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This Article considers whether differences in methods of judicial selection should influence how judges approach statutory interpretation. Courts and scholars have not given this question much sustained attention, but most would probably embrace the "unified model," according to which appointed judges (such as federal judges) and elected judges (such as many state judges) are supposed to approach statutory text in identical ways. There is much to be said for the unified model—and we offer the first systematic defense of it. But the Article also attempts to make the best case for the more controversial but also plausible contrary view: that elected judges and appointed judges should actually interpret statutes differently. We explain and defend that view and explore some of its implications and limits. We identify categories of cases in which the argument for interpretive divergence is at its strongest. We also show how the possibility of interpretive divergence might illuminate several specific doctrinal problems related to judicial federalism and judicial review of agency action.

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INTRODUCTION

The study of statutory interpretation focuses overwhelmingly on federal courts, in particular the US Supreme Court. But most judges are not federal judges, let alone Supreme Court Justices. The vast majority of the judges in this country are state judges, and most of those state judges have to do something that federal judges never

have to do: face the voters in order to keep their jobs.[1] Should this difference in modes of judicial selection influence the enterprise of statutory interpretation? Should elected judges read statutes differently than federal judges read statutes?

When scholars and jurists directly address these questions—which is seldom[2]—the leading view seems to be that statutory interpretation should not differ according to the kind of judge doing the interpreting. For instance, a recent essay by Professor Todd Rakoff raises, but seemingly rejects, the possibility that elections should affect interpretive methodology. Professor Rakoff observes that much thinking on statutory interpretation is based on the factual predicate that "the statute is passed by a legislature that is democratically elected, and it is interpreted by a court that is not."[3] That is, the unelected character of the interpreting judge is, on many accounts of statutory interpretation, said to be of critical significance. Yet if the unelected nature of the judge were really so important, Professor Rakoff points out, "then we [would] need two completely separate theories of statutory interpretation: one for jurisdictions where judges are elected, and one for where they are not."[4] And yet, he continues, "no one . . . actually carries the proposition to this logical conclusion."[5] This failure to follow the logic of interpretive divergence convinces Professor Rakoff that the electoral status of a judge is not important after all.[6]

Our aim in this Article is to see what would happen if one took seriously the line of reasoning that links judicial selection to interpretive methodology in statutory cases. It may well be that statutory

1 About 90 percent of the judges on state appellate courts and trial courts of general jurisdiction face the voters in some form of election. See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Georgetown L J 1077, 1105 (2007).

2 As Professor David Pozen has recently observed in the context of constitutional decision making, the question of "whether a judge's selection method ought to have any bearing on how he or she decides cases" has "received little scholarly treatment" and is "surprisingly undertheorized." David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum L Rev 2047, 2052, 2083 (2010).

3 Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 Nw U L Rev 1559, 1571 (2010), citing Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 22 (Princeton 1997).

4 Rakoff, 104 Nw U L Rev at 1571 (cited in note 3).

5 Id at 1571–72. Although we believe ours to be the first systematic treatment of the subject of electorally driven divergence in statutory interpretation, we are aware of several instances in which the subject has been noted in passing without sustained analysis. See, for example, William N. Eskridge Jr, Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 739–40 (West 4th ed 2007); Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 Ga L Rev 469, 502–03 (2006).

6 See Rakoff, 104 Nw U L Rev at 1571–72 (cited in note 3).

interpretation is an activity that should be homogenous across courts. And yet the possibility that interpretation by elected judges should take a distinctive form should not be dismissed. Writing in other contexts, some commentators have in fact argued that elected judges should act differently than their unelected counterparts, in particular that elected judges can properly employ looser justiciability doctrines[7] and engage in more unapologetic constitutional judicial review.[8] Most recently, Professor David Pozen has discussed and critiqued the case for "majoritarian judicial review," in which elected judges act as conduits for implementing the public's views of constitutional meaning.[9] Some theorists of *constitutional* decision making thus appear to take seriously the possibility of interpretive divergence, but most scholars of statutory interpretation seem curiously content with (or just unaware that they have adopted) the view that elections are irrelevant.

Yet, statutory interpretation is a particularly interesting field in which to see how the logic of judicial elections plays out. Although judges are public officials and ultimately owe their allegiance to the people, the judicial role—in particular the judge's orientation toward the legislature—arguably varies depending on the type of case the judge is deciding. In constitutional cases, the judge stands opposed to the legislature, ever ready to strike down legislative attempts to

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7 See, for example, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv L Rev 1833, 1882–98 (2001); Hans A. Linde, *The State and the Federal Courts in Governance:* Vive la Différence*!*, 46 Wm & Mary L Rev 1273, 1281–87 (2005). Linde's position is hard to summarize easily because although he specifies many important differences in how state and federal judges do and should work, he also clearly claims to "reject the thoughtless notion that a judge on an elective court should approach a legal issue differently from an appointed colleague in a neighboring state." Id at 1286. Although that passage is not explicitly addressed to statutory interpretation, it does seem to commit him to the view that elections ultimately should not matter in that domain.

8 See, for example, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv L Rev 1131, 1137, 1157–59 (1999) (observing that judicial elections may reduce the need for deferential standards of review); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 Rutgers L J 881, 899–900 (1989) (arguing that democratic elections allow state judges more leeway in exercising powers of judicial review); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 Wash L Rev 19, 20 (1989) ("On the state level, the debate about the proper scope of judicial review must alter because, unlike the federal courts, state courts typically are democratically accountable."). See also Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from* The Federalist Papers, 61 S Cal L Rev 1669, 1669, 1689 (1988) (describing the view that electoral accountability and interpretive theories can act as substitutes, such that greater accountability licenses more aggressive constitutional decision making); Robert F. Williams, *The Law of American State Constitutions* 299, 313–56 (Oxford 2009) (describing ways in which state constitutional interpretation does and should differ from the federal model).

9 Pozen, 110 Colum L Rev at 2079–83, 2113–33 (cited in note 2).

overstep the limitations the people set down in their governing charter.[10] The relationship is not so confrontational in the realm of the common law, though there the judge is still understood to act as a rightfully independent actor. Things are quite different in statutory interpretation, however, for here the traditional understanding of the judicial role is that the judge is to act as the "faithful agent" of the legislature.[11] Much of the reason for this subordinate judicial role, on the standard view, is that the legislature and not the judiciary is the people's elected policy-making body. The judges stand a step removed from the people in statutory cases, with the legislature mediating the relationship. And yet when the judge is popularly elected and has a direct link to the people, the logic of legislative supremacy and judicial subordination comes under strain. Or at least that is one line of argument we will explore. In short, although there are some respects in which the judicial role is similar across all types of cases—and thus our discussion should hold interest for scholars of public law generally—statutory interpretation has its own unique features and therefore merits its own dedicated treatment.

Developing a satisfactory account of the interpretive duties and opportunities of elected judges is becoming increasingly pressing given developments in state judicial elections. The days when judicial elections were nonevents are, according to many commentators, giving way to a world that is characterized by sharply contested elections and intense public involvement.[12] If judicial elections are becoming more genuinely meaningful, does that give a winning judge a mandate that an appointed judge lacks? If voters are willing and able to throw judges out of office based on their decisions, should elected judges incorporate public opinion into their decisions in a way that life-tenured federal judges should not—and not just as a matter of prudential self-preservation but also because doing so is the best way to honor the logic of having the election in the first place? Or does the logic of election mean something quite different: that the elected judge should not see herself as an *agent* of the people who elected her but rather as a very liberated *trustee*, who may use her interpretive freedom to lead the people? After all, if the judge extends

10 See note 57 (discussing the judicial role in constitutional cases).

11 See Parts I.A.3 and II.A.3 (describing the faithful-agent account).

12 Divining the nature of judicial elections—whether they create genuine accountability, whether the voters' decisions convey any real meaning—is a crucial part of formulating the normative case for the significance or insignificance of judicial elections. It may be that at least some judicial elections are becoming more like legislative elections, but this is a complicated issue that we will address at some length in Parts I.B and II.B.1.

herself too far outside the comfort zone of the people she serves, she may be removed at the next election.

Because the interplay between judicial elections and statutory interpretation remains largely uncharted terrain, this Article begins by constructing the best cases for and against the proposition that elections should influence interpretive method in statutory cases. Part I presents the argument for the "unified model," the view that elections should not have any systematic effect on methods of statutory interpretation. The case for unified interpretation draws on several theoretical considerations, such as the nature of the judicial role and the demands of the rule of law, but it also relies heavily on more empirical and practical concerns about judicial elections. One of the points we emphasize in Part I—and indeed the point is so important that it bears stating here—is that it is not especially useful to speak of "judicial elections" as a general phenomenon. There are several distinct mechanisms of judicial accountability that involve some sort of election.[13] Some state judges are elected in much the same way as legislators, namely through frequent partisan elections. Other judges are initially appointed and then face the voters in infrequent retention elections that feature no competing candidate; the voters simply vote up or down on whether to keep the incumbent. Still other judges face competitors but do so in elections without party labels, which might decrease voter interest and understanding. Even elections that are similar in terms of formal mechanisms can vary widely in their practical significance. In short, there are elections and then there are elections, and they might not have much in common apart from the name.[14] As we explain, it may be that only rarely would a judicial election confer much in the way of a democratic pedigree that would distinguish the elected judge from an unelected judge.

Switching sides, Part II then presents the case for an interpretive regime in which elected and unelected judges could diverge somewhat in their interpretive methods. The case for divergence builds on the idea that interpretation is an institution-specific activity. Just as the best style of interpretation for administrative agencies might

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13 See American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* *3–11 (2011), online at http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf (visited Nov 20, 2012) (providing an overview of state judicial selection methods).

14 That is, we reject a "unilocular" view of elections, even within the subcategory of judicial elections. See *Republican Party of Minnesota v White*, 536 US 765, 805 (2002) (Ginsburg dissenting) (criticizing the majority for taking a "unilocular, 'an election is an election' approach").

depart from judicial norms,[15] so too might different types of courts diverge. Modes of selection represent, of course, just one dimension along which various courts differ: they also vary in the resources at their disposal, their place in the appellate hierarchy, and the broader institutional contexts in which they are embedded—all of which might bear on proper interpretive method.[16] Nonetheless, electoral status is a particularly salient variable, and it is our focus here. We emphasize that electorally driven interpretive divergence need not take one unique form. Part II thus presents not so much a single case for a particular brand of divergence but rather a collection of arguments that offer varying support for distinct kinds of divergences. Some versions of divergence emphasize elected judges' duty to attend to public opinion, while others contemplate that elected judges may enjoy a degree of interpretive freedom we might find democratically problematic for entrenched and unaccountable federal judges.[17] That it is not immediately obvious what form divergence should take (assuming it should exist at all) may go some way toward explaining why it has not gained more adherents.

Parts I and II implicate deeply contentious issues surrounding the nature of statutory interpretation and the proper role of courts in a democracy, as well as disputed empirical questions about judicial elections. We do not purport to settle these matters definitively in this first systematic treatment of the subject. Nonetheless, having set out the contending positions, in Part III we attempt to present some implications and applications of the analysis. Although we do not think that electorally driven divergence should be pervasive—not all electoral systems will justify it, and not all cases will allow room for it to operate—there are some situations in which it is a reasonably compelling normative position. Part III identifies some categories of cases in which the argument for divergence is at its strongest, such as cases involving stale statutes, special-interest legislation, and

15 See Part II.A.6 (discussing the view that agency interpretation should differ from judicial interpretation).

16 In previous work, one of us has argued that a court's location in the appellate hierarchy should affect methodology. See Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 Cornell L Rev 433, 458 (2012). In a similar vein, Professor Jeffrey Pojanowski considers whether a court's possession of general common law powers should influence its approach to statutory interpretation. See Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 Tex L Rev *2 (forthcoming 2013), online at http://ssrn.com/abstract=2023527 (visited Nov 20, 2012).

17 Still another form of divergence would have elected judges hew especially closely to the text in order to avoid charges of "activism." We thank Professor Abbe Gluck for urging us to consider this possibility. The various forms that divergence might take are explored in more detail in Parts II and III.B.

minority rights. Part III also shows how the analysis might illuminate several specific doctrinal problems related to judicial federalism and judicial review of agency action.

Finally, before proceeding with the analysis, a caveat is in order: This Article is not about whether electing judges is a good idea.[18] Whether or not elections are desirable, they are unlikely to go away anytime soon. Thus we need a normative account of how elected judges should judge, including in statutory interpretation cases, and that account should take seriously the possibility that the internal logic of judicial elections justifies or requires methodologies that depart from prevailing federal norms. However, for reasons we are about to explore, those readers who are strongly opposed to judicial elections of all kinds may find the argument for unified interpretation congenial precisely because it tends to minimize the significance of the institutional arrangement they reject.

I. THE CASE FOR UNIFIED STATUTORY INTERPRETATION

To the limited extent that scholars have given any focused thought to the question whether elected judges ought to interpret statutes just like their appointed colleagues, the leading view is probably the unified approach, the view that modes of selection are normatively irrelevant.[19] And that normative intuition finds tentative support in existing judicial practice: although there are some variations in method from state to state, the judges themselves do not seem to regard their electoral status as an important determinant of their interpretive approach.[20] Although few make the argument for

18 That question is the subject of significant public debate and a voluminous literature. See, for example, American Bar Association, Commission on the 21st Century Judiciary, *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary* 70 (American Bar Association 2003) (recommending reforms to state judicial selection processes); Chris W. Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections* 1–4 (Routledge 2009); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 Ohio St L J 43, 58–72 (2003) (arguing that judicial elections undermine independence while failing to ensure accountability). Since her retirement from the Supreme Court, Justice Sandra Day O'Connor has become a leading critic of judicial elections. See Sandra Day O'Connor, *Take Justice Off the Ballot*, NY Times A9 (May 23, 2010) (supporting a merit selection system instead of partisan elections or lifetime appointments).

19 See notes 2–6 and accompanying text.

20 Given the large number of courts and cases, the tendency of methods to shift over time, and the fact that assessments of judicial method are somewhat subjective, it is very hard to make confident generalizations about judicial interpretive practices. In her recent study of interpretive approaches in several states, Professor Gluck found some evidence of convergence on a form of "modified textualism" but also found some differences across states. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L J 1750, 1772, 1812–14, 1858–61 (2010). Yet even

such a unified approach beyond several sentences or a footnote, it is worth specifying why this intuition has eclipsed potentially more nuanced arguments for tailoring statutory interpretation methodology to varying modes of judicial selection.[21]

The case for the unified approach has three main elements: (A) a collection of distinct but mutually reinforcing arguments based on the nature of the judicial role, (B) an argument based on the limited capacity of judicial elections to confer meaningful forms of accountability, and (C) an argument based on the practical difficulty of translating election results into interpretive inputs. Although we will show in Parts II and III that these arguments are probably not dispositive—or at least they are not dispositive in all cases—they help make sense of the strong appeal of the unified approach.

A. Arguments from the Judicial Role in Statutory Interpretation

Supporters of unified interpretation need not all agree upon any one particular theory of statutory interpretation. Indeed, a number of otherwise quite disparate approaches to statutory interpretation seem designed not to allow for any possibility that the judicial role could differ between elected and appointed judges. Consider, for example, the view that judges should maximize wealth in society when they interpret statutes;[22] the view that judges should generally pursue

where there are differences, the judges themselves do not seem to believe that their electoral status or other state-specific factors should drive divergence. See id at 1789–1800, 1804, 1860–61 (noting that some state court opinions cite textualist opinions from the US Supreme Court for propositions about statutory interpretation). See also Abner J. Mikva and Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* 3–4 (Aspen 1997) ("[A]pproaches to statutory interpretation are not divisible into 'state' and 'federal.' Differences in interpretive approaches are the product of individual judicial sensibilities and not, for the most part, particular jurisdictions.").

21 In previous work, each of us has started to make the case for more nuanced approaches to statutory interpretation that vary based on the *type* of statute being interpreted and *which court* is doing the interpreting. For examples of the former, see Ethan J. Leib and Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 Yale L J Online 47, 53–57 (2010), online at http://yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/the-costs-of-consensus-in-statutory-construction (visited Nov 20, 2012) (suggesting that different interpretative methods should be used for criminal statutes than are used for common law statutes); Ethan J. Leib, *Interpreting Statutes Passed through Referendums*, 7 Election L J 49, 61 (2008) (concluding that courts should use different methods for interpreting referendums than are used for interpreting initiatives). For an example of the latter, see Bruhl, 97 Cornell L Rev at 458 (cited in note 16) (arguing that a court's position in the appellate hierarchy should affect how it interprets statutes).

22 This view might be attributed to a crude version of law and economics. Professor Thomas Merrill calls the basic idea "welfarist." Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 Lewis & Clark L Rev 1565, 1572–74 (2010). Judge Richard Posner, a leading figure in both statutory interpretation and law and economics, holds a considerably more sophisticated view. As he explains, a pragmatist judge concerned with bringing about

the public good because they represent "the people" in a democracy;[23] the view that judges should use the best account of political morality in deciding among plausible statutory meanings;[24] the view that interpretation is an empirical exercise in recovering historical facts about word meanings or authorial intentions;[25] the view that judges must be modest because they are less institutionally competent to develop law than other actors within the legal system because of their limited task of adjudicating specific cases;[26] and the view that the very nature of a legal order with written laws requires judges to be modest textualists of one form or another.[27] This is not an exhaustive inventory of the theories of statutory interpretation, of course, but each seems to lack a simple way to accommodate differences between elected and appointed judges because the theories tend to rely on conceptions of the judicial role that apply equally to all types of judges. Thus, despite long-standing disagreement regarding the proper judicial role in statutory interpretation, people holding quite different views can find common ground in the proposition that elections should not matter. The following Subsections explore a series of considerations—rooted in values ranging from formalism to

good consequences might embrace a degree of formalism in statutory interpretation. See Richard A. Posner, *How Judges Think* 13, 80 (Harvard 2008).

23 See, for example, Ethan J. Leib, David L. Ponet, and Michael Serota, *A Fiduciary Theory of Judging*, 101 Cal L Rev *15 (forthcoming 2013), online at http://ssrn.com/abstract=2029001 (visited Nov 20, 2012) (describing judges as having fiduciary duties to the public). The "fiduciary theory of judging" actually leaves room for interpretive divergence—but the thesis is that both elected and appointed judges share a basic role and function within democratic systems. See id at *27.

24 See, for example, Ronald Dworkin, *A Matter of Principle* 328–29 (Harvard 1985). This is an oversimplification of Dworkin's view, to be sure, since the resort to political morality for Dworkin is permissible only when more traditional tools of statutory interpretation fail the judge. See id.

25 Professor Larry Solum defines interpretation along these lines. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const Commen 95, 98–101 (2010). But, importantly, he distinguishes the empirical-linguistic activity of "interpretation" from the subsequent task of "construction," which is the normative activity of giving operational legal meaning to texts. Id at 103–04. It seems that one could deny that electoral status should affect interpretation but allow that it should affect construction. In that case, the significance of electoral status would depend on how strongly one believes linguistic meaning contributes to and constrains legal meaning.

26 See, for example, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv L Rev 353, 392, 394–404 (1978); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U Chi L Rev 883, 906–11 (2006).

