. Linde, State Constitutions Are Not Common Law: Comments on Gardner’s *Failed Discourse*, 24 *Rutgers L.J.* 927, 928–31 (1993); Shepard, *supra* note 70, at 440–44.

253. Cf. Aronson, *supra* note 18, at 985 (“[A]ll major critiques [of judicial review], and all major normative responses to the critiques, focus almost solely on the acts and omissions of the [U.S.] Supreme Court in its capacity as a constitutional court.”); Sandy Levinson, Our Dysfunctional States, Balkinization, June 11, 2009, at <http://balkin.blogspot.com/2009/06/our-dysfunctional-states.html> (on file with the *Columbia Law Review*) (calling state constitutions “an extremely important, but almost wholly ignored subject by elite law professors and political scientists”).

254. Kramer, *Popular Constitutionalism*, *supra* note 7, at 963.

255. See *supra* note 69 and accompanying text.

256. Sager, *Fair Measure*, *supra* note 40, at 1213–20.

Sager in the belief that “variations among state and federal constitutional rules ought to be both expected and welcomed.”²⁵⁷

But I may be wrong. It is certainly possible to imagine a brand of popular constitutionalism that conceptualizes the people as an exclusively or essentially national community and that trivializes or fears the development of a vibrant state constitutionalism. The United States Constitution is what makes Americans a “People,”²⁵⁸ after all, and disestablishing judicial supremacy at the federal level may well be a more urgent project sociologically and consequentially.

Scholarship on federalism, popular constitutionalism, and state judicial selection has largely proceeded on separate tracks. This cursory treatment cannot begin to do justice to the subject, but it suggests there are many rich potential intersections among the three. Indeed, it suggests that to the degree state judges (i) exercise discretion in the application of federal constitutional guarantees or cognate state provisions, and (ii) their selection method systematically influences that task, any successful normative theory of state judicial selection may *require* a theory of both federalism and constitutionalism. Popular constitutionalists could contribute significantly to our understanding of state constitutional theory, not to mention our understanding of popular constitutionalism itself, by devoting more attention to the subnational level.

3. *Juricentrism*. — Another disconcerting feature of judicial elections, from the popular constitutionalist perspective, may follow from what they do not do: permit nonspecialists to take up constitutional questions on their own, as in an assembly or plebiscite on a particular issue or a recall

257. Lawrence Gene Sager, Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 *Tex. L. Rev.* 959, 976 (1985); see also Lawrence Friedman, The Constitutional Value of Dialogue and the New Judicial Federalism, 28 *Hastings Const. L.Q.* 93, 97, 129 (2000) (celebrating “attempts by state courts independently to interpret the meaning of cognate textual provisions” for advancing “the federal constitutional value of dialogue” and “providing an interpretative counterpoint to the U.S. Supreme Court”); Post & Siegel, *Roe Rage*, *supra* note 7, at 382 (asserting that “state court opinions about state law are venues within which national values are continually contested and reshaped”). Notwithstanding his support for a dynamic state constitutionalism, Sager’s more recent work strongly suggests that he would oppose the use of elective judiciaries in pursuit thereof. See, e.g., Lawrence G. Sager, Justice in Plainclothes 74 (2004) (identifying members’ job security and detachment from “the potentially distorting influence of public will” as key reasons why federal courts are “particularly well structured to address questions of constitutional justice”). Elective judiciaries, it seems, are deeply incompatible with Sager’s justice seeking account of American constitutional practice.

258. As a formal matter, this has been true since the Constitution was ratified. As a cultural or phenomenological matter, it became increasingly true after the Reconstruction Amendments began to reconstitute conceptions of citizenship. See generally Akhil Reed Amar, America’s Constitution: A Biography 381–82 (2005) (observing that Fourteenth Amendment “codified a profound nationalization of American identity”).

vote on a particular decision.²⁵⁹ Judicial elections entail a kind of representative democracy. Although they allow ordinary citizens to shape the interpretive outputs of the courts in potentially significant ways, they do not in themselves allow citizens to interpret or resolve anything. The judge continues to call the shots in any given case and thereby to mediate between popular preferences and the content of enforceable law.

It is in this light that the “nasti[ness]” and “noisi[ness]”²⁶⁰ of today’s campaigns for the bench may become most problematic for popular constitutionalism. The concern is not necessarily that competitive races degrade the civility of public discourse or the dignity of the judicial office, but rather that they lack the proper focus. They foreground the candidates—their looks, their quirks, their backgrounds—rather than the Constitution. Political energy that could be better spent arguing over the substance of constitutional law may be dissipated arguing over what sorts of candidates should be empowered to determine the substance of constitutional law. At the same time that “new-style” campaigns can diminish the stature of the judiciary by subjecting aspirants to the degradations of modern politics, they can enhance its visibility as a fulcrum of constitutional change. Ironically, the more competitive and salient judicial races become, the more they may reinforce the juricentric notion that constitutional updating is the prerogative of the courts.²⁶¹

Competitive judicial elections, consequently, may not complement alternative forms of popular engagement with the Constitution so much as displace and distort them. Whether and in what ways these races will tend to invigorate or to debilitate the broader constitutional culture is a question so far ignored by researchers. The previous Part made the case for their invigorative potential, but we cannot be sure *ex ante*.²⁶²

Competitive election environments may also create unrealistic expectations about the transformative capabilities of the state courts. Like all U.S. judges, state judges are not authorized to reach interpretive outcomes that are incompatible with controlling legal sources or to resolve disputes that are not properly within their jurisdiction. Nor are state

259. Cf. Tamanaha, *Beyond the Divide*, *supra* note 122, at 72 (explaining that “a proposal for the recall of individual [state] judicial decisions” by popular referendum was “seriously debated” in early twentieth century).

260. Schotland, *Comment*, *supra* note 97, at 150.

261. Cf. *supra* notes 23–26 and accompanying text (discussing popular constitutionalist critique of “juricentrism”). Michel Foucault once rejected a proposal for a “people’s court” to judge the police, on the ground that a court, by its very nature, would tend to deform rather than advance communal values. See Michel Foucault, *On Popular Justice: A Discussion with Maoists*, in *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, at 1, 1–34 (Colin Gordon ed., Colin Gordon et al. trans., 1980) (identifying bureaucratic structure of courts and purported neutrality, universality, and authoritativeness of judicial decisions as features antithetical to “popular justice,” which “cannot achieve its full significance unless it is clarified politically, under the supervision of the masses themselves”).

262. Later in the Article, I will give some additional reasons for skepticism. See *infra* Part III.E.5 (discussing consequences of elected judges’ efforts to avoid backlash).

judges authorized to revise U.S. constitutional doctrine when the Supreme Court has already provided instructions. Courts are reactive policymakers and constrained interpreters; state courts are especially constrained on federal questions. No matter how much their constituents might want them to, elected judges cannot move constitutional law in any particular direction unless a variety of external factors converge to provide an opportunity—at least, not without transgressing basic tenets of our legal system. As mechanisms of constitutional change and accountability, judicial elections are bound to be underinclusive as well as overinclusive.²⁶³

The representative character of elective judiciaries thus has a double edge for the popular constitutionalist. On the one hand, it enhances judges' democratic credentials to speak for the people in rendering constitutional judgments. It gives them a plausible claim to be agents rather than "enemies"²⁶⁴ of popular constitutionalism, and so dissolves some of the tension between the popular sovereigntist premise that the Constitution "belongs to the people"²⁶⁵ and the juricentric premise that the judiciary ought to be its exclusive guardian. On the other hand, the representative character of elective judiciaries channels populist energies inward, toward campaigns for the bench and the interpretive outcomes they can facilitate, and so accentuates rather than minimizes the centrality of the courts for constitutional lawmaking. At the same time that they can make a constitutional culture more active, vibrant, and popular, elective judiciaries may exacerbate the tendency to "judicialize" constitutional disputes and to see courts as privileged sites for the diffusion of constitutional norms.

