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

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

The size of the federal judiciary at the levels below the Supreme Court has dramatically increased since the ratification of the Constitution. Each state also has its own judicial system, and state courts are legally authorized—indeed, required—to apply federal law. Judges on both state courts and the lower federal courts implement the doctrines handed down by the Supreme Court, as the Supreme Court hears a very small percentage of cases applying federal statutes or the Constitution. However, the differences between how state and federal judges are selected and their tenure could affect how they implement those doctrines and, therefore, affect how robustly the Supreme Court is able to influence the development of doctrine throughout the nation.

Recent research proposes that the Justices of the Supreme Court—particularly swing Justices near the ideological center—are influenced more by elite opinion epitomized by academics and journalists than by public opinion. In contrast, other empirical work proposes that public opinion significantly affects the decisions of elected state court judges. A separate body of research demonstrates that public opinion is both more politically conservative and more favorable to originalism as an interpretive methodology than is elite opinion.

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

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14 Baum & Devins, supra note 3, at 1516.
15 See infra Part IV.
16 See infra Part V.
17 See infra Part VI.
II. The Current Composition of the Judiciary in the United States

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

The current scope of the federal judiciary is enormous. Today, there are twelve regional courts of appeals with jurisdiction over certain geographical areas and one specialized court of appeals with national jurisdiction. The courts of appeals have rapidly grown in size: in 1950, there were 65 circuit judgeships and 2,830 appeals filed; in 1990, this rose to 156 circuit judgeships and 40,898 appeals filed. The most recent statistics show 56,475 appeals filed in the regional federal circuits in 2013.

The federal courts of original jurisdiction are the U.S. district courts. These courts are divided into ninety-four geographical districts.

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19 U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); Charles Gardner Geyh & Emily Field Van Tassel, The Independence of the Judicial Branch in the New Republic, 74 Chi.-Kent L. Rev. 31, 45 (1998) (“T]he decision to make the creation of the lower federal courts a matter of congressional prerogative, rather than constitutional mandate, was the product of a political compromise, designed to deflect the anti-Federalist fear that a national judiciary would usurp the role of the state courts.”).

20 U.S. Const. art. III, § 1.


22 Baker, supra note 9, at 839.


are 677 district court judgeships.\textsuperscript{26} Although the federal judiciary has expanded, it is nonetheless overshadowed numerically by the state court systems. Approximately 95\% of all cases are filed in state court systems.\textsuperscript{27} Congress can give federal courts exclusive jurisdiction of matters within the province of Article III, but unless Congress does so, state courts hold concurrent power to adjudicate claims based on federal law.\textsuperscript{28} Indeed, state courts may not choose to decline to hear federal claims.\textsuperscript{29} “By any measure, the vast majority of cases raising federal issues are litigated in state courts, not federal courts.”\textsuperscript{30}

It is also important to understand that state courts are in no sense inferior or subservient to federal courts. Except in very limited circumstances, lower federal courts may not review decisions of state courts,\textsuperscript{31} and state courts are not required to follow precedent of lower federal courts, even regarding federal law.\textsuperscript{32} Of course, both state courts and the lower federal courts are inferior to the U.S. Supreme Court on matters of federal law.\textsuperscript{33}

Unlike the federal courts, state supreme courts have a variety of selection and retention methods. Thirty-eight states have elections of some type, with four having partisan contested elections, sixteen with


\textsuperscript{28} Amanda Frost & Stefanie A. Lindquist, Countering the Majoritarian Difficulty, 96 Va. L. Rev. 719, 744 (2010).


\textsuperscript{30} Michael E. Solimine, Supreme Court Monitoring of State Courts in the Twenty-First Century, 35 Ind. L. Rev. 335, 362 (2002).

\textsuperscript{31} See Frost & Lindquist, supra note 28, at 742 (“By statute, lower federal courts are not permitted to review state court decisions except those falling under habeas jurisdiction.”).

\textsuperscript{32} See id. at 743.