27 See, for example, Scalia, *A Matter of Interpretation* at 17 (cited in note 3). But see John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum L Rev 1, 58–70 (2001) (arguing that specific features of the *federal* Constitution lead to textualism's correctness, which leaves open the possibility that different state constitutions could lead to a different method of statutory interpretation for state judiciaries).

pragmatism to institutional competence—and explain how they converge on a unified approach to statutory interpretation.

1. Formalism and "separation-of-powers essentialism."

On the standard account of the judicial role, judges may exercise only formally "judicial" powers, not legislative or executive powers. This role-differentiated division of labor derives, of course, from constitutional text. Article III of the US Constitution confers upon federal judges the "judicial Power" of the United States—and not the "legislative Power[]," which is granted to Congress, or the "executive Power," which is vested in the President.[28] Those textual strictures do not apply to state governments, but states have their own constitutions that divide powers in similar ways. Indeed, in some states the separation-of-powers language is even more "essentialist," expressly forbidding one branch from exercising power conferred upon another.[29] The judicial power is, conventionally, the authority "to say what the law is."[30] In the statutory interpretation context, that involves determining what the words of a statute mean within the fabric of the law.[31] This constrained notion of the judicial role also finds support in extratextual sources such as comparative institutional analysis: the legislative body has competencies and resources that support better lawmaking, while judicial bodies have expertise and education that facilitate better legal analysis and applications of rules to individual cases.[32]

The formalist emphasizes that what is usually referred to as the "judicial *power*" is actually equally a judicial *duty*. The judicial duty, on this view, is "to decide [cases] in accord with the law of the land."[33] Such a duty, importantly, is inherent in the *office*, irrespective

28 US Const Art III, § 1; US Const Art I, § 1; US Const Art II, § 1.

29 See, for example, Cal Const Art 3, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."); Tex Const Art 2, § 1 ("[N]o person, or collection of persons, being of one of these [legislative, executive, or judicial] departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."). But see Part II.A.1 (suggesting that state constitutions might contemplate a more capacious notion of judicial power).

30 *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

31 See *West Virginia University Hospitals, Inc v Casey*, 499 US 83, 100–01 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.").

32 See note 26 and accompanying text (noting limitations on judicial lawmaking stemming from the nature of case-by-case adjudication).

33 Philip Hamburger, *Law and Judicial Duty* 101 (Harvard 2008).

of selection methods. The formalist believes that the judge's duty is to express an impartial judgment about statutory meaning—not the judgment of her selectors, appointing president, appointing governor, or constituents.[34] The unified approach is a natural outgrowth of this commitment to role, office, and duty. To summarize, "judges are selected, one way or another, to act like judges, a role whose specifications does not depend on the presence or absence of popular election."[35]

2. Rule-of-law considerations.

The judicial role is not just a product of particular bits of constitutional text and foundationalist thinking about the separation of powers. Rather, the proper judicial role also derives from more general political-theoretic and pragmatic rule-of-law considerations.

The rule of law is a multifaceted concept,[36] but several aspects of it seem to support the unified approach to statutory interpretation. One important strand of the rule of law emphasizes the importance of stability and predictability: The law should not oscillate wildly, and when the law does change, the change should be announced to all parties ahead of time. If the idea of interpretive divergence is that elected judges may more readily depart from clear texts and settled precedent, those rule-of-law values would come under threat. What becomes of stare decisis in a world where newly elected judges may change the law?

But even assuming that divergence instead operates in a more restrained fashion, limited to hard cases where the law is already unclear, a methodology that makes elections relevant would still threaten other rule-of-law values like independence and impersonality. The independent judgment traditionally expected of judges seems to require indifference to election results or electoral threats in statutory interpretation decisions just as in all others.[37] The electoral

34 See id at 148–78.

35 Rakoff, 104 Nw U L Rev at 1572 (cited in note 3). Rakoff is not an interpretive formalist—but he does believe that the common nature of the judicial role trumps any differences between elected and unelected judges. See id at 1571–72, 1575–76.

36 See Lon L. Fuller, *The Morality of Law* 38–39 (Yale rev ed 1969) (listing formal requirements of valid law); Richard H. Fallon Jr, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum L Rev 1, 7–9 (1997) (listing features typically associated with the rule of law); Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in James E. Fleming, ed, *Getting to the Rule of Law* 3, 4–5 (New York 2011) (distinguishing between formal, substantive, and procedural understandings of the rule of law).

37 There is evidence that various types of electoral pressures do influence judicial decisions. See, for example, Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 Stan L Rev 1629,

endangerment of the judicial role is especially grave if one believes that judges, as trustees of the whole public interest, need to have the backbone to stand up to majority sentiment from time to time in order to protect unpopular groups and litigants.[38]

True, one might contend that the decision to elect judges shows that the polity has embraced a different vision of judging, a different balance of rule-of-law values. Yet we might very well conclude that even in a state that elects its judges, the voters' most important desire is a "meta-intent" that judges should not pay attention to specific public preferences other than the preference that judges decide independently in accordance with law.[39] "The people," one might reasonably think, do not want their judges to act as politicians—even when they are politicians—and so sociological legitimacy might encourage the unified approach to statutory interpretation. In any case, to whatever extent one believes judges in a democracy *should* in fact pay some attention to specific majoritarian preferences in interpreting ambiguities in statutory language,[40] it is not at all clear that such an

1659–71 (2010) (discussing political pressures that affect state judges); Amanda Frost and Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va L Rev 719, 732–40 (2010) (surveying the empirical evidence of electoral influences); Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J Legal Stud 169, 171 (2009) ("[T]he voting of state supreme court judges is strongly associated with the stereotypical preferences of the retention agents."). Recent case studies have also highlighted the impact of campaign contributions on case outcomes. See, for example, Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J L & Polit 645, 646 (1999) (studying the effect of campaign contributions on judicial decisions in 1990s Alabama); Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, NY Times A1 (Oct 1, 2006) (asserting that justices on the Supreme Court of Ohio "voted in favor of contributors 70 percent of the time"). Nonetheless, the empirical evidence concerning the effect of judicial elections is complex and still evolving. For a more detailed discussion of this topic, see Part I.B.

38 See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U Chi L Rev 689, 694, 727–29 (1995).

39 See Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 Mich St L Rev 1443, 1465 (contending that voters make decisions primarily based on judges' fairness, impartiality, and commitment to procedural regularity rather than based on agreement with policy views). But see James L. Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in Charles Gardner Geyh, ed, *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake* 281, 289 table 11.1 (Stanford 2011) (reporting survey results showing that a significant majority of respondents want judges just to follow the law, though substantial numbers also report that they want judges to reflect the voters' views). Note that this is different from the claim that elected judges should be especially cautious and formalistic to avoid even the whiff of activism: this latter claim would actually be a claim for interpretive divergence. See Part II.A.5 (discussing such a form of divergence).

40 A broad variety of accounts envision some role for majority preferences. See, for example, Ronald Dworkin, *Law's Empire* 349 (Harvard 1986) (taking into account "the character and spread of public opinion"); William N. Eskridge Jr, *Dynamic Statutory Interpretation* 152 (Harvard 1994) (suggesting that the preferences of the current Congress are relevant to interpreting statutes passed by a previous Congress); Posner, *How Judges Think* at 136–37 (cited in note 22) (arguing that, subject to qualifications, majority preferences affecting judicial

obligation depends on whether a judge is elected or appointed: both elected and appointed judges may have responsibilities to popular will in democratic governance.[41] The same is true of those who believe that the judicial office and the rule of law require some attention to "natural" rights, irrespective of judicial selection mechanisms.[42]

The interplay between judicial elections and the judicial role is on prominent display in the Supreme Court's decision in *Chisom v Roemer*.[43] The question there was whether, within the meaning of a portion of the Voting Rights Act of 1965,[44] elected state judges were "representatives."[45] The Court divided over the question, and each side mounted a long and elaborate explanation of why its reading of the statute was best. But complicated textual, constitutional, and precedential analysis aside, one gets the sense that much of the driving force behind the dispute arose from a clash between two differing views of the judicial role.[46] The majority acknowledged the vision of judging in which the judge is beholden to no one, represents no one, and is indifferent to public opinion.[47] Yet when a state decides to elect its judges, the majority said, the state necessarily embraces a different view of the judicial role, one in which judges, no less than legislators and governors, are indeed "representatives" of the electorate.[48] For the majority, mode of selection mattered. For Justice Antonin Scalia in dissent, however, the mode of selection did not affect the nature of the judicial role. The elected judge does not act on behalf of the people: "[T]he judge represents the Law—which often requires him to rule against the People."[49] Although this view did not

decisions can be good in a democratic society); Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U Ill L Rev 1103, 1105, 1115–22 (proposing a method of statutory interpretation that would incorporate "the understanding and expectations of the contemporary public as to the law's meaning and application").

41 See Leib, Ponet, and Serota, 101 Cal L Rev at *27 (cited in note 23).

42 See generally Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford 2011) (arguing that the best conception of the rule of law requires judges to protect natural law and natural rights).

43 501 US 380 (1991).

44 Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1973 et seq.

45 *Chisom*, 501 US at 398–99.

46 For a thoughtful treatment of some of the jurisprudential issues at play in *Chisom*, see Michael Herz, *Choosing between Normative and Descriptive Versions of the Judicial Role*, 75 Marq L Rev 725, 738–45 (1992). There were other concerns at work, too. This was a voting rights case in which black voters in the South were claiming that the state legislature had drawn judicial districts in order to dilute their franchise. *Chisom*, 501 US at 384–85.

47 See *Chisom*, 501 US at 400–01.

48 Id.

49 Id at 410–11 (Scalia dissenting). For an argument that judges are trustees for the law, see Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 Wash & Lee L Rev 1637, 1639–40 (2005).

prevail within the complicated context of *Chisom* itself, it commands support as a more general matter—and not just among those with conservative and formalist sensibilities like Justice Scalia. Even those who disagree with Justice Scalia's specific statutory conclusion in *Chisom* could still be drawn to the view that federal and state judges are essentially alike, insofar as they represent "the Law" first and foremost, irrespective of their mode of selection.[50] Indeed, even the *Chisom* majority confessed "that ideally public opinion should be irrelevant to the judge's role."[51] This widely embraced understanding of the judicial role surely goes a long way toward explaining the power of the unified approach to statutory interpretation: it appeals not just to formalists but also to pragmatists concerned with stability, sociological legitimacy, and the rule of law.[52]

3. Judges' relationship to the enacting legislature in statutory interpretation cases.

Moving away from specifications of the judicial role as a matter of general political, constitutional, and democratic theory, a more particularized account of that role has emerged within the field of statutory interpretation. Typically, judges are supposed to be the enacting legislature's "faithful agents."[53] It is not, conventionally, the judge's job to be subservient to the *current* legislature's view.[54] Rather, the task is to implement—deferentially but independently—the *enacting* legislature's instructions as supreme. And if it is the judge's job to divine, reconstruct, or promote legislative intent and will (whether that means hewing closely to text or instead attending to

50 See, for example, *Republican Party of Minnesota v White*, 536 US 765, 806 (2002) (Ginsburg dissenting) ("Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency.").

51 *Chisom*, 501 US at 400.

52 It is likely that those who strongly oppose judicial elections do so for many of the same reasons—and may, therefore, be drawn to the unified approach to statutory interpretation as a second-best accommodation. For our purposes here, we take elections as they come and do not provide any analysis of the normative question of whether judicial elections are desirable.

53 Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 415, 435 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature."). See also Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Georgetown L J 281, 283–94 (1989) (discussing the related concept of legislative supremacy). As we discuss in Part II.A.3, there are different kinds of faithful-agent approaches, which vary in how tightly the interpreting court is bound to its legislative superior's instructions.

54 But see Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U Chi L Rev 1203, 1238–39 (2012) (arguing that courts should interpret statutes in accordance with contemporary majoritarian preferences in the legislature).

more general purposes), the method by which the judge ascended to the bench would seem to be irrelevant to the task. If the principal inquiry in statutory cases is discovery of the will of the legislature, the status of the judge herself—whether elected or appointed—does not change the terrain. Or so one could argue with some plausibility.

Further, the logic of the faithful-agent account does not seem to be sensitive to the matter of who holds the power to select, control, and remove judges. In the federal system, the power to appoint belongs to the Senate and the President, and the power to remove belongs to the House and the Senate together; the people have no direct role.[55] Yet we are not aware of any judge or commentator who relies on these facts about judicial selection to explain why federal judges (or similarly selected state judges) should act as the enacting legislature's faithful agent.[56] Moreover, it is worth observing that the removal power is not limited to statutory contexts. A legislature may remove judges in connection with common law and constitutional law cases as well—yet the faithful-agent theory applies only to statutory cases.[57] Thus, if the justification for the faithful-agent theory does not refer to the judges' conditions of employment or vulnerability to external control, changing those variables by implementing judicial elections should not change the contours of the job. This is another reason to endorse the unified model.

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55 US Const Art II, § 2 (appointment); US Const Art I, §§ 2–3 (impeachment).

56 Less likely still would be a claim that a federal judge interpreting statutes should act as the faithful agent of the appointing president. Consider Gray Davis, one-time governor of California, who said this of judges he appointed: "They're there because I appointed them and they need to keep faith with my electoral mandate. Otherwise, democracies don't work. . . . My appointees should reflect my views. They are not there to be independent agents." Dan Smith, *Davis' Remarks Leave Judges' Heads Shaking*, Sacramento Bee A1 (Mar 2, 2000). To be sure, presidents and governors choose judges in part based on an expectation that the judge will implement the executive's values—and some judges might in fact privately take that as part of their mission. But this is not publicly expressed as a normative theory of judicial duty in interpreting statutes; when it is, as in Gray Davis's case, it provokes outrage. See id (reporting the angry reaction to Davis's remarks and his subsequent backpedaling).

57 Consider the standard account of constitutional judicial review in Federalist 78:

> [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . . It therefore belongs to [judges] to ascertain [the Constitution's] meaning . . . . If there should happen to be an irreconcileable variance between the two . . . the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Federalist 78 (Hamilton), in *The Federalist* 521, 525 (Wesleyan 1961) (Jacob E. Cooke, ed). The point here is that in constitutional law, the judge serves as an agent for the people—or at least the people when acting in their historic Constitution-forging capacity—not the legislature.

B. The Pseudoaccountability of Judges in Judicial Elections?

Even assuming there were sound theoretical grounds for distinguishing the interpretive duties of elected judges from those of their appointed colleagues, there is still a real question about whether judicial elections confer the sort of democratic legitimacy that might warrant disrupting a presumptively unified role. Putting aside the view that judicial elections are normatively undesirable precisely because they threaten to influence judicial behavior improperly,[58] there is good reason to think that many or most judicial elections lack some of the qualities that ordinarily give elections their legitimating power.

To begin, judicial elections tend not to involve the kind of public participation that we usually associate with democratically meaningful contests. Now, that claim might initially seem surprising, for judicial elections have recently gained new visibility for even casual readers of newspapers (to say nothing of those who read political science journals or law reviews).[59] Perhaps the most notable example comes from Iowa, where several incumbent members of the state supreme court were ousted in 2010 in response to their decision recognizing a right to same-sex marriage.[60] But it is worth keeping this new visibility in perspective. To wit, prior to the very recent electoral battles in several states, the leading example of a visible judicial election to which most people could point was a well-known 1986 judicial retention election in California, when Californians refused to return three state supreme court justices to their offices.[61] More commonly, however, elections have gone mostly unnoticed by the electorate and have not been a source of great interest or contestation.[62]

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58 See notes 37–38 and accompanying text. But see Part II.A.5 (arguing that responsive judiciaries can further some rule-of-law values).

59 For some reflections on these recent developments, see Bonneau and Hall, *In Defense of Judicial Elections* at 3–4, 10–11 (cited in note 18); Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 Ct Rev 118, 120–24 (2011); David E. Pozen, *What Happened in Iowa?*, 111 Colum L Rev Sidebar 90, 91–93 (2011), online at http://www.columbialawreview.org/wp-content/uploads/2011/06/90_Pozen.pdf (visited Nov 20, 2012). Schotland examines 2010 judicial elections in Alaska, Colorado, Florida, Illinois, Iowa, and Kansas. Schotland, 46 Ct Rev at 118–20 n 3 (cited in note 59). Even more recently there have been expensive and closely watched judicial elections in Michigan and Wisconsin. See Brady Dennis, *PACs, Donors Shaping Judicial Elections*, Wash Post A1 (Mar 30, 2012).

60 See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, NY Times A1 (Nov 4, 2010).

61 For a meditation on that election by one of the justices who was ousted, see Joseph R. Grodin, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* 162–86 (California 1989).

62 See Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* 36 (Texas 1980); Geyh, 64 Ohio St L J at 53 (cited in note 18). Admittedly, it is possible that judicial elections inspire little public contestation precisely because the public is

Furthermore, even when the elections are noticed, they are probably poorly understood: the "voter ignorance" problem that plagues most democratic elections[63] is likely even more severe in judicial elections because understanding judicial action generally requires special expertise and professional education.[64] Given the public's historically large-scale indifference to judicial elections, it is hard to argue that they matter enough to justify a departure from a unified approach to statutory interpretation. Ultimately, though, the extent to which elections matter to the public raises empirical questions to which we do not yet have definitive answers.[65]

Beyond the empirics, any assessment of the democratic value of judicial elections also requires that one remember that judicial elections comprise a varied group of institutions. Although about 90 percent of state judges face some type of election, only about one-third compete in partisan elections that mirror elections for executive and legislative office.[66] Instead, the majority faces either retention or nonpartisan elections.[67] These latter two kinds of elections—and retention elections in particular—seem to be poor mechanisms for fostering accountability.[68] For example, in a study of 3,912 judicial

broadly in agreement with—rather than ignorant of—what judges are doing. And it is also possible that there is a core attentive public that pays careful attention and that low voting rates (or high rolloff rates) do not tell us that there is no accountability.

63 See generally Ilya Somin, *Deliberative Democracy and Political Ignorance*, 22 Critical Rev 253 (2010) (arguing that widespread ignorance among voters creates problems for deliberative democracy).

64 See David W. Neubauer, *Judicial Process: Law, Courts, and Politics in the United States* 144–45 (1991); Anthony Champagne and Greg Thielemann, *Awareness of Trial Court Judges*, 74 Judicature 271, 271 (1991); Marie Hojnacki and Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 Judicature 300, 301 (1992).

65 For a recent summary of the empirical evidence, see Chris W. Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections* 5 (Federalist Society Mar 14, 2012), online at http://www.fed-soc.org/doclib/20120719_Bonneau2012WP.pdf (visited Nov 20, 2012).

66 To win their initial terms in office, 33 percent of appellate judges and 38 percent of trial judges run in partisan elections. For subsequent terms, even fewer face partisan elections: 25 percent of appellate judges and 29 percent of trial judges. See Schotland, 95 Georgetown L J at 1092 (cited in note 1).

67 Forty-two percent of appellate judges and 19 percent of trial-level judges face retention elections, and 20 percent of appellate judges and 41 percent of trial-level judges face nonpartisan elections. See id at 1105. See also text accompanying notes 13–14 (describing different electoral systems). Even where a jurisdiction has competitive elections as a formal matter, the on-the-ground reality might differ. For example, the Oregon Supreme Court is an "elected" court, yet the majority of the justices initially gain their seats through gubernatorial appointments to vacancies, and most of the elections are uncontested. See Jeffrey C. Dobbins, *Judicial Communication, Elections, and the Oregon Supreme Court*, 46 Willamette L Rev 479, 481–82 (2010). See also Bonneau and Hall, *In Defense of Judicial Elections* at 87–89 (cited in note 18) (providing data on differences across the states in the competitiveness of judicial elections).