Appointive and merit-selected judiciaries do not portend juricentrism in the same way, because they do not hold out the same kind of promise to speak for the people. Their claim to institutional legitimacy depends not upon their responsiveness to the present majority will but instead upon their *independence* therefrom: They purport to be, not faithful agents or representatives of a constituency, but "mere instruments of the law."²⁶⁶ Appointive judiciaries with life tenure are designed precisely to minimize the influence of inchoate popular pressures. In such a system, one may worry very much about unelected judges usurping the role of the people as constitutional expositors and excessively "circum-

263. To be clear, underinclusiveness is not a problem per se: No one mechanism of popular constitutionalism need do all the work. It is a problem only to the extent that judicial elections warp or crowd out other, better mechanisms.

264. See *supra* note 23 and accompanying text (noting literature's characterization of judicial supremacy as "enemy" of popular constitutionalism).

265. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 *The Collected Works of Abraham Lincoln* 262, 269 (Roy P. Basler ed., 1953) ("This country, with its institutions, belongs to the people who inhabit it.").

266. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824); see also Post & Siegel, *Roe Rage*, *supra* note 7, at 384 (expanding on this point).

scrib[ing] the domain of collective self-governance.”²⁶⁷ But one need not worry nearly as much that the judicial selection process will itself come to usurp alternative mechanisms of constitutional construction.

When judicial retention decisions are made regularly by the legislature or the governor, juricentrism may be further reduced. These decisions both dramatize and enforce the limited nature of judicial authority in the larger governmental scheme. Reappointive systems can likewise serve departmentalist values, by deterring courts from invalidating statutes and regulations²⁶⁸ and by empowering the other branches to pass judgment on the constitutional record of any given judge, albeit in the aggregate and at a temporal remove. One may worry very much that reappointive schemes leave courts excessively vulnerable to politicians, but one need not worry nearly as much that the coordinate branches will be marginalized in the fight to determine constitutional meaning.

E. Majoritarian Review Revisited

Part II.C advanced the claim that majoritarian review, whereby judges use their interpretive discretion to reach outcomes they believe will be pleasing to (or at least will not outrage) their constituents, is an inevitable and distinctive byproduct of elective judiciaries. If this claim is correct, then supporters of elective judiciaries must have a theory of why majoritarian review is desirable (or at least tolerable). Any number of regulatory reforms, such as enhanced disqualification rules, could mitigate the risk of judicial favoritism toward discrete parties. Promajoritarian decisionmaking is not so easily rectifiable; it is, rather, the presumed point of using elections. The notion that we could manipulate an elective system so that its judges ignore the political consequences of their decisions is not only Panglossian but perverse. For if that is the goal, then there is no good reason to use elections in the first place.²⁶⁹

267. Post & Siegel, *Popular Constitutionalism*, supra note 23, at 1037.

268. See supra notes 108–116 and accompanying text.

269. At least, such is my position. Some judicial selection scholars, most notably Michael Dimino, do not agree. See, e.g., Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 *Notre Dame J.L. Ethics & Pub. Pol’y* 451, 455–67 (2008) (advocating initial popular election of judges followed by fixed, nonrenewable terms). Jed Shugerman has recently argued that, in the mid-nineteenth century, judicial elections were conceptualized in paradoxically “countermajoritarian” terms, in that they were meant to empower courts to uphold the rule of law against government abuses by reducing their links to parties and factions. Shugerman, *Economic Crisis*, supra note 87, at 1126–44. Shugerman’s fascinating history cautions against broad generalizations about the “point” of judicial elections, which have assumed different forms and engendered different social understandings over time. There is no plausible normative defense of these elections, however, that does not embrace the unique weight they assign to public opinion, the unique connection they forge between voters and judges.

As I understand Shugerman’s account, the countermajoritarian label is an awkward fit for the theory that prevailed in the 1800s. For many reformers, the main attraction of elections was that they were seen as enhancing courts’ ability to defy the other branches

Part II.C.3 advanced the further claim that, on account of their electoral pedigree, these judges might possess a special dispensation, even a duty, to practice majoritarian review. As elected officials, they may plausibly feel an obligation to apply the law in ways that promote the values and beliefs of their constituents. Popular constitutionalists, I suggested, might support majoritarian review as a means to enhance lay control over the legal system and to update the content of the law more continuously to match popular preferences. A number of commentators have recently begun to offer proposals along these lines.²⁷⁰

This strikes me as a mistake. The balance of the Article will argue that popular constitutionalists should not endorse majoritarian review as a general theory of constitutional interpretation or elected judges as its privileged practitioners—at least, not unless they hold quite dubious views about the nature of democratic legitimacy and the capacities of the courts. The jurisprudential method most explicitly attuned to the popular will is, paradoxically, as much a hindrance as an aid to the project of popular constitutionalism.

Several explanatory notes are in order.²⁷¹ First, the jurisprudential distinctions between elective and nonelective judiciaries should not be overdrawn. Some elected judges may eschew anything resembling majoritarian review; some appointed judges may embrace it. Moreover, elective and appointive systems can take many different forms,²⁷² each of which may have different implications for what sorts of lawyers attain the bench and for what they do once there. We are dealing here with crude (though hopefully valid) aggregates and approximations.

when those branches had failed to act as the citizenry's faithful agents. See *id.* at 1067, 1125. Elections were intended to decrease judges' dependence on special interests and machine politicians but to increase their dependence on "the people"—and more specifically on electoral majorities. It may well be the case that Americans of this era generally wanted judges who would uphold the rule of law, and that the judges they chose struck down a relatively large number of statutes in the service of this goal. Yet, notwithstanding the traditional association of the "countermajoritarian difficulty" with statutory invalidations by the Supreme Court, it hardly seems helpful to maintain that these early elective regimes were therefore countermajoritarian. The basic logic on which these regimes operated, indeed the very impetus for their creation, was to advance *majoritarian* values. Cf. *supra* Part II.C.2 (explaining that judges seeking to mirror popular views may be more or less deferential to legislative judgments, depending on context). This semantic quibble with Shugerman's masterful analysis would not deserve mention, except that it illustrates some of the ways in which elective judiciaries can confound the standard categories of constitutional theory.

270. See *supra* notes 117–126 and accompanying text (quoting suggestive passages by Larry Kramer, Richard Posner, Jeffrey Rosen, Chris Bonneau, and Melinda Gann Hall and summarizing views of other scholars). I do not mean to claim that Kramer, Posner, or Rosen would, on considered reflection, endorse majoritarian review, just that their writings contain hints of this view and help illuminate what a popular constitutionalist defense of the practice would look like.

271. Also in order is a restatement of my original caveat about the crudeness of the "majoritarian" label. See *supra* note 121.

272. See *supra* note 61.

Second, it is important to restate what I am not doing: I am not investigating majoritarian review through any lens other than popular constitutionalism, except by way of comparison. As with popular constitutionalism itself, the obvious criticisms of this interpretive method do not sound in popular sovereignty values. They sound in values such as individual rights and the rule of law.²⁷³

Finally, I wish to engage this subject on its strongest terms. Majoritarian review is a theory of how judges negotiate interpretive ambiguity. In constitutional law especially, this is no small space. My contention is that elected judges have a higher statistical likelihood and a stronger theoretical justification to assign their sense of public opinion some meaningful, independent weight in this negotiation, alongside whatever other legal principles guide their decisionmaking. Section C of this Part explored concerns that majoritarian review will slip its legalist bonds and transgress the zone of reasonableness, as when the judge defies a controlling authority or acts to reward a campaign supporter.²⁷⁴ This section will grant elected judges the benefit of the doubt and set aside such concerns.

Let us consider, then, how a popular constitutionalist might feel about a system that breeds judges who are systematically more likely to consult public opinion as one significant factor in their resolution of constitutional controversies. As Jed Rubenfeld has observed in regard to Christopher Tiedeman's defense of this interpretive approach,²⁷⁵ it appears to founder on three "naïve" assumptions: (i) that "the judiciary can better speak for present majority will than can the people's elected representatives"; (ii) that "there exists a 'prevalent sense of right' shared by the people as a whole"; and (iii) that "the judiciary can discern" this sense.²⁷⁶ Rubenfeld seems to view these assumptions as so naïve that to reveal them is to refute them. He is correct that they reflect serious flaws of majoritarian review, but when the judges are themselves elected and when the desideratum is popular constitutionalism, it takes some work to see why.