\textsuperscript{33} See supra note 19 and accompanying text; see also M. Jason Hale, Note, Federal Questions, State Courts, and the Lockstep Doctrine, 57 Case W. Res. L. Rev. 927, 927, 930 (2007).
nonpartisan contested elections, and eighteen with uncontested retention elections after an initial appointment.\textsuperscript{34}

Originally, state judicial selection resembled that of the federal judiciary. All thirteen of the original states selected judges by means of either executive or legislative appointment.\textsuperscript{35} However, in 1832, Mississippi became the first state to force all of its judges to face the electorate, and, since New York adopted elections in 1848, every state entering the union until 1912 required judges to face election; by 1865, twenty-four of the thirty-four states had judicial elections.\textsuperscript{36}

If one looks to the structures of court systems in federations elsewhere in the world, one would not find anything similar to the duplicative, overlapping court structure in the United States. “The standard structure in other federations, like Germany and Australia, is to have only a national supreme court and then state courts below it that decide cases of both state and federal law.”\textsuperscript{37}

The Constitution gives Congress complete discretion over whether to create any lower federal courts and what the scope of their jurisdiction might encompass.\textsuperscript{38} Steven Calabresi argues that Congress could use its power over the inferior courts to affect the Supreme Court’s decision making:

The Supreme Court’s power to engage in judicial activism would end tomorrow if Congress stopped providing

\textsuperscript{34} Neal Devins, How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism, 62 STAN. L. REV. 1629, 1645–47 (2010).


\textsuperscript{36} \textit{Id.} at 1596. States that elect their judges almost never switch to a system abandoning the elections completely. See Aman McLeod, If at First You Don’t Succeed: A Critical Evaluation of Judicial Selection Reform Efforts, 107 W. VA. L. REV. 499, 523 (2005) (observing that, aside from Virginia in 1869, no state that elects judges has ever entirely abandoned judicial elections).


\textsuperscript{38} See Frost & Lindquist, \textit{ supra} note 28, at 740–41. Once created, Congress may, without violating Article III, abolish lower federal courts and the judges sitting on them. See Roger C. Cramton, Reforming the Supreme Court, 95 CALIF. L. REV. 1313, 1329 (2007) (“On three occasions during the first seventy-five years of U.S. history (1802, 1812[,] and 1863), Congress abolished federal courts with the effect of leaving duly appointed Article III judges without any cases to decide.”).
supportive lower federal courts to implement Supreme Court decrees. Without the help of the more than 750 lower federal court judges currently authorized for active duty, the nine Supreme Court Justices would be unable to legislate radical social change and unable to continue to enforce and expand upon past activist victories. . . .

Although Calabresi concedes that total abolition of lower federal courts is ultimately too radical an idea, a similar effect could be obtained by stripping the lower federal courts of most federal question jurisdiction, which is not as radical as it may sound.

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

United States district court judges would remain in every state, but could be statutorily limited to jurisdiction over patent actions, federal

39 Calabresi, supra note 37, at 581 (footnote omitted).
40 See Bradford R. Clark, The Supremacy Clause as a Constraint on Federal Power, 71 GEO. WASH. L. REV. 91, 104 (2003) (“[T]he vast majority of federal question cases throughout history have been decided not by federal courts but by state courts, subject only to appellate review by the Supreme Court.”).
criminal cases, and, perhaps, a limited (by either amount in controversy or other criteria) diversity and removal jurisdiction if deemed necessary.

Under this scenario, all other matters currently handled by United States district court judges would fall under the jurisdiction of state trial courts; appeals would go through the state system and be subject to review by the U.S. Supreme Court. Finally, the regional United States courts of appeals could remain to hear appeals only from those cases within the original jurisdiction of the United States district courts.

These hypothetical reforms are different only in degree from abolition of the lower federal judiciary—the primary change would be the shift of most litigation currently conducted in life-tenured federal courts to the mostly elected state courts. This Article examines the probable effect of such a reform on the ideology of lower court decision making, and how it would affect the Supreme Court’s ability to have its doctrines robustly implemented.46

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

The modern view of the U.S. Supreme Court, and federal courts in general, is that the Court serves as a countermajoritarian force—its prime role is protecting the rights of the minority against majority will.47 The