68 Here again, there is lots of empirical evidence to evaluate, much of which urges that public opinion has a substantial influence on the decision making of judges subject to retention

retention elections spanning a 30-year period, only 50 judges (about 1 percent) were defeated.[69] The high likelihood that a judge will win a retention election goes beyond even the usual incumbency advantage in US legislative elections, which is already very large.[70] Further evidence that retention elections have limited value as a barometer of democratic mandates can be adduced from "rolloff" rates, the rate at which voters voting for other offices simply leave their vote for judicial office blank. In the same thirty-year study cited above, more than one-third of voters "rolled off."[71] So what looks superficially like an altogether different accountability mechanism from the federal system of life tenure is actually—Iowa in 2010 notwithstanding—quite similar to federal job security.

Contested nonpartisan elections are in some ways better than retention systems at approximating democratic preferences, but they have substantial defects of their own. In particular, the absence of party labels can deprive voters of the information that might contribute to more rational decisions.[72] Without knowledge, understanding,

and nonpartisan elections. See, for example, Brandice Canes-Wrone and Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 Wis L Rev 21, 52–65 (finding that judges subject to partisan elections are more independent from public opinion than judges subject to nonpartisan elections); Brandice Canes-Wrone, Tom S. Clark, and Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J L, Econ, & Org 211, 224–30 (2012) (finding that retention elections do not completely insulate judges from public opinion).

69 See Larry Aspin and William K. Hall, *Thirty Years of Judicial Retention Elections: An Update*, 37 Soc Sci J 1, 3–4, 8 (2000). More than half of those defeated (twenty-eight) were in Illinois, which sets its retention threshold at 60 percent; only one judge in Illinois received less than a 50 percent affirmative vote in that period. Id at 8–10.

70 For example, in recent decades members of the US House of Representatives have usually won reelection over 90 percent of the time. See David C. Huckabee, ed, *Reelection Rates of Incumbents* 23 figure 1, 27 table 1 (Novinka 2003); *Historical Elections: Reelection Rates over the Years* (Center for Responsive Politics), online at http://www.opensecrets.org/bigpicture/reelect.php (visited Nov 20, 2012). These high congressional reelection rates reflect in part the effects of partisan gerrymandering of districts. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv L Rev 593, 624 (2002). Yet the judges in retention systems manage to do better even though many of them run in nongerrymandered, natural constituencies like states or counties. It bears noting, however, that reelection rates for all offices are pushed higher by the fact that some officeholders at risk of losing do not seek reelection.

71 See Aspin and Hall, 37 Soc Sci J at 12 (cited in note 69). Aspin and Hall detected a slight decrease in rolloff over time, but it remained close to one-third even in the last period of the study, 1986–94. Id.

72 For some discussion about the ways in which political parties might ameliorate knowledge deficits in mass democracy, see Ethan J. Leib and Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 Cal L Rev 69, 86 (2012) ("The labeling of candidates according to party suggests the candidates' likely policy positions and tells voters whether any given candidate will join or work against the dominant coalition."). The usefulness of party signals suggests that partisan judicial elections might be better at producing democratic mandates than nonpartisan races. See Brian F. Schaffner, Matthew Streb, and Gerald Wright, *Teams without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 Polit Rsrch Q 7, 9 (2001) (finding higher incumbent effects

or reasonable heuristics, elections in the judicial context can be quite limited sources of democratic meaning. And yet partisan elections have become relatively rare: only seven states have them now, compared with twenty in 1960.[73]

To be sure, things may be changing and we might be living through a seismic shift in the politics of judicial elections. The handful of high-profile elections of recent years might be a harbinger of things to come. Judicial elections might be getting better in some respects: more salient, more competitive, more meaningful.[74] Nonetheless, at least as of today, vigorously contested judicial elections seem to be limited to state supreme courts, bypassing the hundreds of judges who engage in statutory interpretation in their daily jobs in the lower courts.[75] If elections should matter to a judge's work in statutory interpretation, perhaps it should be only for the judges whose elections mattered to their constituents.[76] Even if constituents

and lower turnout in nonpartisan elections); Gerald C. Wright, *Charles Adrian and the Study of Nonpartisan Elections*, 61 Polit Rsrch Q 13, 13–14 (2008) (finding that voters use less principled heuristics in nonpartisan elections). See also Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 Polit Beh 343, 344–45 (2007) (reporting that party cues in judicial retention elections can eradicate racial bias). But see Richard P. Caldarone, Brandice Canes-Wrone, and Tom S. Clark, *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J Polit 560, 571 (2009) (finding that state judges chosen in nonpartisan elections track median voter preferences more closely than do judges selected through partisan races); Herbert M. Kritzer, *Change in State Supreme Court Elections: Is Voting Becoming More Partisan?* *16 (University of Minnesota Law School Legal Studies Research Paper No 11-29, July 2011), online at http://ssrn.com/abstract=1879952 (visited Nov 20, 2012) (arguing that nonpartisan elections are becoming more partisan). For some recent analysis of this literature, see Christopher S. Elmendorf and David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U Ill L Rev *23–25 (forthcoming), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010115 (visited Nov 20, 2012).

73 See Bonneau and Hall, *In Defense of Judicial Elections* at 9 (cited in note 18).

74 See notes 146–48 and accompanying text (suggesting that at least some judicial elections have become more meaningful).

75 See Matthew J. Streb, *How Judicial Elections Are Like Other Elections and What That Means for the Rule of Law*, in Geyh, ed, *What's Law Got to Do with It?* 195, 197–98 (cited in note 39). One of us takes a more careful look at what we can know about elections for lower-level judgeships. See Ethan J. Leib, *Localist Statutory Interpretation*, 161 U Pa L Rev *9–30 (forthcoming 2013), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159704 (visited Nov 20, 2010).

76 Although Professors Chris Bonneau and Melinda Hall adduce plenty of evidence to suggest that elections are meaningful and capable of holding judges accountable, they concede that they investigate only the highest-level judges in their empirical analysis. Bonneau and Hall, *In Defense of Judicial Elections* at 18–19 (cited in note 18). Moreover, in the latest and widest-ranging study of competitiveness in state supreme court judicial elections, Professor Herbert Kritzer found that between 1946 and 2009, competitiveness was basically stable (with the apparent increase attributable to the decline of the one-party South). See Herbert M. Kritzer, *Competitiveness in State Supreme Court Elections, 1946–2009*, 8 J Empirical Legal Stud 237, 255 (2011).

identify with their judicial "representatives" on a local trial court, that may not be a function of a competitive election in the vast majority of cases, so one could argue that the election itself should not do any work in licensing the judge to diverge from what judges in nonelective jurisdictions do.

C. The Practical Limitations of Elections for Statutory Interpretation

Even if one looked past the democratic deficits of many judicial elections, there is a set of practical limitations that hinder any attempt to translate judicial elections into useful input for statutory interpretation decisions.

First, if the idea behind interpretive divergence is that elections represent communication between the people and their judicial "representatives,"[77] elections may not convey information specific enough to be of much use. In theory, a judicial election could—if salient enough—come close to being a referendum on a single issue or on methodology generally.[78] But the likelihood that an election has the focus to illuminate a hard question of statutory interpretation (the kind of case that would require a judge to do something more than read the text of the statute and look at some precedent or other obviously authoritative source of statutory meaning) is very small indeed. Elections are opaque to begin with; reading elections to clarify a subtle ambiguity in a statutory text that was probably never mentioned in the election is hugely difficult. If such an election existed—or a statute or methodology was at the center of an election campaign—perhaps it would make sense to take account of it when and if the opportunity presented itself. But the rarity of such elections and campaigns surely contributes to the general case for the unified method.[79]

Second, although it is true that increased spending in judicial elections can help mobilize voters and reinforce the resonance of

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77 The advocate of divergence might embrace such a view, but other, more indirect pathways of influence are possible too. See notes 139–43 and accompanying text.

78 For some evidence that elections for judges can actually be "about" methodology as a whole, see Gluck, 119 Yale L J at 1808–11 (cited in note 20). For a skeptical take on whether elections convey specific information to judges, see Pozen, 110 Colum L Rev at 2119–22 (cited in note 2).

79 Consider the well-known difficulty of determining voter intent in elections on specific initiatives, where such intent has authoritative status and where the voters were focused on a single statute when casting their ballots. See Leib, 7 Election L J at 49 (cited in note 21) (reviewing the principles of statutory interpretation for direct democracy). Then consider the obviously greater difficulty a judge would have divining voter intent on a statute when that statute was very far from the mind of the voter in a general election for a judicial candidate.

judicial campaigns for the average citizen,[80] there is certainly a risk that the increased spending in these elections has other consequences too. To wit, if money is pouring into judicial elections from funding sources outside the state,[81] there is a reasonable concern that election results are being driven by concerns that do not actually emerge from within local politics. If the agenda is set from outside, it is hard to justify paying too much heed to that agenda in local judicial decision making. And even if the money is being raised locally, one might hesitate to give too much normative weight to elections that are—to put it plainly—purchased.[82] Judges, one might think, are supposed to provide the last stand against those who can buy their laws at the legislative level. Again, those who oppose judicial elections on the ground that they put justice up for sale to the highest bidder have quite a powerful argument against having judicial decision making turn on the election returns.

Finally, elected judges must often interpret statutes that originate in jurisdictions outside their electoral constituency. State supreme courts must decide questions of federal statutory interpretation and local trial courts may need to decide statewide issues. In these jurisdiction-crossing cases, it is very hard to see how local elections and local constituents, even when their views are discernable, ought to control questions of statutory interpretation that have much broader application.[83]

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The appeal of the unified model is intuitive—and it is supported by a range of arguments, both jurisprudential and practical. It is hard

80 See Bonneau and Hall, *In Defense of Judicial Elections* at 20–48 (cited in note 18).

81 For a discussion of out-of-state financing of judicial elections, see Pozen, 111 Colum L Rev Sidebar at 93–94 (cited in note 59); Schotland, 95 Georgetown L J at 1099 n 93 (cited in note 59). The overwhelming bulk of the independent expenditures in the campaign to oust the Iowa Supreme Court Justices came from out-of-state groups. See Linda Casey, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices* table 1 (National Institute on Money in State Politics Jan 10, 2011), online at http://www.followthemoney.org/press/PrintReportView.phtml?r=440 (visited Nov 20, 2012).

82 See, for example, *Caperton v A.T. Massey Coal Co*, 556 US 868, 872–73 (2009) (reversing a state supreme court decision on due process grounds where campaign contributions created the appearance of bias). See also note 37 (citing sources documenting how electoral pressures influence judicial decisions). Although partisan judicial elections are the ones most likely to have democratic credibility, apparently they are also the ones most liable to be corrupted by campaign contributions. See Michael S. Kang and Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 NYU L Rev 69, 107 (2011). Thus, it might be just in those elections where considerations of sociological legitimacy would most strongly militate in favor of curtailing any special discretion.

83 For a more detailed discussion of this topic, see Part III.C.

to envision one set of statutory interpretation principles that applies only to federal judges—and then a separate set of principles for elected judges. Adding further complexity, the category of elected judges itself contains several distinct classes of judges (retained judges, judges subject to partisan election, judges subject to nonpartisan election, and hybrids thereof), whose approaches may all have to differ if one took electoral differences seriously in the enterprise of statutory interpretation. Indeed, if we took electoral differences *really* seriously, would we need to scrutinize each election separately? Would judges who win in landslides be entitled to interpret differently from those who squeak through with 51 percent of the vote? Avoiding that sort of complexity counts as its own reason to favor the unified model. But now that we have presented the considerations that could justify unified interpretation, let us see how that approach fares once we construct the best case for the contrary view.

II. THE CASE FOR INTERPRETIVE DIVERGENCE(S)

We turn now to presenting the case for why elected judges' methods of statutory interpretation should differ from the methods of their unelected colleagues. Although interpretive divergence is not the prevailing view today, it should not be dismissed out of hand. A more nuanced, judge-specific approach to statutory interpretation in fact has a number of virtues. It makes sense of the existence of judicial elections and finds support in the internal logic of several leading accounts of statutory interpretation. It takes advantage of the special practical competencies of elected judiciaries. And nothing in the nature of the judicial power or the rule of law necessarily forbids it.

The argument for the unified model did not require a commitment to any particular approach to statutory interpretation. That is, one could largely set aside many longstanding interpretive debates—textualism versus purposivism, pragmatism versus formalism, and so forth—and simply say that methods of selection do not alter the argumentative terrain. One cannot be quite so agnostic about substance when making the case for interpretive divergence: the reason judges should diverge is that one kind of judge should follow one approach and another kind of judge should follow another. So how should elected judges differ in their interpretive approaches from their unelected counterparts?

As it happens, we do not believe that divergence, if justified at all, has to take one uniquely correct form. Rather, one can construct arguments for a few distinct kinds of divergence, which could operate as either complements or alternatives to one another. These different

forms of divergence will be more fully developed below. One possibility is that elected judges may enjoy a relatively greater liberty to interpret statutes in ways that go beyond or even against legislative design. Such interpretation would depart from the familiar faithful-agent model though it need not be countermajoritarian as long as the judges' interpretive departures follow or advance the public's views. According to another (and probably more controversial) form of divergence, elected judges' greater political accountability might also justify them in going beyond or against not just the legislature but also the people themselves in ways we would find democratically problematic for entrenched federal judges, who cannot be removed from office except through the extraordinary and supermajoritarian procedure of impeachment.[84] Some of the arguments presented below support multiple versions of divergence, though others only support certain types.

The case for interpretive divergence grows stronger as the distinctions between judges increase. Therefore, to see if the argument for divergence works, we will generally take "unelected judges" to mean life-tenured judges on the federal model and "elected judges" to mean judges subject to frequent, competitive partisan elections. As we have already explained, the reality is more complex and presents a range of institutional forms rather than just two polar opposites. Nonetheless, if the case for divergence can successfully explain why the judges at the two ends of the spectrum should interpret statutes differently, the analysis may also be useful in figuring out what to do about the intermediate cases between them.

A. Theoretical Justifications for Interpretive Divergence

The argument for interpretive divergence builds on the fundamental insight that interpretation is an institution-specific activity. As Professors Cass Sunstein and Adrian Vermeule put it in an influential article: "The central question is not 'how, in principle, should a text be interpreted?' The question instead is 'how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?'"[85] The legal philosopher Scott Shapiro likewise contends that the interpretation of legal texts should be "actor-relative."[86]

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84 See US Const Art I, § 3, cl 6 ("[N]o Person shall be convicted [in impeachment proceedings] without the Concurrence of two thirds of the [Senators] present.").

85 Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 Mich L Rev 885, 886 (2003).

86 Scott J. Shapiro, *Legality* 358–59 (Harvard 2011) (emphasis omitted). Shapiro does not discuss judicial elections, though he does state more generally that mechanisms of accountability

Proper interpretive method, in other words, depends on contingent features of the institutional context. Understood broadly, the relevant institutional context includes both the competencies of interpreters themselves as well as the interpreters' relationships with other parts of the government.

This insight has been rather widely accepted when it comes to the possibility of interpretive heterogeneity between wholly separate governmental institutions, such as the judiciary and administrative agencies.[87] Our task is to show that methodological divergence makes sense even within the judiciary and in particular that judicial elections should generate that divergence.[88] But because unified interpretation is widely embraced (if often only implicitly), it makes sense to begin the argument by confronting one of the central considerations supporting uniformity, namely the idea that the essential nature of judicial power is invariant with respect to methods of judicial selection. If one is instead willing to recognize that judicial power is not so monolithic after all, that judicial *roles* vary considerably across systems, then one should be more receptive to the notion of electorally driven divergences in interpretive methodologies within the judiciary.

1. The "judicial power" is not monolithic.

Much of the argument for unified interpretation boils down to the view that all judges are judges and that all of them—however they ascend to the bench—exercise the same judicial power. The basic problem with this line of thinking is that it risks essentializing the judicial role and treating the federal judiciary as the model for all judging. In truth, there is no single essence of judicial power that exists invariant across jurisdictions. After all, one of the basic rules of textual interpretation is that it is a holistic endeavor, one that looks to the entirety of the instrument being interpreted.[89] Therefore, in trying to understand what a particular constitution means by "judicial power," one cannot overlook the fact that the same constitution might also provide for the popular election of judges. Further, beyond

are relevant in considering how much interpretive discretion is appropriate. Id at 360. Nonetheless, we suspect that he would countenance, at most, a small range in which electorally driven divergence could operate. We reach that conclusion in light of his overall suspicion toward ambitious or highly discretionary judicial interpretive approaches, which he thinks require more consensus and trust than a system such as ours can support. Id at 329–30, 371–83.

87 See Part II.A.6.

88 This is not to say that electoral status is the only important institutional difference among courts. Other factors can drive divergence as well. See note 16 and accompanying text.

89 *United Savings Association of Texas v Timbers of Inwood Forest Associates, Ltd*, 484 US 365, 371 (1988).

differences in how the judicial power itself is constituted, systems can also differ in terms of their openness to direct democracy, the availability of channels of interbranch communication, levels of legislative professionalism, and other contextual factors that might shape the proper understanding of the judicial role.

What are sometimes regarded as universal truths about the nature of the judicial role are, in fact, not so widespread once one looks outside the federal judiciary. Discussion of the nature and limits of federal judicial power is colored by a preoccupation with judicial restraint, which in turn derives in large part from the lack of electoral accountability of the federal judiciary.[90] That justification for restraint is less apt when it comes to most state judiciaries, which are embedded in systems with their own quite different traditions, institutional contexts, and opportunities for comeuppance. This means, as others have observed, that state courts may properly employ looser justiciability doctrines than their federal counterparts.[91] And state courts do just that, hearing various kinds of cases that a federal court would have to dismiss for want of standing, such as those involving abstract grievances.[92]

Indeed, variability and contingency penetrate to the core of the meaning of judicial power. Article III of the US Constitution vests the federal courts with judicial power only over "cases and controversies," which restricts federal courts from issuing advisory opinions.[93] And even without Article III's cases and controversies language, one might think that the resolution of discrete disputes is indeed a defining incident of all properly judicial activity. Yet, despite all this, some state constitutions permit their courts—wielders of judicial power—to render advisory opinions.[94]

Another pertinent difference between the state and federal judiciaries concerns the greater importance of the common law in the

90 See, for example, *Elk Grove Unified School District v Newdow*, 542 US 1, 11 (2004) ("The standing requirement is born partly of an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.") (quotation marks omitted); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv L Rev 40, 51 (1961).

91 See, for example, Hershkoff, 114 Harv L Rev at 1882–98 (cited in note 7); Linde, 46 Wm & Mary L Rev at 1281–87 (cited in note 7).

92 See, for example, *ASARCO Inc v Kadish*, 490 US 605, 617 (1989) ("But the state judiciary here chose a different path, as was their right, and took no account of federal standing rules.").

93 See *Muskrat v United States*, 219 US 346, 356–63 (1911). See also Erwin Chemerinsky, *Federal Jurisdiction* 57 (Aspen 5th ed 2007).