273. Whether and how popular constitutionalists can reconcile their rejection of judicial supremacy with the Constitution's claim to being supreme law, U.S. Const. art. VI, cl. 2, and with rule of law values generally, is an especially important question beyond the scope of this Article. The question is all the more acute for those versions of normative popular constitutionalism that emphasize methods of "constitutional change" outside of the Article V amendment process and the faithful interpretation and construction of the Constitution's text.

274. Section III.D.1 explored concerns relating to majoritarian review and nonconstitutional judicial decisionmaking.

275. See *supra* notes 122–126 and accompanying text.

276. Rubenfeld, *supra* note 122, at 58–59. As Rubenfeld also makes clear, Tiedeman's interpretive philosophy is deeply incompatible with Rubenfeld's own commitmentarian theory of constitutional law. See, e.g., *id.* at 172–73 (arguing that, to honor enduring commitments embodied in Constitution and thereby facilitate intertemporally extended self-government, "[c]onstitutional interpretation cannot be vested in organs of government beholden to or expressing popular will").

1. *Legislative Supremacy*. — The first problem with majoritarian review, as Rubinfeld suggests, concerns institutional roles and competencies: Compared to executive and especially legislative efforts to advance popular beliefs, judicial efforts will inevitably fall short on standard procedural criteria. This is true for elected state judges as well as life-tenured federal judges. Even when its members are elected at regular intervals, a court will never be as broadly accessible as the legislature, nor will it possess the latter's deliberative structures, information gathering resources, or proactive lawmaking capabilities. Judges are not actually authorized to "represent" constituents in any formal sense, nor do they engage in the sorts of dialogic interactions that help make that representation meaningful. Arguments proffered in courts are often technical and spare compared to the explicit value disagreements hashed out on a senate floor.²⁷⁷ While there is room to debate whether an elected judge ought to be susceptible to popular influence in executing her duties, legislators remain avowedly open to popular influence in virtually all they do. Elected judges might legitimately be responsive to the present popular will at the margins, when the law is unclear. Legislatures unabashedly aspire to effectuate the popular will *except* at the margins.

At least at present, judges cannot even promise to decide a case in a certain way without violating standard canons of judicial ethics.²⁷⁸ Should that case then come before the judge, she would be disqualified from hearing it.²⁷⁹ It is a basic expectation of legislators, by contrast, that they will make and be held accountable for specific campaign promises about specific policy objectives. Furthermore, elective judiciaries are currently more distant from their constituents in a temporal sense, as every state that elects its judges grants them relatively long tenure as compared to other elected officials.²⁸⁰

277. See Waldron, *Core of the Case*, *supra* note 53, at 1384–86 (contrasting richness of British legislative debates on important issues of rights with sterility of American judicial reasoning).

278. Although these canons are currently being challenged in lawsuits around the country, most state codes of judicial conduct still contain a "Commit Clause," banning statements that commit or appear to commit the candidate with respect to cases or controversies likely to come before the court, and/or a "Pledges or Promises Clause," banning "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Goldberg, Sample & Pozen, *supra* note 230, at 506–07 (quoting Mich. Code of Judicial Conduct Canon 7B.1.c (1994); Ohio Code of Judicial Conduct Canon 7(B)(2)(c) (1997)); see also Brennan Ctr. for Justice, *supra* note 208 (tabulating state canons).

279. See Goldberg, Sample & Pozen, *supra* note 230, at 518 & n.78 (documenting that nearly every state code of judicial conduct requires disqualification whenever judge's impartiality might reasonably be questioned).

280. Schotland, *New Challenges*, *supra* note 61, at 1094. There is nothing inevitable about this arrangement; a state could grant its elected judges shorter terms than its legislators. That every state has done the opposite suggests a widely held ambivalence about the representative function of elective judiciaries—a concern that these judges not be *too* responsive to their constituents.

However flawed a state legislature may be as a stand-in for the people themselves, then, it will have thicker and more extensive connections to them than will its judiciary. As vehicles of mediated popular constitutionalism, legislatures will always have superior *bona fides*.

These comparative points help explain why a court, even when elected, could be seen to undermine democratic values when it strikes down a duly promulgated law that does not clearly violate the Constitution—and therefore why the popular constitutionalist case for judicial restraint could be applied to elected state courts as well as to the appointed federal ones.²⁸¹ Yet these points cannot in themselves defeat the popular constitutionalist case for majoritarian review, for three main reasons.

First, in comparing the representative character of the judiciary to that of the legislature, the appropriate reference point is not the legislature as it is today, but the legislature as it was at the time it enacted the measure the judiciary is now tasked with interpreting. When many years have passed or when social norms or conditions have substantially changed since the legislature last took up an issue, the representativeness gap may have closed. This gap may be smaller still in situations where the judges were elected on a statewide basis and the legislators were not.

Second, in the lion's share of constitutional controversies that come before a court, there will be no clear legislative position to which a court might defer. (The same holds true for many important questions of common law, and even many questions of statutory interpretation.) Legislatures are not structured to render constitutional judgments outside of the general terms of statutes and resolutions. Consequently, no matter how much one might prefer the legislature as a departmentalist agent of popular constitutionalism, it will inevitably be an incomplete agent. If the goal is to maximize popular control over the administration of fundamental law, it may be desirable for the courts to combine deference to the legislature with majoritarian review, reserving the latter method for the (many) situations in which the former fails to provide a determinate answer.

Finally, even when the legislature has spoken clearly on an issue, there may be plenty of reasons to doubt its fidelity to the popular will.²⁸² Procedural gridlock, special interest capture, ideological polarization, gerrymandered districts, and a slew of other pathologies can steer legisla-

281. See *supra* notes 105–107 and accompanying text (explaining that scholars sympathetic to popular constitutionalism have preached various forms of judicial restraint as means of reconciling judicial review with democratic imperatives). This logic also suggests why in some cases there may be a net democratic loss from a jurisprudence that asks courts to adapt the meaning of legislation in light of contemporary norms, as the court perceives them, rather than apply the most textually or purposively sound reading of the statute. See *supra* note 126 (discussing William Eskridge's "dynamic statutory interpretation").

282. For now, let us continue to bracket concerns about the notion of a "popular will."

tion away from public preferences. On account of factors both intended and unwanted, statutory lawmaking in the United States has always operated at a large remove from pure majority rule. These factors help explain why, by some measures, life-tenured U.S. Supreme Court Justices have recently been delivering a more majoritarian product than their elected counterparts in Congress.²⁸³ Accordingly, to the extent that popular constitutionalists seek popular outcomes, they may see a space for courts to compensate for deficits in legislation—not necessarily to improve its democratic quality in any strong normative sense, as by granting special protections for discrete and insular minorities, but simply to ensure that popular majorities get their way on the issues that matter most. Regardless of whether legislatures are superior representatives of the people, they are imperfect representatives, and a popular constitutionalist might embrace majoritarian review as a means of picking up some of their principal-agent slack.

A commitment to legislative supremacy in constitutional decision-making, in short, is not necessarily incompatible with majoritarian review. Nor does it necessarily entail a commitment to legislative control over judicial selection. A legislative appointment scheme has the evident virtue (for the legislative supremacist) of putting judges under the thumb of the Congress. Yet inasmuch as the theory of legislative supremacy reflects an underlying concern to maximize representativeness or responsiveness in government, we have seen not only why judicial elections may hold appeal but also why the institutional designer may wish to give courts enough independence from the legislature to be able to override it on occasion. Although elections expose judges to some of the same potentially distortionary influences that act upon congressmen, such as special interest dollars, so do legislative retention schemes, at one level of remove. And while judges subject to legislative retention have been found to strike down statutes least often, elected judges are not far behind.²⁸⁴ Elected judges have a strong incentive to defer to the legislature's constitutional judgments—treating them *as if* they were supreme—both as a strategy for minimizing controversy and as a proxy for the views of the electorate.