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46 See infra Part VI.
47 For a classic statement celebrating this countermajoritarian role for federal courts and contrasting them with state courts, see Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1120 (1977) (“[T]here are several factors, unrelated to technical competence—which, lacking a better term, I call a court’s psychological set—that render it more likely that an individual with a constitutional claim will succeed in federal district court than in a state trial court.”); id. at 1124 (“[F]ederal judges often display an enhanced sense of bureaucratic receptivity to the pronouncements of the Supreme Court. State judges, of course, almost always recognize that they too are bound not to disregard the Supreme Court’s interpretation of the [f]ederal Constitution. Their bureaucratic relationship with the Supreme Court is, however, more attenuated than that of a district court judge.”); id. at 1124–25 (“[F]ederal judges appear to recognize an affirmative obligation to carry out and even anticipate the direction of the Supreme Court. Many state judges, on the other hand, appear to acknowledge only an obligation not to disobey clearly established law. While this distinction is subtle, in the doubtful case it can exert a discernible impact on the trial level outcome.” (footnote omitted)); id. at 1125 (“[I]n seeking a federal forum, civil liberties lawyers hope to benefit from what can be described as an ‘ivory tower syndrome.’ . . . [F]ederal judges are [relatively] insulated from the distasteful and troubling fact patterns [that state judges face.”]); id. at 1126 (“[T]he differences in the backgrounds of the state and federal trial judges make it more likely that a federal judge will possess certain (continued)
obvious tension of this role with democracy (a tension heightened by the life-tenured, unelected nature of the Court) has been the subject of intense scrutiny by legal academics.\footnote{See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT OF THE BAR OF POLITICS 27 (1962).}

A revisionist view of the Supreme Court’s role has been articulated by scholars. This view is that the Court acts largely consistent with public opinion and is not, in any true sense, a countermajoritarian force at all.\footnote{See, e.g., BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 7, 9 (2009); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 3–4 (2006); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991) (“U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government.”); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 VA. L. REV. 1, 6, 17–18 (1996) (“[T]he Court [is not the ‘countermajoritarian hero’ often claimed] and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection.”).}

Public opinion undoubtedly has some effect on Justices.\footnote{See William H. Rehnquist, THE SUPREME COURT 210 (2001) (“When a vacancy occurs on the Court, it is entirely appropriate that that vacancy be filled by the president, responsible to a national constituency, as advised by the Senate, whose members are responsible to regional constituencies. Thus, public opinion has some say in who shall become judges of the Supreme Court.”).} The most obvious way that public opinion affects the Justices is through the means by which they are appointed. The elected President must nominate Justices and a majority of elected U.S. Senators must confirm those Justices.\footnote{Id.}

Due to life tenure and other structural and political features that insulate Justices from direct popular and political branch backlash, the Court tends to make decisions based on ideological or policy preferences.\footnote{See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUINAL MODEL REVISITED 6, 8, 12 (2002); see also Valerie Hoekstra, Competing Constraints: State Court Responses to Supreme Court Decisions and Legislation on Wages and Hours, 58 POL. RES. Q. 317, 317 (2005) (“Justices on the United States Supreme Court have wide latitude to act upon their sincere preferences due to the insularity and (continued)
transfer of their independence they enjoy."); Gordon Tullock, *Public Decisions as Public Goods*, 79 J. Pol. Econ. 913, 914 (1971) ("I would think that judges are, to a considerable extent, affected by their personal preferences; and when their personal preferences are contrary to the law for any one of a number of reasons, the public-good aspect of the law is likely to receive relatively short shrift [compared to the private cost to the judge of making a ruling contrary to his own views.").


54 See *id.* at 1297–98.

55 Baum & Devins, supra note 3, at 1516 (“Supreme Court Justices care more about the views of academics, journalists, and other elites than they do about public opinion [due to social psychology]. This is true of nearly all Justices and is especially true of swing Justices, who often cast the critical votes in the Court’s most visible decisions.”).

56 *Id.* at 1537 (arguing that Justices are more likely to care about perceptions of them by elite socioeconomic groups because the Justices share that background).