94 See Hershkoff, 114 Harv L Rev at 1844–52 (cited in note 7).

state judiciaries. Although there still is some federal common law,[95] and although federal courts do fashion state common law in diversity suits (albeit somewhat reluctantly at times[96]), the far greater part of the job of the federal judge concerns the interpretation of statutes and administrative materials.[97] State judges also live in an age of legislation, of course, but the role of enacted text looms less large in state law. State judges still oversee large bodies of common law, elaborating it through reasoning that is, by its nature, dynamic and pragmatic.[98] State courts' common law role, plus their involvement in various administrative activities beyond the resolution of concrete disputes,[99] reinforces their differentiation from their federal counterparts.

None of this is to say that judicial power has no meaning. But it is to say that judicial power need not mean exactly the same thing in every jurisdiction. And if that is so, we should also take seriously the possibility that the institution of judicial elections in particular could justify heterogeneity in judicial roles, a topic to which we now turn.

2. Making sense of the people's decision to elect their judges.

One virtue of interpretive divergence is that it can help us make sense of the fact that judicial elections exist in the first place. In the late eighteenth century, state judges were typically appointed by legislatures or governors and held office for stated terms or during "good behavior," subject to removal; they did not face the voters.[100] When states began to establish judicial elections, it was no random mutation. One might suppose that the chief reason for implementing

95 The *Erie* doctrine abolished the *general* federal common law (that is, a nationwide, judge-made law of subjects like contract and tort), but there remain pockets of federal common law in areas of special federal concern. See Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 NYU L Rev 383, 384, 405–21 (1964).

96 See, for example, *Insolia v Philip Morris Inc*, 216 F3d 596, 607 (7th Cir 2000) ("Federal courts are loathe to fiddle around with state law.").

97 Scalia, *A Matter of Interpretation* at 12–14 (cited in note 3).

98 See id at 13–14. See also Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 NYU L Rev 1, 19–29 (1995) (emphasizing the predominance of common law reasoning in state courts even when statutes are at issue); Pojanowski, 91 Tex L Rev at *15–20 (cited in note 16) (exploring the interaction between common law authority and statutory interpretation).

99 See Williams, *American State Constitutions* at 298–300 (cited in note 8) (explaining that "state judicial branches are quite different from the federal judiciary" and are "often deeply involved in the state's ongoing policy-making processes").

100 See Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary 1606–1787* 326–29 (Oxford 2011); Evan Haynes, *The Selection and Tenure of Judges* 101–35 (National Conference of Judicial Councils 1944). Removal was not always limited to impeachment for misconduct. See Gerber, *A Distinct Judicial Power* at 89, 114, 141, 327–29 (cited in note 100) (describing the mechanism of removal by "address" of the legislature).

elections was a desire to clip judges' wings, to reduce judicial power by bringing judges under the people's control. Yet, as Professor Jed Shugerman shows in recent work, the more prominent motivation behind the rapid implementation of judicial elections in the middle of the nineteenth century was instead to *empower* judges as agents of the people against corrupt, irresponsible, and overreaching legislators and governors.[101] That is, the idea was to turn judges away from being the political branches' agents and instead yoke them to the people.[102] Professor Caleb Nelson's earlier account differs somewhat in that he sees the rise of judicial elections as part of a broader move to limit all forms of official power, but he agrees that a key element of the plan was to set the judges against the legislators, who could not be trusted to serve the people's interests.[103] Depending on how exactly one construes the intent behind the creation of elected judiciaries, that intent would seem to support forms of divergence that grant elected judges greater independence from the legislature or require greater consideration of popular views (or both). This historical narrative would not appear to support forms of divergence in which elected judges' accountability at the polls was intended to give them more freedom to depart from the people too (though other factors we discuss might support such a version of divergence[104]).

Of course, the history of judicial selection did not stop 150 years ago. State constitutional provisions governing judicial selection have continued to evolve. Notably, in 1940, Missouri instituted a system of merit-based selection with periodic retention elections, a system that many states then embraced for at least some of their judges.[105] One might say that such a system differs from normal elections in that, while retaining an electoral check, it is more elitist and less populist in orientation. And yet while the merit plan loosens the bond to the people, it maintains distance from the other branches, too; the judges

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101 Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv L Rev 1061, 1065–69, 1097 (2010). As Shugerman acknowledges, there were some earlier efforts to implement elections for court-curbing reasons, but these did not take off and spread like the later, differently inspired efforts. Id at 1071–73.

102 See id at 1067, 1097; Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 Georgetown L J 1349, 1396–97 (2010).

103 Caleb Nelson, *A Re-evaluation of the Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am J Legal Hist 190, 207, 217–19 (1993).

104 As noted already, there are a few different forms that divergence might take, and some of the factors that support divergence support some versions more than others. See introduction to Part II.

105 See Charles H. Sheldon and Linda S. Maule, *Choosing Justice: The Recruitment of State and Federal Judges* 6–8, 125–28 (Washington State 1997).

are just more independent from any external control, moving them closer to the federal model.

The differences among electoral systems are significant, but the more important point here for establishing the viability of interpretive divergence is that changes to methods of judicial selection need to be understood as *reforms*—that is, as mechanisms that were meant to alter a defective status quo. To then say that all judges should nonetheless behave the same way—implicitly, the *federal* way—seems quite curious, especially for those states that have devised electoral systems that least resemble the federal model. If a state subjects its judges to partisan elections every four years, that is probably because it does not want its judges to be like federal judges. If it did, it could have emulated the federal model, as a few states basically do.[106]

Even if one is sympathetic to the view that judicial elections should have some effect on judges' orientations toward their proper role, one could still deny that elections hold much relevance to statutory interpretation in particular. Therefore, we next consider how judicial elections might interact with the leading model of the judicial role in statutory interpretation, namely the faithful-agent account. As we show, that model's logic seems capable of being made sensitive to the manner in which the judge is selected.

3. Judicial elections upset the logic of the faithful-agent account.

As we explored above, the conventional view of the judicial role in statutory interpretation casts judges as "faithful agents," and the principal to whom the judges owe their fidelity is the legislature.[107] The attraction of this view is powerful enough that even those who defend a significant role for judicial initiative and creativity often argue that their approach can be justified by (some form of) faithful-agent theory. That is, they will emphasize that the legislature issues only very general and infrequent commands that require significant creative elaboration, that the legislature's "meta-intent" authorizes dynamism, and that *current* legislative preferences matter too.[108] We will set aside those looser versions of agency theory for the moment

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106 A handful of states appoint judges and then let them remain in office without further political accountability until they reach a mandatory retirement age; one state (Rhode Island) lets them remain in office for life. See American Judicature Society, *Judicial Selection in the States* at *9 (cited in note 13).

107 See note 53 and accompanying text.

108 See, for example, William N. Eskridge Jr, *Spinning Legislative History*, 78 Georgetown L J 319, 324–26, 343 (1989).

and focus on the more formalist versions of faithful agency that emphasize judicial subordination and minimize judicial creativity.[109]

The phenomenon of judicial elections poses quite a puzzle for the faithful-agent account. After all, the agency theorist demands judicial deference to the legislature largely on grounds of popular sovereignty and democratic values: the legislators, not the judges, are the people's elected policy-making representatives.[110] As Professor Thomas Merrill pithily puts it, "Since when are unelected and life tenured judges the preferred instrument for achieving legal change in a society committed to popular sovereignty?"[111] Yet, as that quotation lays bare, the democratic case for the faithful-agent theory relies on a claim—or just an assumption—about the relative democratic pedigree of courts and legislatures. The faithful-agent approach thus shares a foundation with the countermajoritarian difficulty in constitutional law: the reason that judicial review presents a *difficulty* is that unelected judges can trump the decisions of the people's elected representatives.[112]

The institution of judicial elections undermines the democracy-based rationale for the faithful-agent account. Perhaps *unelected* judges must defer to the legislature in the name of democracy, but

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109 Even so limited, there remains internal disagreement over how faithful agents can best serve the legislature: by punctiliously parsing the enacted text, by following the legislature's intentions or purposes, and so forth. There is nonetheless an underlying unity in that these accounts see legislatures as supreme policy makers and courts as constrained policy implementers. See, for example, id at 324.

110 See, for example, Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 533 (1947) ("To go beyond [ascertaining the meaning of the words used by the legislature] is to usurp a power which our democracy has lodged in its elected legislature."); Merrill, 14 Lewis & Clark L Rev at 1575 (cited in note 22) ("[F]aithful agent interpretation is necessary in order to preserve the bedrock principle of our constitutional government—popular sovereignty."); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutional" Perspective*, 83 Nw U L Rev 761, 803 (1989) ("[E]ntrusting to the unrepresentative judiciary the authority to second-guess basic legislative policy choices in nonconstitutional cases threatens our fundamental theoretical premise of governmental responsiveness to public will through the electoral process."); Sunstein, 103 Harv L Rev at 437 (cited in note 53) ("The agency view starts from the important truth that it would be improper for judges to construe statutes to mean whatever the judges think best; the lawmaking primacy of the legislature, with its superior democratic pedigree, prohibits such a conception of statutory 'interpretation.'"). But see David Pozen, *Are Judicial Elections Democracy-Enhancing?*, in Geyh, ed, *What's Law Got to Do with It?* 248, 258–72 (cited in note 39) (exploring some of the complexities in equating democracy with elections). Here we are simply describing the ordinary logic of the faithful-agent, restraint-based discourse. To be clear, deference to the legislature is not justified solely by drawing on considerations of democracy and popular sovereignty. Other factors like institutional competence and rule-of-law values are involved too, and they are addressed in Parts II.A.5 and II.B.

111 Merrill, 14 Lewis & Clark L Rev at 1588 (cited in note 22).

112 See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–20 (Bobbs-Merrill 1962).

elected judges are chosen by and are directly accountable to the people. Shouldn't they, therefore, have the right (or even the duty) to act more directly as the people's agents—or at least as the joint agents of the legislature and the people? And if the legislature has strayed from representing the people, shouldn't the elected judge stand in the people's shoes and enforce the people's purposes instead of the erring legislature's? Isn't the demand for deference to the legislature misplaced? All of these questions are more easily answered in the affirmative when judges are elected.

As noted above, there are less formalist versions of agency theory, in which all courts should play more independent, lawmaking roles. We next consider whether judicial elections affect their internal logic too.

4. Divergence is justified even on accounts that envision an active role for all judges.

Much of the discussion so far contemplates freeing state judges from the fetters of the conventional restraint-obsessed discourse of federal judicial power: if federal judges must be passive because of how they are selected, then state judges can be more active for the same reason. But what about those commentators who already reject formalist interpretive methods or strict forms of the faithful-agent approach for all judges?[113] If one believes that even *unelected* judges have a broad mandate to act in the name of the people—as their representatives or fiduciaries[114]—then one might well agree with the formalists that the mechanism of elections should not alter the proper method of interpreting statutes.

Nonetheless, the advocate of divergence can adduce some grounds to believe that judicial elections should matter even to those who give all judges a broad mandate. First, at the level of theory, judicial elections give the citizenry a greater degree of ex post residual

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113 See, for example, Dworkin, *Law's Empire* at 313–14 (cited in note 40); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S Cal L Rev 541, 579 (1988) (rejecting a separationist approach in favor of a collaborative one in which "legislation is part of the common law"). Professor William Eskridge has analogized courts to "relational agents." Although this formulation evokes the familiar "faithful agent" paradigm, it is clear that his notion of agency contemplates a greater role for independent judgment and creativity than more conservative agency approaches. Eskridge, 78 Georgetown L J at 322–27 (cited in note 108).

114 See, for example, William N. Eskridge Jr, *All about Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 Colum L Rev 990, 992 (2001) ("Article III judges interpreting statutes are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of 'We the People.'"); Leib, Ponet, and Serota, 101 Cal L Rev at *27 (cited in note 23).

control over their judicial fiduciaries. The presence of this check reduces the public's vulnerability to judicial malfeasance, and so an elected judge is arguably justified in having even more flexibility than an unelected counterpart. When an agent is instead virtually immune from dismissal or public oversight (as federal judges are), then she should be *especially* punctilious about following internal standards of conduct that prevent any abuse of power.[115] Put differently, electoral accountability and interpretive methodology can act as substitutes, as alternative methods of controlling judicial behavior.[116] Thus, even if all judges have interpretive freedom of some sort, not all judges deserve the same range of interpretive freedom.

Second, and perhaps more important, is a practical point. Even if all judges theoretically enjoy an equal license to act as creative partners, different types of judges vary tremendously in their ability to put that license to effective use. In particular, as we explain in Part II.B below, elected judges are more institutionally competent to employ more ambitious interpretive approaches than their unelected counterparts.

5. Interpretive divergence and rule-of-law values.

As we identified earlier, one of the pillars supporting the case for unified interpretation is the claim that the rule of law limits the range of permissible interpretive methods, leaving little room for notable divergences in approaches.[117] Various values associated with the rule of law do indeed impose some constraints. For instance, basic norms of due process require that the judge be impartial as between the litigants at hand, and so an elected judge should not favor a campaign contributor just as any judge should not favor a friend or political ally.[118] In addition, for reasons of predictability and consistency, judges should not generally flout controlling precedents and clearly applicable texts.[119]

115 See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L Rev 117, 179 (2006) (explaining that agency law typically assigns more stringent duties to agents that are subject to less supervision by their principals); Leib, Ponet, and Serota, 101 Cal L Rev at *9 (cited in note 23) (same).

116 See Tushnet, 61 S Cal L Rev at 1669 (cited in note 8) (making this observation in the context of constitutional decision making).

117 See Part I.A.2.

118 See *Caperton v A.T. Massey Coal Co, Inc*, 556 US 868, 884 (2009).

119 See Merrill, 14 Lewis & Clark L Rev at 1577 (cited in note 22) (emphasizing rule-of-law objections to dynamic interpretation); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw U L Rev 1389, 1393 (2005) (same).

But beyond such propositions, the identification of the rule of law with a particular notion of judicial independence—namely independence from public views and values—suggests that once again the federal model has been mistaken for the essence of judging.[120] Yes, a judge should do what is legally right rather than what is politically expedient. But in the hard cases—the kinds of cases in which divergence is a plausible option[121]—the question is what exactly the law means, and it is difficult to see why in those hard cases the rule of law prohibits (say) consulting public views, especially if the alternative source is simply an unaccountable judge's own preferences ("independent" though she may be). Indeed, popularly infused interpretation—one form that divergence could take—might promote the rule of law if one considers other aspects of that complex concept. As Professor Richard Primus has recently argued in the context of constitutional interpretation, treating public consensus as an interpretive authority promotes values like public respect for, and identification with, governmental institutions.[122] That argument works just as well for statutory interpretation—better in fact, inasmuch as statutes are not meant to entrench past decisions of the people against evolution in the way that constitutions arguably are.[123]

Although we have generally been envisioning notions of divergence according to which elected judges can, in different ways, behave in less conventionally formalist or "constrained" manners, here we should also consider an approach to divergence that points in nearly the opposite direction. Namely, perhaps elected judges should use *more* constrained methods than appointed judges in order to avoid the risk that they will be unduly swayed by electoral pressures.

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120 That type of independence from the people would not have been welcomed by those who instituted judicial elections. See Part II.A.2 (discussing the historic rationale for implementing judicial elections). The public's views of the judiciary are conflicting and even contradictory, but there is at least some support for the proposition that the contemporary public does not want its judges to be more independent from the people. See, for example, Gibson, *Judging the Politics of Judging* at 292 (cited in note 39).

121 See Part III.A (discussing the range of cases in which divergence could be appropriate).

122 Richard Primus, *Public Consensus as Constitutional Authority*, 78 Geo Wash L Rev 1207, 1219–21, 1229 (2010). As Primus explains, following public consensus can simultaneously risk diminishing other components of the rule of law, so one cannot say whether it is a net plus or a net minus on an across-the-board basis. Id at 1227–29. The point here is just to show that using such an input can be an affirmative good, not that it invariably is. See Levin, 2012 U Ill L Rev at 1119–22 (cited in note 40) (arguing that interpreting the law to accord with contemporary expectations promotes predictability and preserves the moral force of law).

123 Thus, one could support popularly infused statutory interpretation even if one is skeptical of judicial attempts to implement popular constitutionalism. See Pozen, 110 Colum L Rev at 2079–83, 2113–33 (cited in note 2) (questioning whether "majoritarian review" exercised by elected judges is a sound way to implement popular constitutionalism).

Although this interpretive posture may even have some positive support in a recent set of case studies of statutory interpretation in the states,[124] we are skeptical that aggressive formalism is successful in constraining judges as a general matter.[125] We are also skeptical that formalism is conducive to sociological legitimacy for voters anyway:[126] using formalism will not stop voters from evaluating case outcomes and their presumptive politics.

6. Institution-specific interpretation and the analogy to agencies.

As part of the case for interpretive divergence, it is worth considering an analogous context where numerous legisprudential scholars already recognize an important example of interpretive divergence. Namely, it is generally believed that administrative agencies may, and indeed *should*, interpret statutes using methods that differ from judicial techniques. For example, it is said that agencies can more properly rely on contentious policy considerations, and they are thought to be more competent at updating statutes in light of changed circumstances.[127]

The Supreme Court itself endorsed court-agency interpretive divergence in its famous decision in *Chevron USA, Inc v Natural Resources Defense Council, Inc*,[128] which directed federal courts to defer to agencies when statutes are ambiguous or silent.[129] It is worth

124 Professor Gluck suggests that elected judges might be more likely to embrace textualism in order to defend themselves against electorally effective charges of "judicial activism." Gluck, 119 Yale L J at 1860 (cited in note 20). That seems plausible as a matter of explaining how judges may choose to present themselves. Yet, we do not believe that forms a good normative basis for them actually to be more textualist than appointed judges.

125 See James J. Brudney and Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand L Rev 1, 96–108 (2005) (using an empirical study to cast doubt on claims that interpretive canons favored by textualists can promote predictable and consistent judicial decision making).

126 See Leib and Serota, 120 Yale L J Online at 53–58 (cited in note 21).

127 See, for example, Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* 212–15 (Harvard 2006) (arguing that agencies' greater competence permits them to be more ambitious and dynamic than courts); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 Mich St L Rev 89, 101 (concluding that agencies should be more purposivist than courts); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 Admin L Rev 501, 504–24 (2005) (discussing a variety of "constitutional and prudential dimensions" of agency interpretive divergence); Peter Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 Chi Kent L Rev 321, 321–22, 329–35 (1990) (emphasizing agencies' better understanding of legislative history and political context).

128 467 US 837 (1984).

129 Id at 842–44.

spending a moment to unpack *Chevron*'s rationale, for it is useful in considering other types of interpretive divergence as well. The *Chevron* opinion noted that judges lack expertise in technical and scientific matters such as the pollution-control regulations that were before the Court, which provides one reason to defer to agency experts.[130] Even more than expertise, however, the Court justified deference by relying on the agency's accountability to the president and, indirectly, to the people.[131] When Congress has not resolved all of the policy decisions in the statute, *Chevron* tells us, then "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[132]

Although the *Chevron* Court was discussing federal courts and federal agencies, this passage provides the outline for a straightforward case for elected judges to diverge from unelected judges in statutory interpretation methodology. Regarding the accountability rationale, which some regard as the most important consideration supporting the *Chevron* doctrine,[133] the obvious point is that although *federal* judges have no electoral constituency, elected state judges do. To that extent they can rightfully claim some of the same policy-making authority that agencies have but federal judges lack.[134] When it comes to expertise, one's first reaction might be that state judges are no more expert than federal judges regarding technical and scientific matters.[135] That may be true, but that is not the only kind of expertise that matters. As we will explain next, state courts may have their own expert competencies in other domains, such as discerning contemporary social facts and values. If one accepts court-agency divergence, one should at least be open to the possibility of divergence within the judiciary, too.