283. See Friedman, *Will of the People*, *supra* note 20, at 372 (arguing that “the Court of late seems to be doing a better job than the Congress in meeting public expectations” and that, “[i]f any worry seems legitimate,” it is not that Justices defy public opinion but rather that they “kowtow” to it); Devins, *Popular Constitutionalism*, *supra* note 180, at 1347 (arguing that “the Supreme Court . . . may be more reflective of public opinion than Congress”); Corinna Barrett Lain, *The Countermajoritarian Classics (and an Upside-Down Theory of Judicial Review)* 5 (Aug. 31, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1669560> (on file with the *Columbia Law Review*) (arguing that in classic mid-twentieth-century cases, “the Court’s position was actually a better reflection of prevailing sentiment than [was] that of the democratically elected, representative branches”).

284. See *supra* note 108.

Rather than tweak its judicial selection or retention scheme, a polity seeking to encourage legislative resolution of constitutional controversies could do so far more forcefully by curtailing judges' lawmaking power. A polity could, for example, institute a supermajority voting rule for courts to invalidate statutes or a streamlined procedure for legislative overrides, as several U.S. states and Commonwealth countries have done.²⁸⁵ Or it could, as Jeremy Waldron has urged, simply do away with judicial review of legislation altogether.²⁸⁶ These reforms may not have much chance of passage in many states today. But the strongest departmentalist response to judicial supremacy is to recalibrate the structure of judicial review, not the composition of the reviewing body.

2. *Coherence, Feasibility, and Direct Democracy.* — This brings us to Rubinfeld's second and third arguments against majoritarian review: that there is no good way for the judge to discern public sentiment on matters of constitutional interpretation, and that rarely will there be any such sentiment to be discerned. These, too, are important though ultimately incomplete critiques.

Majoritarian review raises a practical problem as well as many normative ones: How are judges supposed to know what the people want, except by looking to the laws their representatives have passed and the constitutional provisions their predecessors have enacted (sources that even the most staunchly legalistic judge would consult)? Opinion polls will rarely be available. The briefs of litigants and amici are works of advocacy. Intuition and common sense can only go so far. As Neal Devins has pointed out, however, numerous structural and sociological factors make state judges better positioned than their federal counterparts to estimate the reception their decisions will receive. Often, state judges have lived in their jurisdiction for many years and have extensive experience working within its legal system; regularly interact with other public officials on budgetary, administrative, and policymaking matters; maintain strong ties to local political parties and civic groups; and are "well-informed with respect to the in-state political climate," which is generally less complex than the national climate.²⁸⁷ Procedurally, moreover, some of these

285. See Friedman, *Will of the People*, supra note 20, at 186 & n.182 (identifying three U.S. states that have used supermajority invalidation rules); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *Am. J. Comp. L.* 707, 719–39 (2001) (explaining that Canadian Constitution grants legislature express power to reenact legislation courts have found invalid, British Human Rights Act of 1998 allows for fast track statutory amendment in wake of judicial invalidation, and New Zealand Bill of Rights gives courts no power to invalidate statutes deemed incompatible with its guarantees); Waldron, *Core of the Case*, supra note 53, at 1353–59 (distinguishing American-style "strong judicial review" from these "weak[er]" models); see also Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 *Ga. L. Rev.* 893, 916, 988–91, 995–96 (2003) (discussing legislative proposals in 1820s, 1860s, and 1920s that would have required two-thirds vote of U.S. Supreme Court to invalidate act of Congress).

286. See, e.g., Waldron, *Law and Disagreement*, supra note 53, at 282–312; Waldron, *Core of the Case*, supra note 53.

287. Devins, *State Constitutionalism*, supra note 65, at 1669–71.

judges will be able to avail themselves of devices such as expert testimony, special masters, and facilitators, which state courts routinely use to enhance their understanding of social and factual issues.²⁸⁸

The institution of judicial elections itself provides an additional, partial solution. If an elected judge observes that a particular talking point has been receiving favorable media attention, that a particular attack ad seems to resonate with voters, or that a particular type of candidate has had the most success at the polls, she may find clues about how the community would like to see the law applied. The signaling function of elections is especially acute when incumbents are voted out of office; clearly, those judges did something the people disliked. Reappointment and merit selection practices may yield some useful information too, but they have significantly less capacity to stimulate and disseminate criticism of a judge's work. Compared to the other selection methods, elections generate more regular and robust information about the content of public opinion. The more competitive, frequent, and substantive the races, the better their epistemic value.

More fundamentally, just because a judge lacks perfect epistemic insight into popular preferences, it does not follow that her efforts to apply them will be hopeless or misguided. Even if the elected judge is bound to miss the mark some percent of the time when she seeks to gratify public opinion, she will presumably hit the mark more often than if she never tries at all. If she fails miserably in the effort, voters can throw her out.²⁸⁹

As for whether “there exists a ‘prevalent sense of right’ shared by the people as a whole”²⁹⁰ on most questions of constitutional law—clearly there does not. No sentiment has ever been shared by the people as a whole. Yet just as clearly, a *significant* number of citizens can have coherent preferences on *some* constitutional questions. To defend the view that courts ought to aim to effectuate those preferences within certain interpretive constraints, there is no need to conceptualize “the people” or their “will” as an organic unity, to overlook the Condorcet paradoxes and deliberative deficits that may confound the endeavor, or to believe that judges possess any special access to the popular zeitgeist. One need not be “naive”²⁹¹ to be a populist.

Nevertheless, Rubinfeld's arguments point to a subtler complication. The problem is not that lay persons are unable to develop intelligible, respectable preferences on questions of constitutional law—popular constitutionalism is committed to the view that they can—but rather

288. Hershkoff, *Positive Rights*, supra note 127, at 1177–79.

289. This is not to say that social welfare, or the courts' social standing, is likely to be enhanced in the long run by judicial efforts to satisfy popular preferences, see, e.g., Sunstein, supra note 42, at 200, 211–12 (defending traditional, law-focused model of judging on second-order consequentialist grounds), just that judges are reasonably capable of discerning and applying these preferences.

290. Rubinfeld, supra note 122, at 58.

291. *Id.*

that they are unlikely to hold such preferences on the precise sorts of questions that come before a court. State judges do not address constitutional disputes in a vacuum. They do so in the context of specific cases, laden with all manner of supplemental claims, factual particularities, procedural histories, jurisdictional complexities, and doctrinal precedents that shape and constrain the judicial task. Ordinary citizens have neither the training, nor the resources, nor the responsibility to engage constitutional disputes in the way that judges must engage them. Citizens are far better equipped to develop meaningful views on what the Constitution provides in a class of cases, as might a legislator, or on what it ought to provide in the future, as might a reformer. Judges cannot do constitutional law in such categorical or aspirational terms. And this will remain true so long as American courts continue to articulate general norms only in the process of resolving discrete disputes.²⁹²

A popular constitutionalist might plausibly dismiss as “elitist” or unsubstantiated the concern that citizens will tend to approach constitutional interpretation through the lens of ordinary politics, and thereby conflate their sense of the proper constitutional result with their momentary desires. She cannot, in my view, plausibly dismiss the concern that citizens will tend to evaluate constitutional controversies at a higher level of abstraction, and with less sensitivity to the demands of professional legal reason, than would be expected of a judge. This descriptive feature of our sociolegal order, if not many others, significantly limits the utility and coherence of any jurisprudence that aspires to vindicate popular preferences. For those preferences are unlikely to be keyed to the precise issues facing any given judge, or to have been developed, tested, and refined in any manner resembling the judicial process.²⁹³

The notion that judicial decisions ought to “mirror popular views”²⁹⁴ is, in fact, quite a few steps away from being a workable principle of jurisprudence. In addition to the question of how to assimilate generalized preferences into specific cases or controversies, the judge who subscribes to this notion must ask herself whether the circumstances call for popular

292. Cf. *supra* note 232 and accompanying text (invoking Robert Cover’s insight that common law courts serve dual functions of “norm articulation” and “dispute resolution” and discussing potential tensions between these two).

293. This fairly modest predictive claim could be expanded into a stronger normative one. Whatever its virtues or vices as a framework for judicial elaboration of constitutional meaning, it might be argued, there is no reason to believe that the case format provides a suitable framework for collective decisionmaking. In light of the systemic biases, fleeting passions, partisan attachments, and informational cascades that can affect the popular view of any given controversy, institutional designers may be wise to force members of the public to engage constitutional questions prospectively, in general rather than in case-specific terms. These sorts of arguments can easily bleed into a broader mistrust of popular politics that is anathema to popular constitutionalism. But they need not. There are many different ways to enhance the people’s control over constitutional law without giving them control, even indirectly, over active disputes between specific parties.