57 See *id.* at 1532 (noting the desire to be liked by others, and reasoning that federal judges may be especially affected by this factor because the office, which pays less and requires more personal restrictions than law firm positions, is likely to be most attractive to those who value the esteem provided by such a position); *id.* at 1533 (“Justices surely understand that audiences outside the Court care—often a great deal—about the votes they cast and the legal rules they support. If judges seek popularity and respect, they have good reason to do so as decision makers."); *id.* at 1533–34 (“[A]lthough the Justices will not cast votes that undermine their preferred legal or policy preferences, they are also attentive to how they present themselves to audiences they care about. Put another way, Justices are not single-minded pursuers of their preferred policy positions; instead, they adopt legal policy positions that take account of both their ideological and personal preferences.”).
Justices at the extreme ideological ends of the Court likely desire the respect and approval of simpatico ideological reference groups.\textsuperscript{58} Swing Justices with no firm ideological mission are more likely to be influenced by the need for admiration from elite opinion makers.\textsuperscript{59} For Supreme Court Justices, that group of elite opinion makers consists of elite lawyers, news media, and law professors.\textsuperscript{60} In recent times, elite legal opinion and news media are decidedly to the left of public opinion,\textsuperscript{61} including the American Bar Association\textsuperscript{62} and elite lawyers in the aggregate.\textsuperscript{63}

\textsuperscript{58} See \textit{id.} at 1534 (arguing that Justices at the polar ends of the ideological spectrum may care most about the perceptions of groups with whom they strongly identify).

\textsuperscript{59} \textit{id.} at 1545 ("Supreme Court Justices are elites whose reference groups are also elites. And although there are both liberal and conservative elite audiences—so that highly ideological Justices are likely to garner praise from the interest groups they identify with so long as they generally support the positions of those groups—the Court’s swing Justices are especially likely to look to the media, law professors, and lawyers’ groups like the American Bar Association. . . . As it turns out, these audiences are left-leaning, at least on civil liberties issues, in the current era."); \textit{id.} at 1538 ("[T]he Justices have good reason to care about how they are regarded by other lawyers. . . . [T]hose legal professionals—especially fellow judges and legal academics—perform the most intensive evaluations of the Justices’ voting behaviors and judicial opinions.").

\textsuperscript{60} \textit{id.} at 1528 (noting that elite opinion, which is likely to be influential with the Justices, may have contributed to the Court’s retreat from controversial decisions on statutes dealing with communist subversion—the American Bar Association, legal academics, and prominent jurists, such as Learned Hand, were highly critical); \textit{id.} at 1542 (noting that Justices should be particularly influenced by news media and academics, especially because they “define the Justices’ status and reputation to society at large,” and noting that many of the Justices’ law clerks will become legal academics).

\textsuperscript{61} See \textsc{David H. Weaver} \& \textsc{G. Cleveland Wilhoit}, \textsc{The American Journalist: A Portrait of U.S. News People and Their Work} 28, 31 (1991) (noting the significant tendency toward left opinions and allegiances among executives and staff members of prominent news organizations); \textsc{John O. McGinnis} et al., \textsc{The Patterns and Implications of Political Contributions by Elite Law School Faculty}, 93 GEO. L.J. 1167, 1202 (2005) (finding that elite legal scholars overwhelmingly lean left); \textsc{Deborah Jones Merritt}, \textsc{Research and Teaching on Law Faculties: An Empirical Exploration}, 73 CHIL.-KENT L. REV. 765, 780 n.54 (1998).

\textsuperscript{62} See, e.g., \textsc{Baum} \& \textsc{Devins}, supra note 3, at 1545; \textsc{James Lindgren}, \textsc{Examining the American Bar Association’s Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989–2000}, 17 J.L. \& POL. 1, 28 (2001) ("Controlling for credentials, Clinton nominees have 9.7–15.9 times as high odds of getting a unanimous Well Qualified rating [from the American Bar Association] as similarly credentialed Bush appointees. For those without prior judicial experience, just having been nominated by Clinton instead of Bush is a stronger positive variable than any other credential or than all other credentials put (continued)
Baum and Devins argue that public opinion can be resisted by the Court because public support for it is “strong and robust, and it is not fragile in the sense that negative reactions to the Court’s decisions threaten it.” Furthermore, “the powers of the other branches do not necessarily create strong incentives for the Justices to respond to public opinion” because lawmakers’ threats to act against the Court have been hollow. Additionally, the evidence shows that public opinion, as expressed in polling data, is often strongly opposed to many of the most politically salient Supreme Court rulings. “In light of the evidence that the Justices have little to fear from public disapproval, there is good reason to be skeptical about the belief that the Justices rein themselves in to avoid running afoul of public opinion.” Those who argue that public opinion highly restricts the Supreme Court have yet to address the argument that
the Court’s action itself may influence public opinion; thus, the cause and effect between public opinion and the Supreme Court remains unclear.\textsuperscript{68}