B. The Argument from Relative Competence

Any sound interpretive theory needs to consider the ability of judges to carry the theory into execution. The common perception

130 Id at 865.

131 Id at 865–66.

132 *Chevron*, 467 US at 866.

133 See, for example, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum L Rev 612, 626 (1996).

134 To be sure, the analogy is imperfect. Although *Chevron* emphasized that agencies are held accountable through the president, one might also find agency policy making acceptable because the legislature can exercise some control via oversight and funding decisions. Legislatures typically do not exercise that degree of control over courts, and one might find it problematic if they did.

135 See Part III.D (discussing rationales for deference to administrative agencies in state systems).

(or perhaps just prejudice) is that elected state judges are less able than their appointed, especially federal, counterparts.[136] But surely it depends on what kinds of competencies are at issue. If we believe, for example, that judges should decide cases in ways that seek to incorporate the community's current values,[137] it is the federal judges whose abilities we might reasonably doubt. They need not seek or win the approval of the people to stay in office. They serve lifetime terms designed to insulate them from public opinion, and as their tenure lengthens into decades they may come more and more to reflect fading values and bygone political coalitions.[138]

This Section explores some special competencies of elected judges, competencies that open up possibilities for interpretive divergence.

1. Advantage in discerning public opinion.

As compared to their unelected peers, elected judges have both more incentive and greater ability to make fruitful use of popular opinion. The brute fact of having to face the voters gives elected judges a strong motivation to understand how the public will receive their rulings.[139] Moreover, at least on state supreme courts, a significant minority of justices have previously served as elected officials, which supplies a degree of political savvy and comprehension.[140] (Contrast that with the modern US Supreme Court, where only one Justice appointed in the last forty years, Justice Sandra Day O'Connor, had previously held any elected political office.)[141] Any

136 Consider Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, 26 J L, Econ, & Org 290, 326–28 (2010) (comparing elected and appointed state judges and casting doubt on the view that elected judges are inferior).

137 Various approaches say we should. See note 40.

138 See Jack M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va L Rev 1045, 1066–69 (2001) (making this observation in the context of setting forth a theory of "partisan entrenchment"). See also *Dennis v United States*, 341 US 494, 525 (1951) (Frankfurter concurring) ("[Courts] are not designed to be a good reflex of a democratic society. . . . Their essential quality is detachment, founded on independence.").

139 See Devins, 62 Stan L Rev at 1659–68 (cited in note 37) (describing state judges' incentives to take political consequences into account in the context of constitutional decision making).

140 See Chris W. Bonneau, *The Composition of State Supreme Courts 2000*, 85 Judicature 26, 28 table 1 (2001) (providing data on prior political experience of state supreme court justices as of 1994 and 2000); Henry R. Glick and Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 Judicature 228, 232 table 1 (1987) (providing similar data for 1980–1981).

141 See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* 67 (Princeton 2006) (stating that only 7.7 percent of Supreme Court Justices appointed from 1969–2005 had previously run for an elected political office, compared with 38.1 percent of Justices appointed from 1933–1968, 57.9 percent of Justices appointed from 1896–1932, and 86.4

elected judge that has remained on the bench has demonstrated some facility in gauging the most important public reactions (at least where elections are genuine events, a notable caveat). Note that the argument here does not rely on the judicial elections themselves offering particularized guidance for decision making; the judges can draw on other election results, their reading of the community's general sensibilities, and so forth.

To be sure, one has to assess competence in a cross-institutional way. Even if elected judges are quite good at discerning public opinion—both in absolute terms and as compared to unelected judges—one might suppose that the real question is whether elected judges are more adept than the legislature, which writes the laws. Despite their dependence on the voters, elected judges are more insulated from the public than are legislators. In addition, legislators act through institutions—their legislative committees, their party caucuses, and the legislature as a whole—that can accumulate and process information, including information about public opinion, in ways a judge (or even a small group of judges) cannot.[142] If legislatures are superior gauges of popular opinion, then the populist might well conclude on comparative institutional grounds that even elected courts should treat the legislature's products—the statutes themselves as well as reliable legislative history like committee reports—as the best proxies for popular preferences rather than try to divine the public's sentiments for themselves.

There is some force to this point, but it is not decisive. It is well understood that legislative preferences can, for various reasons, diverge from popular opinion.[143] For instance, although a recent statute might accurately reflect contemporary opinions, the powerful forces of legislative inertia and vetogates mean that statutes are usually old and, often, out of step with current societal facts and values. That legislative sluggishness is, after all, the reason many people are drawn to dynamic interpretation and allied approaches that urge

percent of Justices appointed from 1861–1895); Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-appointment Experience*, 64 Fla L Rev 1137, 1154–55 (2012).

142 See Pozen, 110 Colum L Rev at 2116 (cited in note 2) ("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."). To be clear, Pozen then goes on to describe circumstances in which the legislature's competency advantage might be eroded. Id at 2117–18.

143 Indeed, one of the more common ways of attempting to dissolve the countermajoritarian difficulty is by showing that legislatures are not so majoritarian either. See Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 Ann Rev L & Soc Sci 361, 372–80 (2008) (reviewing recent literature emphasizing the countermajoritarian aspects of the political branches).

judges to update aging enactments.[144] So even if recently enacted statutes, when present, might be the best available gauge of public sentiment, a judge recently chosen in a salient election might beat a moldering statute.

Although we believe that the argument from relative competence is one of the most forceful points in the case for interpretive divergence, one has to acknowledge some weaknesses in the argument. Even if public opinion can be a useful input in judicial decision making, and even if elected judges are well positioned to understand it, judicial elections may be poor mechanisms for conveying it. Elections are always crude means of communication, and some judicial elections are particularly opaque due to low levels of interest, information, and participation.[145] Further, even setting aside the prospect of the election itself conveying particularized information—which is perhaps too ambitious—elections will not even generate incentives for judges to attend to public views if the elections are mere charades.

Without denying the real limitations of judicial elections, one should keep in mind that times change and that the frequent claim that judicial elections are meaningless affairs may reflect an outdated understanding of the reality of elections today.[146] Moreover, here we need to recall the differences between different types of judicial elections, for partisan elections tend to perform quite well qua elections. For example, partisan elections for state supreme court seats are actually more competitive (in terms of the rates at which incumbents are challenged and lose) than elections for the US House of Representatives and Senate.[147] Similarly, the high rates of ballot rolloff that are often cited to show that voters do not attend to judicial elections are largely a phenomenon of retention elections and nonpartisan elections; rolloff rates in partisan elections are quite

144 See, for example, Eskridge, *Dynamic Statutory Interpretation* at 123–25 (cited in note 40). See also Guido Calabresi, *A Common Law for the Age of Statutes* 31–43 (Harvard 1982) (describing attempts to use interpretation to counteract legislative inertia but ultimately deeming them inadequate to the problem).

145 See Part I.B.

146 See David E. Pozen, *The Irony of Judicial Elections*, 108 Colum L Rev 265, 267–68, 296–300 (2008) (describing the "new era" in which judicial elections are more like other elections). See also Streb, *How Judicial Elections Are Like Other Elections* at 195–200 (cited in note 75) (summarizing research on the competitiveness of judicial elections and stating that "the traditional view that judicial elections . . . are mostly sleepy affairs has been debunked," at least for state supreme courts).

147 See Bonneau and Hall, *In Defense of Judicial Elections* at 78–89 table 4.5 (cited in note 18). Judicial elections are sometimes more competitive than gubernatorial elections and sometimes less competitive, depending on the year. See id at 85–86 table 4.5.

low.[148] These complexities highlight the fact that whether elected judges should diverge depends on the actual electoral circumstances.

2. Advantage in understanding the legislature.

In some versions of interpretive divergence, elected judges could properly view themselves as more independent from the legislature than could their unelected peers. Nonetheless, statutory interpretation is an interbranch affair, and so even judges that do not regard themselves as the legislature's servants still benefit from understanding the legislature and its preferences. Here too elected judges have an advantage. As a matter of character, elected judges are political creatures who must, like state legislators but unlike federal judges, periodically face the voters in order to remain in office.[149] Indeed, it is not uncommon for state supreme court justices to have previously served as legislators or other elected officials.[150] Moreover, regardless of methods of judicial selection, the relationships between legislators and high court judges in a state capital are often close, quite different from the near estrangement of the federal judicial and legislative branches.[151]

The elected judge can put her understanding of the legislature to good use in a number of ways. For one thing, theorists as diverse as Professors William Eskridge Jr and Einer Elhauge have both argued that judges should interpret statutes consistently with the preferences

148 See id at 22–28.

149 In a handful of states, judges are dependent on the legislature for their continuance in office, either because the legislature itself is the reappointing authority or because it must approve the governor's reappointment. See American Judicature Society, *Judicial Selection in the States* at *3–11 (cited in note 13). Such judges have strong incentives to understand the legislature and its preferences for the same reason popularly elected judges need to understand the public. The argument in the text is that even popularly elected judges will understand the legislature better than will federal judges.

150 See Bonneau, 85 Judicature at 28 table 1 (cited in note 140) (providing the career history for state judges); Glick and Emmert, 70 Judicature at 232–33 & table 1 (cited in note 140). See also Hans A. Linde, *Observations of a State Court Judge*, in Robert A. Katzmann, ed, *Judges and Legislators: Toward Institutional Comity* 117, 118 (Brookings 1988) ("[M]any state judges, by dint of prior political experience as legislators or prosecutors, are quite familiar with the legislative branch and feel comfortable interacting with it.").

151 See Williams, *American State Constitutions* at 299 (cited in note 8) (explaining that state judges have "more regular involvement in the workings of other branches" and "are often deeply involved in the state's ongoing policy-making processes"); Linde, *Observations of a State Court Judge* at 118 (cited in note 150) (noting that "[a]s elected representatives, like legislators, [state judges] feel less hesitant to offer their policy views than do appointed judges" and that state judges find it "relatively easy . . . to stay in touch with legislative activities").

of the current legislature, not just the enacting legislature.[152] Although their work tends to emphasize the federal courts and the US Supreme Court in particular, it is actually elected state judges who are best positioned to use current legislative preferences as interpretive inputs. Elected judges might put their understanding of the legislature to use in more oppositional ways too, such as by diagnosing and responding to corruption and pathology in the legislative process.[153] More generally, any theory that envisions some sort of dialogue or dynamic interaction between courts and legislatures—whether cooperative or confrontational—requires as a factual predicate that the judiciary speak the legislature's language. That kind of fluency is more likely to be found in state judiciaries, especially where they are elected.

* * *

We have now presented what strikes us as the strongest case for the proposition that elected judges and unelected judges should diverge in their interpretive methods. That proposition is supported by the need to make sense of the existence of judicial elections, the internal logic of leading accounts of statutory interpretation, and the relative competence of elected judges in responding to public opinion and interacting with the legislature. Moreover, divergence is not necessarily prohibited by the separation of powers or the rule of law.

Of course, in Part I we constructed a case for the contrary position, namely that all judges should approach statutory interpretation the same way, regardless of their mode of selection. Where, then, does this leave us? The next Part attempts to answer that question by developing some implications of the analysis and reaching some tentative conclusions regarding when and how elections should influence interpretive method.

III. SYNTHESIS AND APPLICATIONS: WHEN AND HOW SHOULD JUDICIAL ELECTIONS MATTER?

As the discussion so far shows, the question whether elections should affect interpretive method implicates deeply contentious issues concerning the nature of statutory interpretation and the proper

152 William N. Eskridge Jr, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L J 331, 391, 404–05 (1991); Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 9–10, 41–69 (Harvard 2008).

153 To the extent that the legislative dysfunction is due to interest-group capture, the judiciary will not solve the problem if it is captured, too. This is a real risk that accompanies judicial elections, a point to which we will return. See Part III.B.2.

role of courts in a democracy. Perhaps some readers are prepared to declare a winner, having confirmed an initial preconception and put it upon a more solid foundation or, upon reflection, having changed their prior views. For our part, we find that this continues to be a tough question, and we think it would be foolhardy to expect to settle the matter definitively in this first systematic foray into the subject. Nonetheless, having presented the best cases for the two contending positions, there are some lessons we can draw from this investigation at both the level of high theory and the level of specific doctrines.

This Part begins by surveying, in Part III.A, the extent of the territory in which judicial selection could plausibly influence interpretation. Even someone who is quite persuaded of the importance of elections will recognize that other considerations will and should drive the results in many cases, indeed probably in most cases. Interpretive divergence—even under the most favorable conditions for it—is thus more of the exception than the rule. Having narrowed down the field, we then present, in Part III.B, examples of situations in which the case for divergence—of one form or another—is at its strongest. Finally, in Parts III.C and III.D respectively, we address two interesting applications of the analysis: the problem of cross-system interpretation (for example, elected state judges interpreting federal law, and vice versa) and the doctrine of state court deference to state administrative agencies.

A. The (Limited) Range in Which Elections Should Matter

Judicial elections should not matter in every case. Indeed, they probably should not matter in most cases. This is so for several reasons.

If popular views should play a more prominent role as an interpretive input for elected judges (and remember that this is just one form that divergence might take), then that source will often be neutral in the sense that the people will not have even a hypothetical (let alone actual) view about the matter before the court. If divergence instead means that elected judges enjoy a larger zone of discretionary freedom to depart from popular preferences, then the electorate's lack of particularized preferences is not a problem. Nonetheless, if elected judges have such freedom, few cases will provoke them to feel moved to use it. After all, many interpretive questions

are quite technical and unlikely to arouse much passion in anyone, whether the people, the legislators, or the judges themselves.[154]

Moreover, even in those cases that hold the potential to generate strong views, often the enacted text and other traditional tools of statutory construction will yield only one plausible answer. People may disagree over whether any particular case falls into the category of the clear case and about what the "traditional tools of statutory construction" actually are,[155] but there is no real doubt that some easy cases exist and that within many jurisdictions there is plenty of agreement about what tools may be used to interpret the words of a statute. Elections provide no escape from easy cases. After all, governors and presidents are elected and have a genuine democratic pedigree,[156] but they still have to follow the law in the easy cases. Elected judges are no different.

Judicial precedent might also narrow down the range in which elections should matter. An interpretive problem that might have started out in the zone of reasonable disagreement can become more closed—easier—once a prior court decision has chosen one meaning over another. Predictability and allied rule-of-law values would seem to require that the prior interpretation remain in force even if an election has since turned the prior judges out of office, especially where private reliance is substantial. In line with that intuition, the US Supreme Court and several other courts have stated that old precedents should remain valid despite the later adoption of an interpretive method that would have resolved the prior case differently.[157] The Court's rationale drew on the familiar rule-of-law case for stare decisis: to overrule would "substitute disruption, confusion, and

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154 In that regard, consider this appraisal of the Supreme Court's October Term 1989 statutory interpretation cases:

> None of them was interesting. Not one. Compared to flag burning or affirmative action or separation of powers or political patronage, these cases struck me as real dogs. That is not to say they were socially unimportant. Far more of the public welfare of the United States turns on questions of qualification for AFDC benefits than on the question of flag desecration.

Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S Ct Rev 231, 247.

155 *Chevron*, 467 US at 843 n 9.

156 A chief executive arguably has a better democratic pedigree than any particular legislator in that she is elected by the whole people instead of just a subset. Of course, at the federal level, the president has only an indirect and contingent democratic pedigree, thanks to the Electoral College.

157 See Gluck, 119 Yale L J at 1822–24 (cited in note 20). Not every court agrees: the Michigan Supreme Court, notably, overruled dozens of precedents in the years after a newly formed majority adopted a textualist approach. See id at 1803–04, 1824.

uncertainty for necessary legal stability."[158] Indeed, statutory precedents are said to enjoy an especially entrenched status.[159]

And yet perhaps one should not be so quick to exclude the possibility of overruling precedent on account of an intervening election. Although inferior courts are strictly required to follow their superior courts' precedents, a court does not have an *absolute* duty to follow its own precedents.[160] Overruling is permissible in special circumstances, even in statutory cases.[161] In determining what makes for special circumstances, shouldn't it matter that the voters threw the prior judges out of office because those judges' particular decisions, or general interpretive strategies, were, by the people's lights, *wrong*? Part of the justification for heightened stare decisis in statutory cases is that separation-of-powers principles put the legislature in charge of making and changing policy,[162] but that rationale is less forceful in elected judiciaries. When it comes to other elected offices, people believe elections should have consequences, including reversals of policy. To be sure, the judicial office is somewhat different: unlike most other changes in law, judicial overrulings are ordinarily retroactive and thus hold the potential for greater unfairness where there has been reliance.[163] And although it is possible that judicial elections could engage with disputes over interpretive approaches in a meaningful way,[164] we should guard against reading too much significance into electoral results. Nonetheless, with those important qualifications, it seems to us that the domain of cases in which elections could matter includes those in which there are precedents on point. Stare decisis applies even in elected judiciaries, but it need not apply in just the same way and with exactly the same force.[165]

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158 *John R. Sand & Gravel Co v United States*, 552 US 130, 139 (2008). See also *CBOCS West, Inc v Humphries*, 553 US 442, 457 (2008) ("Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same.").

159 See *Patterson v McLean Credit Union*, 491 US 164, 172–73 (1989).

160 See *Payne v Tennessee*, 501 US 808, 828 (1991) ("*Stare decisis* is not an inexorable command.").

161 See, for example, *Patterson v McLean Credit Union*, 485 US 617, 618–19 (1988) (per curiam) (citing cases in which statutory precedents were overruled).

162 See Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 Mich L Rev 177, 200–15 (1989).

163 See *James B. Beam Distilling Co v Georgia*, 501 US 529, 534–38 (1991) (Souter); *Bouie v City of Columbia*, 378 US 347, 350–54 (1964).

164 See Gluck, 119 Yale L J at 1803–11 (cited in note 20).

165 As an empirical matter, it appears that precedent does in fact have less force in states with elected judiciaries, especially those with partisan elections. See Stefanie A. Lindquist, *Stare Decisis as Reciprocity Norm*, in Geyh, ed, *What's Law Got to Do with It?* 173, 184–85 (cited in note 39).

B. Scenarios in Which Judicial Elections Plausibly Matter

Having gone some way toward limiting the domain in which elections could matter, let us now consider the kinds of cases in which the argument for interpretive divergence is at its strongest. That is, we are looking for situations in which it is most likely that one's verdict on the propriety of a court's interpretation would change based on how the judges were selected. More modestly, the aim is to identify situations in which, even if one's final verdict on the correctness of the decision remains the same, one's level of confidence in that verdict varies according to how the judges were selected.