294. Friedman, *Mediated Constitutionalism*, *supra* note 16, at 2598 (suggesting this notion is key “share[d]” tenet of scholars identified with popular constitutionalism).

views to be given weight; how much weight is due; and, given the inevitable heterogeneity of public opinion, what kind of views she (and popular constitutionalism generally) should aspire to vindicate in the first place. The epistemic difficulties of majoritarian review do not even arise until the judge knows what to look for. Is it the prevailing view of today's society, as might be reflected in a vote or a poll? The prevailing view within the segment of society that has the right to vote? Within the motivated minority that has bothered to study the issue, write editorials, lobby the legislature, and so forth? Or would the judge better serve popular constitutionalism by attending instead to the majority belief that *would* arise under conditions of fuller information, participation, and deliberation?²⁹⁵

These questions admit of no easy answer. To the extent that majoritarian review focuses on views that have been presented to the court in amicus briefs, expert testimony, and the like, it will be easier to administer and will reflect a more realistic notion of group agency than any appeal to the views of "the people." But the cost of this added coherence is an elite frame of reference potentially at odds with the aim of popular empowerment. Likewise, to the extent that majoritarian review licenses the judge to depart from the will of the present people (as best she can perceive it) in the service of some more idealized or trans-temporal conception thereof, its empirical demands may become more manageable. Yet any such concession leads away from popular constitutionalism's core commitments in favor of a more freewheeling and paternalistic judicial role. And if majoritarian review ought to concentrate on what today's citizens want as the touchstone for negotiating interpretive ambiguity, this begs another question of institutional design: Why not ask them?

Mechanisms of direct democracy such as ballot initiatives, referenda, and assemblies would seem to hold privileged, if not paradigmatic, status as formal instruments of popular constitutionalism. After all, only a popular vote to amend (or not to amend) the Constitution makes the people themselves the explicit authors of constitutional change, and makes explicit what they have decided.²⁹⁶ Elections might have a unique claim to

295. These questions lead us back to the identification problem. See *supra* note 42 and accompanying text. Until we have a clear understanding of what counts as popular constitutionalism, and what counts as superior or inferior forms of popular constitutionalism, we cannot confidently develop a theory of how it should bear on the judicial function—or on anything else, for that matter.

296. But see Raphael Rajendra, "The People" and "The People": Disaggregating Citizen Lawmaking from Popular Constitutionalism, 27 *Law & Ineq.* 53, 84–91 (2009) (arguing that ballot initiatives should not count as popular constitutionalism because they "fetishiz[e] constitutional texts" and substitute discrete mode of political engagement for more dynamic and diffuse social movements). When a thoughtful, published paper argues that "initiative constitutionalism"—whereby ordinary citizens propose and vote on explicit reforms to their constitution—"is not, and cannot be, popular constitutionalism," *id.* at 91, one has to wonder whether the vocabulary of "popular constitutionalism" has ceased to

satisfy a commitment to political equality with respect to the composition of the judiciary. But they do not give citizens an equal share in the elaboration of fundamental law in a remotely comparable sense.

If any of the standard “good government” criticisms of direct democracy²⁹⁷ were to trouble a popular constitutionalist, that might be grounds to establish a supermajority voting threshold, to incorporate informational aids, to constrain spending, to apply a single subject rule, to require legislative or gubernatorial signoff, or to make any number of other procedural tweaks designed to discipline the process and facilitate a graver, richer, more “constitutional” mode of deliberation. It would presumably not be grounds to bypass direct democracy altogether. For if direct democracy seems categorically unattractive as a means of determining constitutional law, if ordinary citizens cannot be trusted to change the legal status quo, then the theoretical basis of normative popular constitutionalism unravels.

Still, though, we have not entirely defeated the case for majoritarian review as a tool for popular constitutionalism. Holding repeated plebiscites would be an exceedingly costly and time consuming way to develop constitutional law. For this practical reason alone, if not also to preserve the basic stability of the legal system, it is unrealistic to think that the judicial role in determining constitutional meaning could be fully taken over by the people. Even a committed popular constitutionalist, moreover, may have qualms about such pervasive reliance on decisionmaking procedures unmediated by any institutional actor. The indirect nature of the constitutional change that judicial rulings can foster may not be as empowering as direct democracy. Yet it may do a better job of preserving the distinction between higher law and ordinary politics—facilitating a productive tension rather than an outright collision between the constitutional ideals of stability and commitment over time, on the one hand, and the populist ideals of responsiveness and accountability in the here and now, on the other.²⁹⁸

In any event, even if greater use of referenda, relaxed amendment procedures, and the like offer more potent instruments of popular constitutionalism, majoritarian review could be seen as a welcome complement. Just as the proponent of legislative supremacy might want judges to consult public opinion interstitially, when the legislature has not already spoken to an issue, the proponent of direct democracy might regard majoritarian review as an attractive gap-filling solution.

3. *Democratic Legitimacy.* — We have seen that the case for majoritarian review rests on a number of controversial assumptions about the capacity of ordinary citizens to evaluate issues of constitutional inter-

advance comprehension. At this point, we may be better off simply retiring the phrase, and thereby pushing authors to focus on the specific forms of popular constitutional engagement they mean to celebrate or critique.

297. See *supra* note 164 and accompanying text (summarizing criticisms).

298. I thank Heather Gerken for emphasizing this point to me.

pretation and of judges to perceive and incorporate those evaluations. But at least in situations where the greater part of a community seems likely to hold a certain considered view—for instance, that the equal protection clause of the state's constitution does or does not guarantee a right to same-sex marriage—these assumptions are not so implausible as to defeat the theory out of hand. This kind of textually underdetermined, newly emergent, high salience, value laden question is precisely the kind of question for which it makes the most sense, conceptually, to advocate majoritarian review. If it seems clear that the majority of citizens would strongly oppose a ruling that same-sex couples have a right to marry, the brand of normative popular constitutionalism considered in this Article suggests that courts ought to try to avoid such a ruling. The choice to elect judges can be seen to embody this same logic. Both presuppose that lay persons should be empowered to influence the interpretation of the fundamental laws that govern them.

Yet, if this is a coherent position, it may also be a misguided one. For it is at this point that popular constitutionalism's ambivalence about judicial independence comes into maximal tension with its agenda to democratize constitutionalism. Numerous strands of American constitutional theory provide reason to fear that even the most responsible and efficacious practice of majoritarian review will tend to diminish rather than enhance the democratic character of constitutional law.²⁹⁹ The basic arguments are familiar from debates over the countermajoritarian difficulty. Applied to the institution of elective judiciaries, they help show why the view that judges should “draw upon public perceptions and the prevailing . . . political climate when resolving difficult disputes”³⁰⁰ reflects not only a highly contestable set of empirical assumptions, but also a highly contestable conception of democratic legitimacy.³⁰¹

Depending on its precise formulation, the view that judges should be guided by public perceptions may conflict with the idea that the Constitution embodies an intergenerational scheme of self-government that combines majoritarian and nonmajoritarian aspects in the service of something greater than “statistical”³⁰² democracy or “brute forms of pref-

299. Readers who reject the analogy between federal constitutional law and state constitutional law may not much care what theorists of the former have had to say. This is a complicated issue that I cannot adequately treat here. I take it, however, that most participants in the debate over state judicial selection view state constitutions as “real” constitutions and state supreme court justices as “real” constitutional judges, and so would at least be inclined to entertain the analogy.

300. *Bonneau & Hall*, *supra* note 120, at 15. I take this view to be common to many advocates of both judicial elections and popular constitutionalism.

301. I will have nothing novel to say here about the relationship between nonmajoritarian models of judicial review and democratic legitimacy (if anything novel remains to be said). My limited point is that the popular constitutionalist critique of the former necessarily presupposes a theory of the latter that is compatible with “constitutionalism,” and yet it is not clear what that theory is.

302. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 20 (1996).

erence aggregation.”³⁰³ It may conflict with the idea that judicially enforced constitutional norms can themselves be democracy enhancing,³⁰⁴ for instance because they compensate for breakdowns in the political process caused by irrational prejudice, special interest pressure, incumbent self-entrenchment, temporal myopia, or other pathologies; because they keep government officials within the bounds of their enabling grant of power; because they honor commitments made in more profound moments of prior populism, involving heightened political engagement and agreement; or because certain kinds of secure entitlements of person and property are necessary prerequisites to meaningful social discourse and self-determination. The view may likewise conflict with the idea that judicial review embodies a deontic commitment to forms of political equality that help legitimize democratic rule, such as providing all aggrieved persons an opportunity for a fair hearing on a claim that some law or practice violates their rights.³⁰⁵ If everyone knows at the outset that an elected court is less likely to rule in favor of same-sex marriage because its members are afraid to contravene the apparent preferences of their constituents (whether out of a high-minded commitment to role fidelity, a self-interested commitment to job preservation, or anything in between), this value may be degraded.³⁰⁶

Raising a separate set of equity concerns, judicial elections and majoritarian review threaten unpopular persons and causes differentially across jurisdictions. Judges will generally find it easiest to discern the will of the people in communities that are normatively homogeneous: for instance, a state in which few openly gay citizens hold positions of prominence. Majoritarian review is most viable where it is easiest to tell who is in the majority, and who is despised. As judicial elections become increasingly salient and competitive, incumbents in these communities can expect to face increasingly steep penalties for decisions that protect marginalized groups, paradigmatically noncitizens who lack the franchise. There is irony in this tradeoff, for the most famous advocate of a vigorous, self-conscious state constitutionalism, the late Justice Brennan,

303. Post & Siegel, *Popular Constitutionalism*, *supra* note 23, at 1036.

304. See *id.* at 1035–36 (summarizing well known variations on this idea).

305. See, e.g., Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 *Va. L. Rev.* 991, 999–1006 (2006).

306. The view that judges should be guided by public perceptions may further conflict with the central tenet of American constitutionalism that the best understanding of the principles set forth in the Constitution ought to trump the public’s latest desires, no matter how strongly they are expressed short of formal revision. There is no conflict if public preferences help judges to identify the “best” understanding of the Constitution, *cf. supra* note 129 (distinguishing epistemic rationale for consulting public opinion from majoritarian review), or if the best understanding itself depends upon popular acceptance or approval.

championed this vision with the express aim of expanding rights and liberties beyond the federal floor.³⁰⁷

By shrinking the space for independent judgment, judicial elections and majoritarian review are also liable to shrink the temporal horizons of constitutional law. Every government faces a question of how to allocate political control over time, and every constitutional democracy experiences a tension between the goals of “representatives of the actual people of the here and now”³⁰⁸ and constitutional limitations of any sort. Judicial elections can deprive government of the one branch that is backward looking in its focus on the work of prior courts and lawmakers, instead of the will of present voters, and that is nonmajoritarian in its composition and role orientation. In so doing, they can alter the balance of intergenerational control and mixed representation in ways that retard rather than foster a people’s capacity to realize collective self-rule.

This cursory tour of alternative theoretical perspectives is hardly a decisive rejoinder to the popular constitutionalist case for electing judges: An enormous amount of fine-grained work would need to be done to map the competing models of constitutionalism, democracy, and judicial review onto the competing models of judicial selection and retention. But it suffices to show that, by aligning the decisionmaking norms

307. The classic work is William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). See also Paul W. Kahn, *Two Communities: Professional and Political*, 24 Rutgers L.J. 957, 968–69 (1993) (discussing Justice Brennan’s “political agenda for the state courts—they are to be a counterforce to the increasingly conservative federal courts”—and contrasting it with movement for more vigorous state constitutionalism on grounds of state sovereignty); Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 Vt. L. Rev. 13, 34–35 (1988) (similar).

In response to the argument in the main text, it might be objected that because the Supremacy Clause, U.S. Const. art. VI, cl. 2, commits all courts to follow the federal Constitution, state judges are bound to be at least as protective of individual and minority rights as Article III judges. Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 627–31 (2004). Furthermore, the federal courts can devote special scrutiny to potentially compromised decisions by elected state courts. See Pozen, *Irony of Elections*, *supra* note 8, at 329 (flagging this possibility); see also Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719 *passim* (2010) (developing this idea). It is true that the federal floor protects all Americans from certain forms of state abuse, and that the federal courts, particularly the Supreme Court, can police their state counterparts on certain issues. Yet these rebuttals would hardly satisfy a liberal like Justice Brennan, given that the guarantees in the Bill of Rights cover only a minimal slate of basic rights, Supreme Court doctrine elaborating these rights often leaves great discretion to state judges, Supreme Court review of any given state court ruling is discretionary and exceedingly rare, and state constitutions cover far more substantive ground than the federal Constitution. More generally, if one takes seriously the idea that state constitutions provide independent sources of fundamental rights and values in our federalist system, as this Article does, then it will never be a sufficient response to an argument about their systematic misapplication that the federal courts can pick up the slack.

308. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 17 (2d ed. 1986).

of the courts more closely with those of the legislature, popular methods of judicial review can frustrate some of the distinct democratic benefits that the former have, in countless formulations, been thought to provide. A jurisprudence that privileges contemporary sentiment may be at odds with thicker conceptions of democracy that encompass ideals of political equality, liberty, and universality as essential components of self-government. Corrupted forms of judicial populism, in which judges privilege the views of powerful interests rather than the community as a whole, deviate even further from these ideals. Nonmajoritarian review may well disserve democracy in some systematic respects; it depends upon what the courts do and upon one's understanding of democracy. This section has simply pointed out that there is no need to venerate judges, mistrust the masses, or adopt an esoteric account of democratic legitimacy to believe that majoritarian review can do so too.

Perhaps some supporters of popular constitutionalism really do subscribe to an ideal of constitutional democracy that seeks to maximize popular influence over every significant decision of state, equates democracy with elections, or lacks any notion of higher-order law. Absent some such premise, it is a fallacy to think that making the structure of each part of government more democratic, invariably makes the government as a whole more democratic.³⁰⁹ Even if one believes that majoritarian decisionmaking procedures are uniquely fair or uniquely supportive of political equality, it does not follow that every institution of government ought to be selected by them or aim to reproduce them.

4. *Much Ado About Nothing?* — But enough abstract theorizing about democracy and majoritarian review. In how many constitutional cases is judicial selection method actually likely to make a difference, and to what extent? The normative concerns outlined above generally presuppose that the choice to elect judges (and, thereby, to authorize majoritarian review) will be a consequential one, affecting numerous persons and decisions. Relax this assumption, and one might challenge the interpretive case for electing judges from a very different angle.

Recall how we got here. Previous sections of this Article sought to establish the viability of majoritarian review as a method of constitutional interpretation: Before it could assess whether judges ought to rely on public preferences in deciding constitutional issues, the Article had to show that, at least in some situations, the public can have meaningful, discernible preferences, and that judges can incorporate those preferences into their decisionmaking without transgressing basic norms of the judicial role.³¹⁰ In responding to all of these threshold objections to majoritarian review, the Article progressively narrowed the space for its

309. Cf. Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 *Harv. L. Rev.* 4, 37–39 (2009) (discussing obverse form of this “fallacy of composition,” as it manifests in countermajoritarian critiques of U.S. Supreme Court).

310. See *supra* Parts II.C.2–3, III.B, III.E.2.

application to situations in which the community appears to hold a firm view on an underdetermined constitutional question.

Such situations, however, may be few and far between. If we accept that a popular constitutional jurisprudence only becomes viable, practically and normatively, when public opinion reaches a high degree of intensity and unanimity, the judicial selection question becomes less pressing. For it seems fair to assume that virtually all judges, no matter what modes of formal discipline they face, will feel compelled to heed *that kind* of public opinion. It is unclear whether the most plausible variant of majoritarian review—the belief that “attention to public consensus,” or near-consensus, “in constitutional decisionmaking would show respect for democracy . . . and enhance public identification with the regime”³¹¹—supports any significant preference for choosing judges by popular election. One would have to show that unelected judges have a greater likelihood or ability to defy such consensus.