As we have already emphasized, interpretive divergence might take multiple forms, which could act as complements or even alternatives. Thus we will consider a few different scenarios below. Nonetheless, to make a generalization, the circumstances in which divergence is most compelling tend to be cases that implicate independent judicial policy making and the countermajoritarian- and competence-based anxieties that swirl around it. If criticisms of independent-minded judicial interpretation have less bite in the context of elected judiciaries, that would be a real advance and would provide some justification for interpretive divergence between elected and appointed judges.

1. Updating in light of changed social circumstances.

Many different legisprudential theorists argue that statutory interpretation need not limit itself to an archeological search for a statute's original meaning. Rather, the meaning can change, even without legislative amendment, as the surrounding social and legal circumstances change. That is, interpretation can be dynamic.[166] And interpretation might need to be dynamic if statutes are to remain workable, for legislatures suffer from inertia, procedural hurdles, and limited agendas, all of which tend to impair their ability to update statutes as circumstances change. One can object to judicial use of dynamic methods on a number of grounds, of course.[167] Here we do

166 For two of the works most closely associated with this idea, see Eskridge, *Dynamic Statutory Interpretation* (cited in note 40); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich L Rev 20 (1988).

167 See, for example, Vermeule, *Judging under Uncertainty* at 105–15 (cited in note 127) (raising competence objections); Merrill, 14 Lewis & Clark L Rev at 1575–79, 1588–89 (cited in note 22) (raising democratic and rule-of-law objections); Martin H. Redish and Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 Tulane L Rev 803, 805–07, 833, 840–58 (1994) (raising democratic and competence objections); Tyler, 99 Nw U L Rev at 1393 (cited in note 119) (raising stability and predictability objections).

not wade into that debate, with all its arguments and counterarguments, except to point out that the balance of arguments weighs somewhat differently—and more strongly in favor of judicial dynamism—when the dynamic interpreter is elected. This is so for two primary reasons.

First, one enduring objection to judicial updating of statutes is that it is undemocratic. It is said to be undemocratic because it envisions policy making by unelected judges. As Professor Martin Redish and Theodore Chung put it, "dynamic interpretation [is] a transparent and constitutionally suspect transfer of lawmaking power from a popularly elected Congress to an *unaccountable* judiciary."[168] That particular line of argument loses much of its sting when the judges are elected too, at least where judicial elections involve genuine accountability.

Second, judicial elections also diminish objections based on judicial competence. Depending on the version of dynamic interpretation at issue, judges might be encouraged to update statutes by looking to current (rather than enacting) legislative preferences or current social values.[169] One could wonder whether a judge would be any good at discerning either, when the judge never faces the voters, has no political experience, and has little interaction with the legislature. The institutional and personal circumstances of *elected* judges, by contrast, give them an advantage in understanding the changing wishes of the people and the legislature.[170]

2. Trumping the legislature in the name of the people.

The previous Subsection involved the scenario in which the courts go somewhat beyond enacted policies but with the ultimate aim of helping the legislature overcome inertia and better represent the people. One can also imagine situations in which the courts should perhaps act more antagonistically toward the legislature, such as when the legislature appears to be advancing special interests at the expense of the common good. An example might be *Mississippi Poultry Association, Inc v Madigan*,[171] in which the Fifth Circuit was

168 Redish and Chung, 68 Tulane L Rev at 833 (cited in note 167) (emphasis added). Redish and Chung repeatedly link their democratic critique of judicial dynamism to the judiciary's lack of electoral accountability. See id at 807, 811, 851, 877. See also notes 110–11 and accompanying text.

169 See note 40 (discussing judicial interpretive theories that account for current public views); note 152 (discussing judicial interpretive theories that account for current legislative preferences).

170 See Part II.B (discussing elected judges and their connection with the electorate).

171 31 F3d 293 (5th Cir 1994) (en banc).

faced with a federal statute requiring imported poultry products to be inspected under "the same" standards as domestic poultry.[172] The Department of Agriculture had promulgated a regulation that interpreted the statute to require inspection rules "at least equal to" domestic standards.[173] The Mississippi Poultry Association challenged the agency's regulation on the ground that the statute required identical inspection regimes, a position the agency considered absurd because it would bar the importation of foreign poultry inspected under superior safety standards.[174]

Of course, that bar on imports would not be absurd if one thought the legislative purposes of the statute were not public health and safety but instead protection of the domestic poultry industry—even at the cost of making consumers pay more for less sanitary chicken. That is, a standard mandating identical inspections would be perfectly sensible if one imagined that Congress was behaving as public choice theory would predict, namely by responding to the lobbying efforts of a concentrated interest with a lot of money on the line rather than promoting the diffuse interests of the public at large.[175] Some judges on the court were content to view the statute as reflecting such pathologies and were unwilling to interpret the statute to avoid that outcome:

> Had the Agency labeled the actions of Congress protectionism, we would not necessarily disagree. But, while that may be deemed in some quarters to be unwise or undesirable, it cannot be labeled "absurd" in the context of divining the result intended by Congress. The Agency's complaint, therefore, is one implicating the clear policy choice of Congress—a choice made, undoubtedly, in response to effective lobbying by domestic poultry producers. It is not within the purview of the Agency, however—or of the courts for that matter—to alter, frustrate, or subvert congressional policy.[176]

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172 Id at 297. The case was initially heard before a three-judge panel, which reached the same result as the en banc court. See *Mississippi Poultry Association, Inc v Madigan*, 992 F2d 1359, 1364–65 (5th Cir 1993).

173 *Mississippi Poultry Association*, 31 F3d at 297.

174 Id at 308.

175 See Michael T. Hayes, *Lobbyists and Legislators: A Theory of Political Markets* 40–65 (Rutgers 1981).

176 *Mississippi Poultry Association*, 992 F2d at 1365 (emphasis omitted). The en banc majority opinion did not dispute that Congress could engage in bad policy like protectionism if it wishes, but the opinion also offered public-interest justifications for its reading of the statute, such as the ease of administering a single uniform standard. See *Mississippi Poultry Association*, 31 F3d at 309–10.

This is the kind of case in which elections might justify courts playing a more active role. On the standard account of the judicial role in statutory interpretation, judges are supposed to be the faithful agents of the legislature,[177] and that is how the (unelected) judges of the Fifth Circuit present themselves in the passage quoted above. But what about when the legislature is itself unfaithful to the people? To be sure, even unelected judges are, ultimately, the people's agents and not just the legislature's lackeys; accordingly, maybe *all* courts should act in the name of the people to ameliorate the effects of a legislative process that is captured by an interest group.[178] Yet, for the unelected judge, the relationship with the people is indirect and mediated by the legislature, which is the people's elected policy-making body. Departing from the legislature's design raises all of the familiar restraint-based anxieties.

Elected judges, by contrast, are selected by and accountable to the people directly and so need not be so anxious. Indeed, as we have seen, judicial elections were often instituted precisely in order to police the legislature's loyalty to the people.[179] So when the interests of the elected judge's two masters conflict—and the rent-seeking scenario provides a paradigm case of that—the elected judge should have fewer qualms about trumping the legislature in the name of the people (subject, of course, to rule-of-law limits along the lines discussed above[180]). Moreover, from the point of view of pragmatic competence, elected judges on a state supreme court can probably do a better job than their appointed counterparts of diagnosing when their legislative colleagues across the street have fallen prey to interest-group pathologies.[181]

To be sure, there is a practical problem with imagining elected judiciaries acting to suppress certain types of legislative dysfunction,

177 See note 53 and accompanying text.

178 Some theorists have in fact argued that judges should try to ameliorate dysfunctions in the legislative process, for example by interpreting statutes to counteract the legislative influence of rent-seeking special interests. See, for example, Eskridge, *Dynamic Statutory Interpretation* at 151–61 (cited in note 40); Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum L Rev 223, 227, 252 (1986).

179 See Part II.A.2.

180 See Part III.A. In the poultry-inspection case, we do not see a strong rule-of-law objection to embracing the "at least as good as" interpretation. The court would be upholding the agency's forward-looking regulation rather than imposing retroactive liability, and, in the context of a *safety* standard, a textual requirement to "follow the same standard" can readily bear the meaning of "follow standards that are the same or safer." See *Mississippi Poultry Association*, 31 F3d at 310–12 (Higginbotham dissenting).

181 See Part II.B.2 (discussing relative competence in understanding and relating to the legislature).

namely that the very same interest-group pathologies that occasionally sway the legislative process might interfere with judicial elections too. Judicial candidates, like their legislative counterparts, often need to raise money for their campaigns and can be as subject to contribution-minded decision making as legislators.[182] Indeed, it may be cheaper to buy a court majority than a legislative one. Given that background, we cannot be overly sanguine about the prospects of elected judges actually using the legislature-trumping legitimacy that their democratic pedigree confers. Competitive partisan races, despite their other democratic advantages, may be the worst in terms of interest-group influence.[183] Retention elections and nonpartisan races, notwithstanding their other democratic deficits, might therefore hold more promise when it comes to counteracting legislative capture. Viewed in their best light, these elections might represent a sort of happy medium that balances normative and positive concerns: enough electoral accountability to make counterlegislative action legitimate, enough insulation from monetary pressure to make it realistically possible. Viewed less charitably, the problem of interest-group capture may show that the plans of those who instituted judicial elections have gone awry: by pulling judges away from the corrupting effect of legislative influence, the judges have been driven into corruption themselves and rendered incapable of safeguarding the public interest.

3. Beyond the people?

We have just discussed the situation in which a court engages in interpretation that is countermajoritarian in the sense that it overrides the legislature's preferences. Yet a court's action in such a case actually promotes the people's interests, rescuing them from the dereliction of the people's supposed representatives in the legislature. This naturally leads to the next question: What about interpretation that goes beyond or even against the public too? Do elections alleviate concerns about decisions that are too independent from the people themselves?

As before, a concrete scenario can focus our analysis. Consider the problem, faced by numerous courts interpreting broadly similar state adoption laws, of whether the same-sex partner of a child's

182 See text accompanying notes 37–38, 81–82 (discussing the risks of corruption that accompany campaign funding).

183 See Kang and Shepherd, 86 NYU L Rev at 74–76, 106–19 (cited in note 82).

biological parent can adopt the child as a second parent.[184] For purposes of exposition, let us focus initially on what is probably the most famous case on the issue, the 1995 decision of the New York Court of Appeals (the state's highest court) in the case of *In the Matter of Jacob*.[185] The most pertinent statutory provision stated (as of 1995) that "[a]n adult unmarried person or an adult husband and his adult wife together may adopt another person."[186] The lesbian partner in *Jacob* was certainly "an adult unmarried person," so this provision supported the right to adopt.[187] The textual difficulty arises because the New York adoption statute, like many others, includes another section providing that an order of adoption terminates the child's connection with the birth parent(s),[188] which is obviously not what a couple in this situation intends. There were several express statutory exceptions to the termination rule, such as in the case of an adoption by a stepparent who had *married* the birth parent.[189] But the New York statute and others like it had no such exception to termination in the case of adoption by an unmarried partner, same sex or otherwise. This suggests that such an adoption was not contemplated by the text and, arguably, not textually possible as a matter of plain language.

Moving beyond the bare text to consider legislative intent, the intent would of course vary depending on the particular state at issue and the age of the relevant portions of the adoption law. Nonetheless, it is fair to say that in many cases the enacting legislators would not have thought about adoption by a same-sex partner and, if they had thought about it, their reaction would have been negative. (As one notable commentary on *Jacob* puts it, the legislators of yore would not have stopped with denying the right to adopt but "would have had the women arrested for violating the state sodomy law."[190]) In New York, the legislature had amended parts of the adoption law from time to time to reflect modern familial realities—stepparent

184 See Alona R. Croteau, Comment, *Voices in the Dark: Second Parent Adoptions When the Law Is Silent*, 50 Loyola L Rev 675, 685–97 (2004) (reviewing developments in various states). The issue continues to arise. See, for example, *S.J.L.S. v T.L.S.*, 265 SW3d 804, 809–10 (Ky App 2008).

185 660 NE2d 397 (NY 1995). The case actually involved two separate adoption petitions, the other of which concerned a cohabiting boyfriend's attempt to adopt the biological child of his female partner. Id at 398. For purposes of presenting our test case, we are only concerned with the same-sex couple.

186 NY Dom Rel Law § 110 (McKinney 1991).

187 *Jacob*, 660 NE2d at 400 n 2.

188 See NY Dom Rel Law § 117(1)(a) (McKinney 1987).

189 See NY Dom Rel Law § 117(1)(d) (McKinney 1987). See also *Jacob*, 660 NE2d at 411, 414 (Bellacosa dissenting) (citing special provisions that act as exceptions to the general terms of the adoption law).

190 Eskridge, Frickey, and Garrett, *Legislation* at 740 (cited in note 5).

adoptions, adoptions by teen fathers, open adoptions, and so forth[191]—but the legislature did not amend the termination provision to allow the second-parent scenario at issue in *Jacob*. All of this tends toward an intent-based argument against the adoption. On the other side of the ledger, one could argue that permitting the adoption would further the general legislative purpose of promoting the best interests of the child and would advance sound social policy.[192]

The various state courts to have confronted this interpretive problem have struggled with it and have divided on the issue.[193] In *Jacob* itself, a bare majority of the New York high court, in an opinion by Chief Judge Judith Kaye, read the statute to permit the adoption.[194] That courts would struggle with these cases is perhaps unsurprising. Equality for same-sex couples in matters of family relations like marriage and adoption has been a contentious social issue, and it is an area where public attitudes are evolving. Statutory text often lags behind societal changes, providing an opportunity for judicial updating. Constitutional norms of equal treatment likewise press judges to modernize stale texts and, perhaps, even to move out in front of current attitudes. These are, in short, hard cases.

Our concern, of course, is whether judicial selection has any bearing on how judges ought to resolve these difficult problems. Then-Governor of New York George Pataki and some state legislative leaders certainly seemed to think that judicial selection mattered. Pataki responded to the *Jacob* ruling by stating that "[p]olicy matters such as this . . . should be made by the elected officials of the people, namely the Legislature and the Governor, and not by an appointed judiciary."[195] Whatever one thinks of Pataki's normative position, he was right about the judges' status: the judges of New York's high court are appointed to fourteen-year terms by the governor from a list of candidates generated by a nominating commission, with reappointment to additional terms pursuant to the same process.[196]

191 See *Jacob*, 660 NE2d at 403–04.

192 The dissent in *Jacob* disagreed that the result would advance the legislative purpose, arguing that the interest in placing a child in a stable family situation could be threatened when the adoptive parents' own relationship was not legally recognized. Id at 406–08 (Bellacosa dissenting).

193 See Croteau, Comment, 50 Loyola L Rev at 685–97 (cited in note 184).

194 *Jacob*, 660 NE2d at 405–06.

195 James Dao, *New York's Highest Court Rules Unmarried Couples Can Adopt*, NY Times A1 (Nov 3, 1995) (quoting Pataki and reporting that the state senate majority leader "echoed [Pataki's] comments").

196 NY Const Art VI, § 2. See also *History of Reform Efforts: New York; Formal Changes Since Inception* (American Judicature Society), online at http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=NY (visited Nov 20, 2012).

The rather insulated New York court had moved more quickly toward equality than the state political process was ready to go.

Getting out ahead of the legislature may not be a judicial sin, of course, especially if the court is representing the people better than the legislature itself. Indeed, one could mount a majoritarian defense of *Jacob* by contending that the New York legislative process was failing to express public sentiment due to interest-group dynamics, upstate versus downstate deadlocks, or other pathologies. If so, the *Jacob* decision might be considered counterlegislative but not really countermajoritarian. Structurally, it would resemble the poultry-inspection case discussed in the previous Subsection.

But what if a decision permitting a same-sex partner to adopt would go not just beyond or against the legislature but also beyond or against the people too? It is hard to know for certain whether the *Jacob* decision accorded with New York public opinion,[197] but remember that this issue arose in many other states as well, including some that are usually regarded as more socially conservative. For instance, consider Indiana, where the state's intermediate appellate court permitted second-parent adoptions under factual and legal circumstances similar to those in *Jacob*.[198] While New York has very recently authorized gay marriage, Indiana law forbids it.[199] Let us assume, to make the test case perfectly clear, that a decision permitting a same-sex partner to adopt as a second parent would conflict with public opinion. Such legislative and popular disapproval is hardly dispositive, and one could defend the decision on frankly countermajoritarian grounds. Protecting disfavored minorities is, after all, one of the functions for which we often turn to courts, and one need not limit that role to constitutional interpretation. At the same time,

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197 Adoption by same-sex couples was pretty strongly disfavored by national majorities in 1995. See Karlyn Bowman and Adam Foster, *Attitudes about Homosexuality & Gay Marriage* 38–40 (American Enterprise Institute June 2, 2008), online at http://www.aei.org/files/2008/06/03/20080603-Homosexuality.pdf (visited Nov 20, 2012) (compiling data from numerous opinion polls). In New York, however, by 1995 there was already an administrative regulation (though not a statute) providing that a potential adoptive parent could not be turned away solely because of homosexuality. See *Jacob*, 660 NE2d at 401. Further, one would assume that attitudes toward second-parent adoptions by the same-sex partner of the child's biological parent would be more favorable than opinions on the more general question of adoptions by same-sex couples.

198 See *In the Matter of the Adoption of K.S.P.*, 804 NE2d 1253, 1257 (Ind App 2004).

199 Compare Nicholas Confessore and Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, NY Times A1 (June 25, 2011), with Ind Code § 31-11-1-1. The Indiana legislature recently voted overwhelmingly in favor of a state constitutional amendment banning same-sex marriage or civil unions, though the amendment would have to be approved by the next legislature and then be approved in a referendum to take effect. See Heather Gillers, *Marriage Amendment Clears First of 3 Steps*, Indianapolis Star A1 (Mar 30, 2011).

however, a countermajoritarian defense is vulnerable to all the time-honored, restraint-oriented criticisms.

The basic conflict between minority rights and majority rule may be insoluble (and it is definitely insoluble within the confines of this Article), but does the problem at least look different when one considers judicial selection? The judges of the Indiana intermediate appellate court are appointed by the governor from a list provided by a nominating commission and, after their initial retention election, serve ten-year terms.[200] The judges of the New York high court, recall, do not even face retention elections.[201] The adoption decisions issued by these two courts would be harder to criticize on conventional democratic grounds were the judges rendering them subject to real elections.

Genuine accountability through elections confers, we believe, a degree of decisional freedom that unaccountable judges lack. At first blush this claim might seem surprising, for one might suppose that elected judges, as agents of the people, should not rule against what the people want. Yet, upon further reflection, that view is too simplistic. When it comes to legislators, who are even more clearly supposed to be the people's representatives, it is not at all clear that a legislator's duty is to mirror the voters' preferences in every instance.[202] Part of the reason that legislators can legitimately depart from their constituents' preferences from time to time is because the legislators are accountable to the voters after the fact. Elected public officials are supposed to lead, one might think, not only follow. The same is true for elected judges. Moreover, the legitimacy of elected judges occasionally moving beyond the people's current position is further bolstered by the fact that they (unlike legislators) have to provide the voters with a reasoned explanation for their actions in the form of a judicial opinion.

Even for those observers who are less concerned about conventional majoritarian and judicial-restraint-oriented objections and prefer to defend the pro-gay-adoption decisions on more "meta-democratic"

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200 Ind Const Art 7, §§ 10–11. See also *Methods of Judicial Selection: Indiana; Selection of Judges* (American Judicature Society), online at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=IN (visited Nov 20, 2012).