We thus confront a tension in the interpretive case for electing judges. Narrowing the space for majoritarian review, by placing strict conditions on the types of public opinion that can be consulted, opens up horizons for reconciling it with more traditional conceptions of constitutional reasoning and judicial duty—and hence for reconciling popular constitutionalism’s “competing commitments to the rule of law and to self-governance.”³¹² Yet it also threatens to trivialize the theory’s jurisprudential aims. And it bolsters the argument that judicial elections are overinclusive in the pursuit of those aims, that they popularize too many areas of law too indiscriminately.³¹³

5. *Backlash and Constitutional Change*. — But still, isn’t there a clear democratic benefit from the fact that elective judiciaries are more likely to avoid the kind of extreme backlash we have seen at the federal level in response to a few cases, such as *Roe v. Wade*?³¹⁴ Once again, it depends upon one’s conception of democracy, as well as the dynamics of backlash. Further distancing themselves from the robust normative strains of popular constitutionalism, Robert Post and Reva Siegel suggested several years ago that it is not necessarily a bad thing, democratically speaking, for courts to occasionally eschew minimalism and render decisions that risk generating outrage.³¹⁵ The presence of backlash indicates that a segment of the population feels deeply aggrieved, it can be disruptive and inefficient, and it can come over time to undermine the very goals that inspired the contested ruling. Yet backlash can also sharpen constitutional questions, catalyze political engagement, and ultimately invigorate

311. Richard Primus, *Public Consensus as Constitutional Authority*, 78 *Geo. Wash. L. Rev.* 1207, 1220 (2010). In Primus’s view, public opinion may legitimately be consulted only when it “approach[es] consensus.” *Id.* at 1209, 1222.

312. Post & Siegel, *Roe Rage*, *supra* note 7, at 375.

313. See *supra* Part III.D.1 (presenting overinclusiveness critique).

314. 410 U.S. 113 (1973).

315. See generally Post & Siegel, *Roe Rage*, *supra* note 7.

the popular responsiveness of constitutional law.³¹⁶ Sometimes, moreover, backlash may be an unavoidable “consequence of vindicating constitutional rights.”³¹⁷ Think of *Brown v. Board of Education*.³¹⁸

Elected judges, however, will generally seek to avoid backlash at all costs. Any segment of the population angry enough about a judicial decision to protest it represents a serious threat to the judge’s reelection bid. Especially in low information election environments, the safest strategy for an incumbent, absent a clear and widely held communal desire to move the law in some particular direction, will be to preserve the legal status quo. According to a group of state judges who met recently with Judge Posner, “[t]he goal, if you are standing for reelection, is to avoid scrutiny. The goal in getting elected is to avoid negative attention, to be invisible.”³¹⁹ A judge’s best hope for achieving invisibility: Aim whenever feasible to uphold laws and regulations, to skirt difficult issues, and to conceal controversial judgments behind a cloak of legalisms. So long as Americans continue to be skeptical of judicial innovation and to favor incumbents, majoritarian review is likely to remain a relatively conservative, and opaque, social practice.

Consider once more the same-sex marriage example. It is a remarkable feature of the evolving constitutional jurisprudence on this subject that all four of the state high courts that have found a right to same-sex marriage (Massachusetts,³²⁰ California,³²¹ Connecticut,³²² and Iowa,³²³ in chronological order), plus all three of the high courts to issue sympathetic rulings covering much of the same ground (Hawaii,³²⁴ Vermont,³²⁵ and New Jersey³²⁶), were courts selected by gubernatorial appointment or by merit selection.³²⁷ It is a remarkable testament to constitutional theory’s aloofness from judicial selection that hardly anyone has noted this yet.³²⁸ Each of these opinions provoked significant forms of back-

316. Id. at 388–406.

317. Id. at 390, 395.

318. 347 U.S. 483 (1954).

319. A Conversation with Judge Richard A. Posner, 58 Duke L.J. 1807, 1822 (2009); see also Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. Pol. 1117, 1117–19 (1987) (finding that elected judges are less likely to publish dissents on politically volatile issues).

320. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

321. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

322. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

323. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

324. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

325. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

326. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

327. Am. Judicature Soc’y, *supra* note 61, at 4–10. This is not to say that all nonelective high courts have endorsed same-sex marriage rights. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

328. To my knowledge, Neal Devins is the only legal scholar to have drawn this connection. See Devins, *State Constitutionalism*, *supra* note 65, at 1676 (“The most salient characteristic shared by all seven courts [that have interpreted their constitutions to provide expansive protections for same-sex couples] is their retention schemes. None of

lash, at the national as well as state level. Yet several of them also appear to have solidified support for same-sex marriage within the jurisdiction.

In Massachusetts, where justices are appointed by the governor and hold office until age seventy, legislative efforts to recognize same-sex marriage had gone nowhere for many years, and seemed to have no immediate prospects, prior to the landmark *Goodridge* decision.³²⁹ Nevertheless, polls taken just days after the opinion came down showed that a full half of the state's residents supported the court's decision,³³⁰ and its logic now seems solidly entrenched. *Goodridge* transformed the political culture. "[O]nce *Goodridge's* dust had settled," researchers have consistently found, "the state's elected institutions were significantly more supportive of [same-sex marriage] than they had been at the outset."³³¹ Decisions such as *Goodridge* have also emboldened some politicians from other states to endorse same-sex marriage, not through any binding legal force but through their reasoning, their mainstreaming effect, and their persuasive authority.³³² There is currently a debate raging among same-sex marriage supporters over whether the backlash occasioned by these decisions threatens to overwhelm any short-term gains.³³³ Wherever one comes out on this debate, it is by no means clear that the courts that have taken the lead on the issue have disserved democracy, and to the contrary that argument may look increasingly formalistic—and hence increasingly at odds with the popular constitutionalist sensibility—in light of the mass mobilization these rulings have inspired and the continued growth of the same-sex marriage movement.

the seven makes use of contested judicial elections.”). Devins's article provides a nuanced account of the same-sex marriage decisions and the lessons they hold for how and why state courts take backlash risks into account. *Id.* at 1675–91.

329. See Tonja Jacobi, *How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative Action, and Judicial Power*, 15 *J. Contemp. Legal Issues* 219, 223 (2006).

330. Frank Phillips & Rick Klein, *50% in Poll Back SJC Ruling on Gay Marriage*, *Bos. Globe*, Nov. 23, 2003, at A1.

331. Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 *Law & Soc'y Rev.* 151, 162 (2009); see also Jacobi, *supra* note 329, at 220–23 (finding no negative electoral repercussions for Massachusetts politicians who supported same-sex marriage following *Goodridge*).

332. See, e.g., Richard Just, *Maine and Judicial Activism*, *New Republic The Plank Blog* (May 8, 2009, 6:52 PM), at <http://tnr.com/blog/the-plank/maine-and-judicial-activism> (on file with the *Columbia Law Review*) (citing remarks by Governor of Maine for claim that “as judges across the country reinterpret equal protection clauses in light of our culture's changing understanding of homosexuality, they are not merely persuading themselves or their peers in other courts; they are also persuading those outside the judicial system”).

333. Compare, e.g., Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from *Brown v. Board of Education* and Its Aftermath*, 14 *Wm. & Mary Bill Rts. J.* 1493 (2006) (summarizing and criticizing backlash thesis as applied to same-sex marriage), with William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *Yale L.J.* 1279, 1324–27 (2005) (urging judicial caution in this area).

The rulings in favor of same-sex marriage by appointed and merit-selected high courts did not come out of nowhere. As scholars have documented at the federal level, judges continue to care about how their decisions are received even when they have life tenure, and judicial interpretations of open-ended constitutional guarantees are invariably shaped over time by changing social mores, grassroots movements, partisan trends, and countless other extrajudicial inputs.³³⁴ *Goodridge* likely never would have happened, would not have been possible, if the Massachusetts polling numbers in support of same-sex marriage had been in the single digits.