201 See text accompanying note 196.

202 The question of how representatives should represent their constituents—where the contrasting positions are usually described as the "delegate" and "trustee" models—is one that has long generated debate. See generally Hanna Fenichel Pitkin, *The Concept of Representation* (California 1967); Ethan J. Leib and David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J Polit Phil 178 (2012) (exploring the political theory debates about political representation).

or deliberation-forcing or openly normative terms,[203] elections should still affect one's assessment of the pro-adoption decisions. A judicial decision that attempts to lead the people forward toward a more just society carries the risk of provoking a legislative or popular backlash that could render the decision self-defeating.[204] Elected state judges, who are close to and dependent upon the people and the political process, should generally have a greater capacity to predict when such a backlash is likely as compared to more isolated appointed judges.[205] Indeed, it might be normatively acceptable for elections to be used to express that backlash, instead of creating more disruptive reverberations throughout the political system.

An important caveat to the analysis above, and one that bears repeating, is that judicial elections should matter to the extent that they are meaningful events. Many times they are not.[206] But sometimes they are. And the type of scenario represented by the adoption problem, in which the issue is salient and relatively understandable, seems like the kind of case in which elections could provide some degree of genuine accountability, an accountability that justifies independence from legislators and even from the people.

* * *

Before closing this Section, it is worth noting the possibility of a rupture between how elected judges are justified in acting and how they might feel prudentially bound to act. We have argued on normative grounds that meaningful elections contribute to the legitimacy of judges acting in countermajoritarian ways. Nonetheless, as a positive matter, it seems that heightened accountability would simultaneously dissuade judges from deviating too far from the people on salient matters.[207] Cast in its best light, this is reassuring, in that it suggests that judges will use their normatively justified independence with caution and will avoid the worst excesses of unaccountable

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203 For such defenses, see Eskridge, Frickey, and Garrett, *Legislation* at 740–41 (cited in note 5); Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chi Kent L Rev 933, 942–49 (2000).

204 There is a substantial literature on backlash, mostly focusing on constitutional decision making. See, for example, Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 Mich L Rev 431 (2005); Robert Post and Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv CR–CL L Rev 373 (2007); Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 Stan L Rev 155 (2007).

205 See Devins, 62 Stan L Rev at 1659–74 (cited in note 37). See also Part II.B.

206 See Part I.B.

207 See Pozen, 108 Colum L Rev at 326–27 (cited in note 146) (noting the irony that judicial elections legitimize countermajoritarian constitutional review in theory but create disincentives for judges to engage in it in practice).

power. More ominously, though, it evokes fears about judges who lack the strength to take unpopular action when necessary. That may well be a reason to do away with judicial elections altogether (or to be thankful that we also have life-tenured federal judges in the background). But if a jurisdiction decides to govern itself with elected judges—genuinely elected judges—we cannot just assume that they ought to behave like their federal counterparts and that every decision is just as proper regardless of who rendered it.

C. Crossover Cases

As we think more carefully about the relevance of judicial elections for the interpretive enterprise, we must consider an important but underappreciated feature of statutory interpretation. In our federal system, statutory interpretation involves various jurisdictional crossovers. State court judges often interpret federal statutes and federal court judges often interpret state statutes.[208] On account of choice-of-law regimes, state courts often interpret "foreign" state statutes. Additionally, within a given state system, judges elected from one district or locality must routinely interpret state laws passed by representatives of a different and wider electorate; by the same token, judges elected in at-large, statewide elections must interpret local laws that do not purport to bind the entire state.

These matters of "intersystemic statutory interpretation"[209] raise interesting and difficult questions for our current inquiry. For example: Should a federal judge tasked with interpreting state law eschew whatever freedom elections might confer, even if elected state judges might approach the same statute in a more liberated spirit? Ought a state high court judge elected in a salient, partisan, and competitive election use the freedom conferred by election to interpret *federal* statutory law? And what should one set of state judges do when

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[208] See 28 USC § 1652 ("The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); *Howlett v Rose*, 496 US 356, 367–75 (1990) (explaining that state courts are generally both permitted and required to apply federal substantive law). See also Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 Yale L J 1898, 1926, 1960–62 (2011).

[209] We credit Professor Gluck with coining the term but mean to use it in a more capacious sense than she does. See Gluck, 120 Yale L J at 1906 (cited in note 208). She focuses only on the vertical federalism of federal-state interaction, whereas we are also concerned here with horizontal interstate and vertical intrastate statutory interpretation problems. One of us explores these issues further. See Leib, 161 U Pa L Rev at *9–30 (cited in note 75). We also differ from Professor Gluck in that she views intersystemic interpretation largely through the lens of whether interpretive methodology is "law." We prefer to draw more directly on considerations of competence, democratic legitimacy, and pragmatism in order to identify circumstances in which cross-system sensitivity is warranted.

choice-of-law principles require them to interpret the law of a sister state whose law is controlled by judges subject to a different selection scheme? This cluster of issues replicates itself in wholly intrastate scenarios as well: May a judge elected by a local (say, county-level) constituency use whatever presumptive freedom election bestows when that local judge interprets not just a local ordinance but also a statewide law enacted by the whole state's legislature? And may the state-level judges selected from larger constituencies impose statewide policy when interpreting local law?

Admittedly, one could be forgiven for wanting to adopt the unified method for elected and appointed judges just to make these practical puzzles disappear. Indeed, these challenging questions may very well generate good reasons to reject interpretive divergence. Still, our analysis thus far gives us the ability to make at least some headway in this doctrinal morass.

1. *Erie* (and foreign state law).

The classic *Erie* context presents the puzzle in the most familiar guise. Imagine a federal judge—appointed with life tenure by the federal government—with jurisdiction over a case that requires the federal judge to interpret a state statute. On account of prevailing *Erie* doctrine, that federal judge must do her best to interpret the state statute as the highest state court would.[210] One might suppose that means using state interpretive methods.[211] Notice the problem that arises for those who favor electorally driven interpretive divergence. We have argued that (some) elections license a type of decisional freedom for elective judiciaries that appointive judiciaries lack—and we have emphasized an institutional competence to perform this work in elective judiciaries, which appointive judiciaries

[210] See *Erie Railroad Co v Tompkins*, 304 US 64, 78 (1938). There is academic commentary challenging whether *Erie* requires federal courts to "predict" state law (when it has not already been decided by a state high court). See, for example, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U Pa L Rev 1459, 1461, 1495–1501 (1997); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L Rev 651, 695, 707–15 (1995). But the federal courts more or less agree that they are supposed to be taking that posture in *Erie* cases. See Gluck, 120 Yale L J at 1927 n 90 (cited in note 208) (citing cases). See also Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 19 *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4507 at 115–220 (West 2d ed 1996) (discussing how federal courts ascertain the content of state law).

[211] A number of federal courts have stated that they should use state methods when interpreting state statutes. See, for example, *Bass v County of Butte*, 458 F3d 978, 981 (9th Cir 2006); *General Electric Capital Corp v Southeastern Health Care, Inc*, 950 F2d 944, 950 (5th Cir 1991). But one can also find numerous instances in which federal courts appear to ignore or depart from that directive. See Gluck, 120 Yale L J at 1927–40 (cited in note 208).

again lack. What is a federal court supposed to do when it is called upon to stand in the shoes of the state judiciary yet lacks the competence to understand the constituency in the state?

Although we cannot make this problem disappear, it should not be blown out of proportion. This complex issue arises only when state law is unclear (for clear law triggers no decisional freedom even for the elected state judge). Moreover, if the construction of the state statute is controlled by recent precedent—or an obvious extension of recent precedent—a federal court would ordinarily have little trouble simply following that established law. In a large class of these hypothetical cases, interpretive divergence simply will not arise on account of electoral status or otherwise, as the case will be an easy one for all judges.

But some cases are not so simple. How should the federal judge approach the difficult cases in which elections might matter? These might be cases in which, for example, an unclear statute addresses a matter of public interest or in which old precedent seems out of step with contemporary trends. Although it is common for federal courts in these more complex positions to use a variety of sources of authority to "predict" uncertain state law,[212] the competence concerns we adumbrated earlier make it particularly difficult for federal judges to predict unsettled state law when it is controlled by elected judges who have specially designed decisional freedom. Although by hypothesis state high courts can have the warrant and the competence to be dynamic, we doubt federal judges have the ability to approximate these dynamic virtues—and are better off not trying. Accordingly, in these circumstances, the procedural device of certifying the question to the elected state high court seems like the most appealing option for a federal court that is being asked to perform a task for which it is unsuitably designed.[213] Alternatively, federal courts at the very least need to formulate their *Erie* guesses with an understanding about how elective judiciaries comport themselves

212 Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex L Rev 1, 20–21 (1994); Benjamin C. Glassman, *Making State Law in Federal Court*, 41 Gonzaga L Rev 237, 299–303 (2006).

213 For an embrace of certification "solutions" (though for reasons having little to do with our focus on interpretive divergence on account of different selection mechanisms), see Clark, 145 U Pa L Rev at 1549–56 (cited in note 210); Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 NYU L Rev 1293, 1299 (2003); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases between Federal and State Courts*, 104 Colum L Rev 1211, 1214, 1254–56 (2004).

and with some sensitivity to the electoral dynamics surrounding state court judicial elections.[214]

Consider next the plight of state judges—whether elected or appointed—who have to interpret a sister state's law owing to choice-of-law principles.[215] One would suppose that applying a statute of State X does not mean applying the text in a vacuum but rather applying it as the State X judges would. Yet if the judges of State X interpret the law using (say) a measure of electorally justified and informed decisional freedom, the judges of other states (even if elected) would lack the legitimacy and the information necessary to wield that same power. For this reason, we regard it as unfortunate that many of the states that authorize their supreme court to accept certified questions from federal courts deny that option to the courts of other states.[216] Perhaps that would change—and existing opportunities for certification would be used more often —were interpretive divergence to take hold. In any case, when certification is unavailable, the second-best solution of judges muddling through may be the only way forward.

All of this is untidy, we confess. But it bears reminding the reader that the potential for radical disuniformity in state law on account of this particular complexity associated with interpretive divergence is very small (and anyway there is plenty of divergence because of other disparate methodological commitments across the states). When important disuniformity arises—whether through federal exposition of state law via *Erie* or one state's application of another state's law—it is always a state's high court that ultimately controls the development of its own state's law. When other courts err in their predictions about what a given statute requires, the state's high court can always clarify the law using whatever sources and methods are appropriate given their local method of judicial selection.

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214 In stating that federal judges should sometimes consider political factors when determining the content of state law, we acknowledge that some other scholars believe such a course unduly compromises the ideal of law as impersonal and objective. See, for example, Dorf, 42 UCLA L Rev at 687–88 (cited in note 210); Gluck, 120 Yale L J at 1985–86 (cited in note 208). But see *Salve Regina College v Russell*, 499 US 225, 241 (1991) (Rehnquist dissenting) ("A [federal] judge attempting to predict how a state court would rule must use not only his legal reasoning skills, but also his experiences and perceptions of judicial behavior in that State.").

215 Thanks to Professor Howard Erichson for a good talk about these issues.

216 See Charles Alan Wright, et al, 17A *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4248 n 33 at 497 (West 3d ed 2007). Where state-to-state certification is available, it has been very rarely used. See Ira P. Robbins, *Interstate Certification of Questions of Law: A Valuable Process in Need of Reform*, 76 Judicature 125, 127 (1992) (reporting, as of 1992, that state-to-state certification had never been used). For a rare example of state-to-state certification, see generally *In re Certified Question from Fourteenth District Court of Appeals of Texas*, 740 NW2d 206 (Mich 2007).

2. "Reverse-*Erie*."

The "reverse-*Erie*" scenario[217] presents somewhat different considerations. Here, we focus on what a state court should do when interpreting federal law. The issue is practically important: "[S]imply by virtue of their numbers, state courts hear more federal-question cases than do federal courts, and so these state cases have a significant effect on the meaning of federal law."[218] The deep question for our analysis is what to think about the fact that some elected state judges may enjoy some variety of interpretive freedom—and yet the decisional freedom's best justification derives from features of state constitutional structure and pragmatic knowledge about state politics, state legislatures, and constituent preference. When the elected state judge takes to interpreting federal law, can she bring that freedom into federal statutory construction?

It would seem reasonably clean to conclude that state judges simply do not have the right democratic pedigree when it comes to national legislation and ought to decline to use the interpretive freedom they won in a state election when they interpret federal statutes.[219] The use of their decisional freedom in this context would be misplaced at best and could lead to disuniformity and forum shopping, which is presumptively disfavored by the *Erie* ethos and general rule-of-law concerns.[220]

But, on the other side of the ledger, there is plenty of disuniformity—and interpretive divergence of many kinds—anyway. Further, it is hard to believe that an elected judge primed to respond to constituents' views would ignore those views just because federal law is at issue. Asking elected judges to remove the "judico-cultural vestment"[221] granted by election for a class of important federal cases may be a bit naive. As it is, most state courts do not feel constrained

217 See generally Kevin M. Clermont, *Reverse*-Erie, 82 Notre Dame L Rev 1 (2006) (discussing the absence of a unified theory to explain when state law or federal law applies in state court decisions).

218 Gluck, 120 Yale L J at 1960 (cited in note 208).

219 See Anthony J. Bellia Jr, *State Courts and the Interpretation of Federal Statutes*, 59 Vand L Rev 1501, 1506–07, 1547, 1552, 1558 (2006) (finding, in a study of Founding-era state practices, that state judges felt less free to engage in equitable interpretation when interpreting federal statutes than when dealing with their own state statutes). Bellia's explanation is based not on judicial elections (which would not have been relevant in that period) but on the Supremacy Clause and related structural requirements for federal lawmaking.

220 See *Erie*, 304 US at 74–75; Clermont, 82 Notre Dame L Rev at 36 (cited in note 217).

221 Thanks to Professor James Brudney for the turn of phrase and the challenge here.

to adopt constructions of federal law announced by any federal court below the Supreme Court.[222] And the sky has not fallen.[223]

In addition, there are good normative reasons to allow state judicial elections to have some small impact on the interpretation of federal law. Although a state judge could not purport to represent a national constituency, neither would the state court's interpretation of federal law extend outside its own state; this allows state judges to satisfy local preferences while allaying concerns about overstepping their electoral mandate. Moreover, locally elected judges can provide some valuable information to federal officials about how their local constituents would prefer ambiguous statutes to be read and implemented—and this may be precisely what the federalist design of the United States would recommend. Electorally driven interpretive divergence thus provides fertile ground for the flourishing of an attractive form of what others have called "dialectical federalism"[224] or "polyphonic federalism."[225]

It is true that the modest divergence we are inviting could contribute to intrastate (and interstate) forum shopping as between federal and state courts, a principal concern of the *Erie* doctrine. Neither court's interpretations of federal law would be able to bind the other, though the US Supreme Court could settle disputes definitively, at least in principle.[226] Nonetheless, our provisional view on this difficult subject is that the kind of decisional freedom authorized by a relevant election does actually warrant a state judge to use that small range of freedom even when interpreting federal law—at least unless federal law settles on some principles of federal statutory interpretation that are sufficiently clear and sufficiently law-like that state judges could be bound to follow them in the reverse-*Erie* scenario.[227] That does not mean that state judges should ignore the risks

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222 See Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 Wm & Mary L Rev 1143, 1173–76 (1999); *Hall v Pennsylvania Board of Probation and Parole*, 851 A2d 859, 863–64 (Pa 2004) (collecting cases and finding that a "vast majority of state supreme courts" do not hold lower federal court pronouncements on federal law to be binding).

223 See Amanda Frost, *Overvaluing Uniformity*, 94 Va L Rev 1567, 1584–1606, 1639 (2008).

224 Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L J 1035, 1046–47 (1977).

225 Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L Rev 243, 285 (2005); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 Cal L Rev 1409, 1466–67 (1999).

226 See 28 USC § 1257 (authorizing Supreme Court review of state court judgments on federal law). Given the immense number of state decisions, the Supreme Court can review only a tiny fraction.

227 See Gluck, 120 Yale L J at 1961 (cited in note 208) ("[B]ecause there is no 'law' of federal statutory interpretation, as a formal matter, [ ] state courts are free to make methodological

of intrastate disuniformity when the risks are compelling—after all, their constituents would have second-order preferences for orderliness—but it means that uniformity is just one of the relevant values.

3. Local judges and state laws—and local laws and state judges.

There are, finally, a set of complexities that arise wholly within individual states and relate to the enterprise of interpreting intrastate statutory law.[228] Within a given state, methods of judicial selection often vary depending on the level and type of court at issue. For instance, lower court judges may be seated by elections but higher court judges may be appointed and then subject to retention election.[229] In such a scenario, our analysis might suggest differential degrees of interpretive freedom—with the lower courts presumptively having more freedom than higher courts. Can that be right? Moreover, even if all judges within a state are elected in the same type of election, some will be elected by statewide constituencies while others will be elected by local units like counties or districts. Is it ultra vires, then, for a locally elected judge to use decisional freedom when interpreting state legislation rather than when she is interpreting county ordinances? And, in the *Erie* corollary, is it ultra vires for state judges to use interpretive freedom when construing local laws and ordinances when their electorate is not coterminous with the electorate who voted in the representatives who passed the law under scrutiny? These are not easy problems with easy solutions, and we do not purport to say how courts should behave in every intrastate crossover scenario.[230] Nonetheless, we do offer a few comments here in an exploratory spirit.

choices different from those of the lower federal courts."). One area in which federal law might have established such a binding interpretive rule is the *Chevron* doctrine governing review of agency interpretations. See *Friends of the Columbia Gorge, Inc v Columbia River Gorge Commission*, 213 P3d 1164, 1172 (Or 2009) ("Although [*Chevron*] deference is foreign to the administrative law of this state, we are bound to apply it in our interpretation of federal statutes if the federal interpretive methodology so demands."). For a discussion of whether *Chevron* is an appropriate model for elected judiciaries, see Part III.D.

228 See Leib, 161 U Pa L Rev at *9–30 (cited in note 75).

229 In California, for example, voters directly elect the lowest-level judges (Superior Court) in nonpartisan elections. The judges at the higher-level appellate courts (the Courts of Appeals and the Supreme Court) are seated through gubernatorial appointment and are then subject to retention elections at regular intervals. See *Judicial Selection in the States: California; Overview* (American Judicature Society), online at http://www.judicialselection.us/judicial_selection/index.cfm?state=CA (visited Nov 20, 2012).

230 Our literature review reveals that although local government scholars have studied both the political and constitutional dynamics that occur among local and state authorities, the judicial terrain internal to state systems—and their statutory interpretation practices, in particular—

First, we suspect that local courts[231] may not be the most promising sites for the exercise of decisional freedom—and this is so for a variety of democratic, structural, and institutional reasons. Although many judges on the lowest state courts are elected, very few such elections give rise to any salience or any deliberation about real issues in the local electorate.[232] Further, these elections are often controlled by political party machines.[233] Except in the rare case of a meaningful election that does not get captured by interest-group financing, local judicial elections could provide only a thin invitation for interpretive creativity. Additionally, even where local elections are genuine, one could question how much local autonomy the state constitutional structure would allow them to confer. Unlike state authority, which is not regarded as deriving from the national government, the power of localities is usually regarded as deriving from a grant of authority by the state.[234] Finally, as a more practical matter, the lowest-level judges within state systems are already the most constrained in their statutory interpretation because they are the ones most likely to be bound by precedent.