Yet, if the ability of any court to forge new constitutional understandings will always be heavily dependent on context, the first wave of pro-same-sex marriage rulings suggests a substantial difference between elected and unelected judges in their willingness to try. Elected judges generally lack the job security, the moral stature, and the professional self-conception to defy entrenched norms or strongly held preferences about constitutional meaning. The nonelective selection method of the courts in the first wave plainly was not a sufficient factor to account for their rulings. It may have been a necessary one.

We have now adduced one more reason why the existence of a politically insulated branch of government might ultimately lead to greater democratic legitimacy for constitutional law. At one level, Part II explained, the majoritarian review facilitated by an elective system makes the law more fluid. A concern for public opinion adds to the store of permissible interpretive materials, and it invites novel measures to elicit and enforce citizen preferences. Yet at another level, this Part has shown, majoritarian review can make the law more rigid, by preempting courts from issuing decisions ahead of the legal zeitgeist—decisions such as *Brown* and *Goodridge* that might have altered *future* public opinion, whether through their agenda setting effects, the force of their arguments, the real-life consequences they engender, the cover they give to politicians, or any number of other mechanisms. When pusillanimous judicial interpretations of the Constitution merely reproduce and reinforce prevailing beliefs, when judges aspire to “invisib[ility],”³³⁵ the complex dialectic of backlash never gets off the ground. The courts contribute nothing distinctive to the “discursive formation of popular will upon which democracy is based.”³³⁶

334. To take just one notable recent example, Reva Siegel has demonstrated that, notwithstanding the Supreme Court’s explicit focus on the original meaning of the Second Amendment in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), a dedicated movement of gun rights activists and partisan politicians helped lay the groundwork for that decision over many years. Reva B. Siegel, *The Supreme Court, 2007 Term—Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191, 201–45 (2008).

335. *Supra* text accompanying note 319.

336. Post & Siegel, *Popular Constitutionalism*, *supra* note 23, at 1036. The implicit reference here is to Habermas. See, e.g., Jürgen Habermas, *Between Facts and Norms* 304

Popular constitutionalists sometimes speak as if “the will of the people” has an ontic or teleological status, as if it exists in the ether (or an opinion poll) waiting to be vindicated or frustrated by judicial action. This suggestion is misleading on several levels. There is, of course, no such thing as “the will of the people” when it comes to constitutional interpretation. That notion may serve as a useful metaphor or shorthand, but no plausible theory of group intention supports it,³³⁷ and the majesty of its phrasing obscures the essentially majoritarian ideal that lies beneath. And as the recent history of backlash suggests, judicial rulings can do more than consolidate, at the back end, constitutional norms that have arisen outside of the courts. They can also catalyze, at the front end, a dialogic process of constitutional construction that unfolds over many iterations. The time and effort it takes to reach an accommodation between judicial and extrajudicial interpreters may be quite costly. But the accommodation process can yield deliberative, participatory, and substantive dividends: It helps “separat[e] out the considered ‘constitutional’ views of the American people from passing fancy.”³³⁸

The countermajoritarian difficulty, in other words, may solve itself through the antagonism it breeds between “undemocratic” judges and democratic movements that, over time, produce new judges and new understandings of the Constitution. Elective systems, however, invite not antagonism but identification, not conflict but conciliation.³³⁹ In so doing, they are liable to reduce not only judicial creativity and courage but also the public’s felt need to invest in extrajudicial mechanisms of constitutional control.

These arguments cannot prove that judicially inspired backlash is likely to be a net positive for popular constitutionalism, just that it is not an unmitigated harm. Some popular constitutionalists may not assign much weight to the potential communicative benefits of controversial decisions, relative to their immediate costs. The arguments do, however, severely undercut the vision outlined in Part II of judicial elections as agents of a more dynamic and experimental model of constitutional change.³⁴⁰ In the short term, a backlash-less jurisprudence might seem to mark a democratic triumph, as there will be fewer decisions that roil a significant portion of “the actual people of the here and now.”³⁴¹ Yet if we take the diachronic view and conceptualize a people through time, as the Constitution invites us to, this triumph begins to look more hollow. A

(William Rehg trans., MIT Press 1996) (1992) (“Deliberative politics acquires its legitimating force from the discursive structure of opinion- and will-formation that can fulfill its socially integrative function only because citizens expect its results to have a reasonable quality.”).

337. Lawrence B. Solum, Narrative, Normativity, and Causation, 2010 Mich. St. L. Rev. (forthcoming) (book review) (manuscript at 17) (on file with the *Columbia Law Review*).

338. Friedman, Will of the People, *supra* note 20, at 383.

339. See *supra* Part III.D.3.

340. See *supra* Part II.B.3.

341. Bickel, *supra* note 308, at 17.

system that ties judges too closely to public opinion can usurp the achievements of previous generations by channeling constitutional interpretation toward contemporary understandings of the provisions they enacted. It can usurp the achievements of future generations by foreclosing judicial innovations that might have helped generate, consolidate, and legitimize new understandings of the Constitution. It leaves us in a majoritarian circle.

CONCLUSION

This Article responds to Larry Kramer's call to consider "what kind of institutions we can construct to make popular constitutionalism work."³⁴² Among the many possibilities, it has shown, elective judiciaries offer a potent option. What's more, they are already in widespread use; they are politically viable, distinctively American, and richly deserving of study. In applying the theory of popular constitutionalism to the question of judicial selection, the Article has also tried to cast light back on the theory. Attending to the issue of judicial selection, it has shown, can illuminate questions regarding popular constitutionalism's implications for jurisprudence, its deliberative and participatory preconditions, its commitment to majoritarian rule as distinct from democratic rule, its willingness to trade off potential constitutional benefits for potential extraconstitutional harms, its relationship to federalism, and its perspective on alternative devices such as ballot initiatives, legislative overrides, and juries.

At the same time that it provides an important new framework and vocabulary with which to defend elective judiciaries, the Article has argued, popular constitutionalism also points the way toward an original critique. For in the service of aligning judges more closely with "the people," judicial elections do more than threaten collateral damage to values such as legality and equality: They threaten to undermine the democratic aspirations of popular constitutionalism itself. The relationship between popular constitutionalism, popular sovereignty, and judicial supremacy is significantly more fraught than the former's exponents have tended to acknowledge. Popular constitutionalists need not demand the election of every branch of government. And critics of elective judiciaries need not cede the democratic high ground.

The import of these conclusions transcends the states. Although this study has adopted the premise that state constitutions are constitutions, that they are legal charters of great intrinsic as well as practical significance in a federated polity, one need not accept this view to care about its implications for constitutional law. Constitutional theory has been obsessed for the past half-century with the countermajoritarian difficulty,³⁴³

342. Kramer, Response, *supra* note 6, at 1182.

343. See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, Part Five, 112 *Yale L.J.* 153 (2002); Barry Friedman,

the ostensible democratic problem that arises when appointed, life-tenured judges contravene the will of the people's representatives. Popular constitutionalism's critique of judicial supremacy can be seen as an especially acute statement of these old concerns. What happens when the judges are *themselves* the people's representatives?

Constitutional scholars have not wrestled with this question, presumably because they take it for granted that federal judges will always be selected the same way. They should not be content to rely on this assumption. Even if, as a practical reality, it is inconceivable that the federal courts will move to an elective model in the foreseeable future, constitutional revision remains possible in America. If the current system really does imperil popular sovereignty or other important values, we should be thinking about how to change it. More generally, we should bear in mind that the appointive, life-tenured structure of the federal judiciary is a contingent feature. Destabilizing our conception of the courts can help us to think more clearly about what we want from them.

Popular constitutionalism teaches us to mistrust judicial supremacy and to think critically about the rigidity of formal constitutional change, in light of the nation's fundamental commitment to government of, by, and for the people. Historical experience at the state level teaches us that many Americans prefer to select judges through competitive elections, if given a choice. It is tempting to construct from these sources a new argument for elective judiciaries; this Article has shown how that might be done. Yet, while there may be numerous reforms to the federal courts that could help democratize American constitutionalism without degrading the judicial function, the analysis here ultimately suggests why popularizing their selection and retention method is not likely to be among them. At least in this one respect, we may be grateful that it is so very difficult to amend the Constitution.