Having expressed those doubts, we do acknowledge that there is something to be said in favor of decisional freedom at the local level, in particular where local ordinances are at issue. Just as citizens can

is much less an object of careful analysis. One of us has started to get more systematic about these issues. See Leib, 161 U Pa L Rev at *9–30 (cited in note 75).

231 "Local" courts here carries two meanings: local courts that are run by municipalities, counties, or cities, and those run by the state directly at the local level.

232 See Charles A. Johnson, Roger C. Shaefer, and R. Neal McKnight, *The Salience of Judicial Candidates and Elections*, 59 Soc Sci Q 371, 374 (1978) (finding that the salience of lower-court elections—2.5 percent of voters surveyed could name a single candidate—is much lower than higher-court elections: 14.5 percent of same).

233 See, for example, *Lopez Torres v New York State Board of Elections*, 462 F3d 161, 171–81 (2d Cir 2006) (describing the process for electing New York trial court judges as dominated by local party bosses), revd 552 US 196 (2008).

234 This is very contested territory within the state and local government law community, but most acknowledge that local power flows from some state concession in a state statute or a state constitution. See Gerald E. Frug, Richard T. Ford, and David J. Barron, *Local Government Law: Cases and Materials* 138 (West 5th ed 2010) (referring to "the dominant view" that local governments "are dependent on state law delegations for any powers that they may exercise"). Even within the group that advocates for more extensive freedom for local governments, no one—to our knowledge—believes judicial federalism in particular is an especially useful way to reinforce local political autonomy, though one could construct such an argument from scholarship within the pro-local-autonomy tradition. See, for example, Daniel B. Rodriguez, *State Supremacy, Local Sovereignty: Reconstructing State/Local Relations under the California Constitution*, in Bruce E. Cain and Roger G. Noll, eds, *Constitutional Reform in California: Making State Government More Effective and Responsive* 401, 410–21 (Berkeley Institute of Governmental Studies 1995) (providing an argument for expanded local power); Gerald E. Frug, *The City as a Legal Concept*, 93 Harv L Rev 1059, 1141–49 (1980) (emphasizing the importance of judicial federalism as a means of supervising state control of cities).

use local school board elections to express their most important political views, local judicial elections may be a site for reinforcing political efficacy, too. Imagine a scenario in which a local judicial election is salient and focused on an issue of tremendous local concern that is also the subject of statutory interpretation cases. Although cities and counties are rarely regarded as independent fonts of sovereignty, there may still be good reason to allow some play in the joints for interpretive freedom by local judges in such cases. And there are few risks when locally elected judges use decisional freedom to interpret only local law. The local judges can be corrected by their judicial superiors if they take whatever local mandate they have too far, and the state legislature can always preempt local ordinances if it wishes.[235]

It is a somewhat harder case if local judges purport to use their decisional freedom to interpret statewide law. To be sure, the US Supreme Court has agreed that states may have an interest in "maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters."[236] State constitutional design may be open to allowing locally elected judges to decide statutory cases in ways that correspond to their electoral status. Indeed, just as "dialectical federalism" can work on the national level,[237] it might also have value intrastate.

Still, such local judges must recognize their limits in terms of democratic legitimacy and their practical abilities. Moreover, they may be subject to direct review (and excoriation) by a higher court. Here is an example:

> We observe that one of the bases for the Juvenile Court's . . . order was [the local court's] understanding of the policies of Morgan County. . . . But county courts must be guided by state law rather than local practice in carrying out their duties: "[a] general statute, enacted by the people of the entire state through their representatives, speaks for and to the whole population, and therefore cannot be given or be supposed to have a merely local meaning, or a meaning varying to suit the special usage prevailing in the several localities." In fact, "[u]niformity in the interpretation and application of the law is the keystone in our system of jurisprudence." Accordingly, the Juvenile

235 Intrastate preemption is commonplace—and state judges routinely use "implied" preemption broadly. See Paul Diller, *Intrastate Preemption*, 87 BU L Rev 1113, 1140–57 (2007).

236 *Houston Lawyers' Association v Attorney General of Texas*, 501 US 419, 426 (1991). Thanks to Professor Christopher Elmendorf for the lead.

237 See note 224.

> Court—and, indeed, all local courts—must base its decisions on state law, and must also ensure that local practice complies with state law.[238]

In short, even if local courts get creative with state law, infusing it with local concern, we would expect to see state appellate courts trying to retain control over state law. These scenarios are quite different from the classic reverse-*Erie* case between state and federal authorities because within the framework of state and local governance, the relationship here is hierarchical rather than coordinate.

It is also worth analyzing how state supreme court justices subject to at-large elections should think about their role when they take to interpreting local laws, passed by representatives of subpopulations within their jurisdictions.[239] This inquiry requires more attention than we can give it here, requiring a rehearsal of all of the arguments for intrastate polyphony and all the arguments against it from the perspective of uniformity and the homogenizing function of state law. Yet, given that the state tends to have hierarchical superiority over its localities, we would expect state judges to bring statewide policy preferences to bear on local ordinances freely and often. At the very least, we hope our attention to the strongest arguments for and against interpretive divergence has put these constellations of difficult intrastate issues on the agenda for scholars of statutory interpretation to grapple with in the future.

D. Elected Judges and Deference to Agencies

We close with an example of a practical doctrinal payoff of attending to the role of judicial elections. In particular, we consider how elections might affect the doctrines governing judicial deference to administrative agencies' statutory interpretations. In the federal system, the familiar framework comes from the Supreme Court's *Chevron* decision, which instructs courts to defer to reasonable agency interpretations of unclear statutory language, assuming the legislature

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238 *In the Matter of Infant Girl W.*, 845 NE2d 229, 244 (Ind App 2006), quoting *Cook v State*, 59 NE 489, 490 (Ind App 1901) and *Warren v Indiana Telephone Co*, 26 NE2d 399, 405 (Ind 1940).

239 We focus on at-large, statewide races here—but there is also another complication: What about the handful of state supreme courts whose members are elected from districts rather than by the entire state? See Bonneau and Hall, *In Defense of Judicial Elections* at 12–13 table 1.2 (cited in note 18) (listing states). Should those judges act as local or instead statewide officials with whatever freedom and obligations those respective roles involve? Given our competence-based arguments in Part II.B, judges might be limited to using their freedom in ways keyed only to their individual districts.

actually delegated such interpretive authority to the agency.[240] States have their own administrative agencies, of course, and so the question naturally arises whether and how state courts should defer to state administrative interpretations. Some recent work has tracked what state courts are doing in reviewing the statutory interpretation decisions of state agencies and has provided normative analysis of what they ought to be doing.[241] In what follows below, we explore how judicial elections interact with—and disrupt—the rationales typically offered in support of a *Chevron*-like regime of deference.

We acknowledge at the outset that there can be other aspects of state constitutional law—wholly separate from judicial selection mechanisms—that bear on the appropriateness of a *Chevron*-like deference regime. For example, some state constitutions contain strong language prohibiting the delegation of legislative authority,[242] which could be read to restrict deference. Nonetheless, most states regard deference as a live option—about two-thirds of the states have some form of deferential review[243]—so it is valuable to see how *Chevron*'s rationales should play out when the judges are elected. Let us say, to simplify, that *Chevron* is based on three basic justifications: (1) Unlike the federal executive agencies, federal judges lack clean lines of political accountability; deference makes sense because of the greater democratic credibility of executive agencies. (2) Unlike the federal executive agencies, federal judges lack the technical expertise that is the core justification for the administrative control of policy making in the first place; deference makes sense given the courts' incompetence on technical and scientific questions that occupy agency attention. (3) Unlike the federal executive agencies that

240 See *Chevron*, 467 US at 842–44.

241 See Eskridge, Frickey, and Garrett, *Legislation* at 1258–61 (cited in note 5); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 McGeorge L Rev 977, 978, 984–87 (2008); D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 Yale L J 373, 373, 378–80 (2009).

242 See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand L Rev 1167, 1191–1200 (1999).

243 About one-third of the states have a *Chevron*-like deference regime; about one-third give "due deference," coming shy of full *Chevron* deference; and about one-third perform de novo review. See Pappas, 39 McGeorge L Rev at 1010–24 (cited in note 241). There is generally little correlation between the mode of judicial selection in a state and its deference regime. See Hudson, Comment, 119 Yale L J at 381 n 30 (cited in note 241) ("[O]nly one-third of the state judiciaries that are held directly democratically accountable refuse to show deference to state agencies' interpretive efforts."). But these comparisons need to be kept in perspective: as we explain below, it is inappropriate to assess states with judicial elections as a monolith. A careful empirical inquiry would require analysis of the form of election, the salience of that election, whether the agency at issue has an elected head, and the salience of *that* election.

can act quickly and responsively to changing political and social facts, the federal judiciary is a relatively slow and institutionally incompetent mechanism for updating statutes to conform with democratic mandates and material changes in the fabric of society.

It is, perhaps, relatively easy to see how each of these arguments for *Chevron* deference runs into complications in the state environment. Take the accountability rationale for *Chevron*, and then consider that state court judges are, on average, politically accountable in a way that federal court judges are not. Given that electoral pedigree, one cannot so readily say that these judges should defer to state administrative agencies because they lack the agencies' democratic credibility.

But notice that although it may be tempting to recommend abandoning deference in the states for this reason, the real lesson here is that one has to embrace nuance when thinking about when deference is indicated in the state courts. Unlike federal judges—who are all appointed and are formally accountable only through impeachment—state judges vary across states, and even within states, in their degrees of political accountability.[244] The category of "judicial elections" hides important differences between forms of electoral contests and the political salience of any one election. Thus, although some class of elected judges should reject the *Chevron* decision rule—say, those subject to high-salience, partisan, and competitive judicial races for the highest courts in a state—others should not immediately jump to the conclusion that deference should be abandoned.[245]

Indeed, the accountability-based argument becomes yet more interesting when one considers how state agency chiefs get their positions. The heads of some state agencies are *directly* accountable to the electorate through separate elections, not just indirectly accountable through the removal and appointments powers of the

244 See Bruhl, 97 Cornell L Rev at 488–89 (cited in note 16) (discussing electoral differences across and within state judiciaries); Part I.B (discussing the degree of accountability associated with various electoral systems).

245 Our basic disagreement with the Hudson Comment is that it too often lumps states together and assumes that "[s]tate judicial elections 'routinely feature intense competition, broad public participation, and high salience.'" Hudson, Comment, 119 Yale L J at 377 (cited in note 241), quoting Pozen, 108 Colum L Rev at 265 (cited in note 146). Some races do have these features and some do not—and election regimes and dynamics are so variable that it is inadvisable to treat the question as a binary one. To the extent that Hudson's core argument is that *Chevron* should not be simplistically applied to all cases in the states, we agree. But our analysis here is poised to address how to "tailor deference to variety." *United States v Mead Corp*, 533 US 218, 236–37 (2001).

chief executive, as in the federal system.[246] If the relevant agency head were directly elected in a visible, competitive, and coherent election, a lower-level judge who got her office through what is in truth a patronage system might be required to defer, even if she had been nominally elected, too. Deference might likewise be proper when the judicial election is a low-salience retention vote. In sum, *Chevron*'s reasoning cannot be applied neatly in the states, but it still furnishes a framework to assess when deference might be appropriate for a state judge in a given case. The judge would need to evaluate the democratic credibility of her own election (if she were elected at all) and the accountability mechanisms that control the state administrative agency.

A similarly nuanced account is available for *Chevron*'s second principal justification, which draws on the comparative expertise of (federal) administrative agencies over (federal) courts. Translating *Chevron* to the state context requires one to consider the expertise of state agencies and state courts. Regarding state agencies, there is reason to believe that they are not quite as technically impressive as their federal counterparts. State agencies generally have fewer resources at their disposal and pay their officials less, and it may be that corruption and capture are greater risks at the state level.[247] Such doubts about state administrative expertise tend to undercut the case for deference. Yet when one turns to the state courts, it seems that they too are less technically capable than their federal counterparts. State judges work in a tougher institutional environment characterized by larger caseloads and fewer resources (money, law clerks, central support staff, and so forth).[248] Add to those institutional factors the delicate matter of whether state judges are, on average, of the same ability of federal judges. Differences in the sheer numbers of

246 For discussions of the plural executive in state governance, see Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U Ill L Rev 1243, 1273–75; Christopher R. Berry and Jacob E. Gersen, *The Unbundled Executive*, 75 U Chi L Rev 1385, 1386, 1399–1401 (2008); Steven G. Calabresi and Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 Minn L Rev 1696, 1697 (2009).

247 For suggestions along these lines, see Hudson, Comment, 119 Yale L J at 378–80 (cited in note 241), citing Susan Rose-Ackerman, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* 159–73 (Free Press 1992); Jerry L. Mashaw and Susan Rose-Ackerman, *Federalism and Regulation*, in George C. Eads and Michael Fix, eds, *The Reagan Regulatory Strategy: An Assessment* 111, 115–22 (Urban Institute 1984). Other accounts portray state administrative capabilities more favorably and emphasize that they have improved in recent decades. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 Yale L J 534, 552 (2011).

248 See Bruhl, 97 Cornell L Rev at 471–73 (cited in note 16); Burt Neuborne, *The Myth of Parity*, 90 Harv L Rev 1105, 1121–24 (1977).

positions to fill, together with the pay and prestige that accompany them, tend to suggest a negative answer.[249]

Although state agencies and state courts both fall short of their federal counterparts in terms of technical expertise, the real question for purposes of determining the proper rule of deference is how the state entities compare to each other.[250] It seems to us quite likely that state agencies fall short of federal agencies to a greater degree than state courts fall short of federal courts. If that is so, then the "expertise gap"—the advantage agencies possess over courts—is smaller in the states than in the federal government.[251] State judges presented with vigorous advocates on both sides of an issue (and a cultural commitment to independence, judicial elections notwithstanding) may do better than a locally captured and elected agency head, on both technical questions and value determinations. The argument against deference is all the more compelling when, as is often the case, the state agency is not even dealing with matters that are technically complex.[252] Therefore, although judges should defer when they are out of their domains of expertise, there is good reason for state judges to hesitate before embracing an across-the-board rule of strong deference on an expertise rationale.

Considerations of relative institutional competence are also at the core of the third justification for *Chevron* deference, which emphasizes agencies' advantage in updating statutes. The fact of judicial elections invites the claim that deference to state agencies is unnecessary for updating statutes because elected judges have the relevant competence to perform the task themselves. Indeed, as we explored in Part II, elected judges of many kinds (whether subject to retention elections or partisan contests) have incentives to familiarize themselves with popular sentiment. State judges subject to elections are, unlike their federal counterparts, poised "to know what the issues of

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249 See Neuborne, 90 Harv L Rev at 1121–22 (cited in note 248).

250 Other cross-institutional comparisons would be relevant for different doctrinal questions. For example, the relative expertise of federal versus state agencies might be relevant when a court confronts competing interpretations of a statute issued by two agencies, one state and the other federal. For an interesting investigation of this problem, see Gluck, 121 Yale L J 534, 598–605 (cited in note 247).

251 Expertise may be a function not only of scientific or technical knowledge but also of sheer manpower. In the federal context, the administrative state has hundreds of thousands of people to decide and implement policy; the federal courts have mere hundreds. The state systems have much more parity between court personnel and agency personnel. We thank Professor Rick Hills for this insight.

252 See, for example, Hudson, Comment, 119 Yale L J at 378–79 (cited in note 241) (arguing that state agencies tend to deal with issues that are on average less complicated than the issues dealt with by federal agencies).

public debate were when state legislation was proposed, what the state legislature thought it was doing when it passed the legislation, and what the situation in the State was before and after that legislation was passed."[253]

If the updating-focused rationale for *Chevron* is couched in terms of presumed congressional intent to put agencies in charge of managing policy, that justification does not translate easily to the states either. Because judicial-legislative ties tend to be closer in the states than at the federal level, a state legislature is less likely to intend to cut the politically accountable judiciary out of the interpretive equation—hence, less justification for a background presumption that delegations flow primarily to agencies.[254] Quite routinely, state legislatures legislate against background knowledge that state courts use the common law to effect policy making. Legislatures can, of course, abrogate the common law. But unlike the federal judicial system, which is not set up to develop common law subjects over time,[255] the state judiciary is already assumed to be a policy maker in many statutory domains.[256]

In sum, all three justifications that are commonly offered in support of *Chevron* deference in federal courts fail as justifications for a blanket *Chevron*-like decision rule for the states. But the justifications—along with the analysis in this Article considering the arguments for and against interpretive divergence—point the way toward a more principled and nuanced set of guideposts for how state judges should seek to review state administrative statutory interpretation decisions.

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253 Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U Pa J Const L 1167, 1198 (2007). For an argument in support of state judge competence in updating statutes, see Kaye, 70 NYU L Rev at 18–34 (cited in note 98).

254 See, for example, Jeffrey C. Dobbins, *Methodology as Model; Model as Methodology*, 47 Willamette L Rev 575, 583–86 (2011) (arguing that *Chevron*'s view that ambiguity equals delegation to the agency is inappropriate in Oregon because the state judges are elected and are in closer dialogue with the state legislature).

255 See *City of Milwaukee v Illinois*, 451 US 304, 312–13 (1981).

256 This is why many state cases in common law subject areas engage in dynamism without much pushback from legislatures. See, for example, *Li v Yellow Cab Co*, 532 P2d 1226, 1230 (Cal 1975) (torts). And consider any contract case under the Uniform Commercial Code, which essentially treats the Code as mere common law. For more on the interaction of common law adjudication and statutory regimes, see Pojanowski, 91 Tex L Rev at *15–20 (cited in note 16). For a more skeptical take on legislative meta-intent to enable judges to develop statutory law in a common law method, see Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different?* *2, in Shyamkrishna Balganesh, ed, *Intellectual Property and the Common Law* (forthcoming Cambridge 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042146 (visited Nov 20, 2012).

CONCLUSION

For too long, most scholars of legisprudence have appeared to embrace without much reflection a unified model of statutory interpretation, according to which elected and appointed judges are supposed to approach statutory text in identical ways. There is much to be said for that view—but the justifications for it have not been fully articulated before. We hope that if this Article accomplishes nothing else beyond reinforcing a conventional view, we have explained the appeal of that view and placed it on firmer ground. Still, our exploratory study here has also attempted to make the best case for a more controversial but also plausible and intuitive view: that judicial elections of certain kinds can justify certain types of interpretive divergence between elected and appointed judges. We have tried not only to explain and defend that view but also to explore some of its limits.

By distinguishing among different types of elections, we are able to supply a more nuanced account of the normative significance of elections for the enterprise of statutory interpretation. And by exploring different kinds of cases—from cases that touch upon matters of clear public concern to cases that implicate public-choice problems in the legislature, from crossover cases where a judge subject to one selection mechanism must speak on the law of a jurisdiction that uses a different selection mechanism to cases involving agency interpretations—we are able to show how attending to the distinctive features of elective judiciaries can enrich our understanding of how judges ought to do their jobs. We know there is much more to say about our subject; we wanted first to set out the terms of debate, demonstrate its interest and complexity, and highlight the conflicting values that are at stake.