Instead, Justices seem to move further left the longer they are on the Court\textsuperscript{69} and, where elite opinion diverges from public opinion, the Court often sides with the former, even where the issue becomes highly salient.\textsuperscript{70} Noted swing Justice Sandra Day O’Connor moved leftward on several social issues salient to elite opinion, with her later views explicitly contradicting her earlier ones.\textsuperscript{71}

Frederick Schauer also argues that elite opinion is likely to be more influential with the Justices than public opinion.\textsuperscript{72} Schauer notes that ideological drift, in recent times, is almost uniformly in a leftward direction.\textsuperscript{73} Schauer emphasizes that elite legal opinion likely influences Justices’ decision making, particularly as their careers come to a close, because Justices worry about their reputations at the hands of those who have the power to shape them.\textsuperscript{74}

\textsuperscript{68} Id. at 1564–65 (arguing that the Court and its allies in the elite media and academia can influence public opinion, rather than the public opinion influencing the Court, elite media, and academia).

\textsuperscript{69} Id. at 1574–76 (noting significant shifts leftward for Justices Warren, Stewart, Blackmun, Powell, Kennedy, and Souter from their first two terms to a later set of two terms on civil liberty issues, but noting no shift on economic issues).

\textsuperscript{70} Id. at 1566 (noting Justices learn of the views of elite groups through amicus curiae briefs); id. at 1570–74 (noting that, on legal issues that people with postgraduate education differ greatly with public opinion, the Court sides with liberal elites on sex equality, homosexuality, abortion, school prayer, flag burning, juvenile death penalty, rights of alien detainees, and affirmative action).


\textsuperscript{73} Id. at 625–26 (noting that, of the ten Republican Justices appointed between 1968 and 2000, six moved ideologically leftward, even though all had been billed as conservatives).

\textsuperscript{74} Id. at 625 n.53 (noting that Justice Powell made a public statement after his retirement, saying that he regretted his vote upholding antisodomy laws and musing that concern for his reputation among legal academics may have played a role); id. at 628 (“Justices [provide evidence] of the current attitudes of young intellectuals, of law professors, and of the intellectual classes in general. If the Justices desired to appeal to this class . . . of legal intellectuals, the clerks would be a pretty good source of evidence about what this class was now thinking.”); id. at 629 (“[T]he primary creators of reputation for (continued)
This does not mean that the influence of elite opinion on Justices will always move them leftward. To the contrary, elite legal opinion has, in the past, been to the right of public opinion. During the early twentieth century, when peer elites were more conservative than the public-at-large, the Supreme Court reflected that fact by resisting redistributive, antiallaissez faire laws passed through the majoritarian political process.75

It is difficult to say who has the better argument—those who say the Court is influenced by public opinion or those who maintain that it is, instead, influenced by elite opinion. Both groups of scholars cite public opinion to support their claims.76 However, it is not necessarily an either/or proposition. Both public opinion and elite opinion, along with myriad other factors, logically affect the Justices’ decision making. The important question for purposes of this Article is a relative one: Are judges who do not have to face elections more influenced in their judicial decisions by elite opinion than those who must face a vote of the public to retain their offices?

Overall, the social psychology evidence seems to bolster the older, countermajoritarian model.77 Without a doubt, public opinion does cabin Supreme Court discretion to some extent. Yet, a specific subset of that opinion, held by those who shape Supreme Court Justices’ reputations, is more likely to have an effect at the margins of swing Justices.78 The next

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75 See, e.g., EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 11–38 (2000) (arguing that, from 1877 to 1937, federal courts were probusiness and antiregulation); Baum & Devins, supra note 3, at 1543 n.147 (“Before 1930, . . . economic issues dominated and the cultural elite supported a constitutional jurisprudence that was somewhat more protective of property rights than was majoritarian politics.” (internal quotation marks omitted)); Stephen A. Siegel, Lochner Era Jurisprudence and the American Constitutional Tradition, 70 N.C. L. REV. 1, 107 n.528 (1991) (noting that Thomas Cooley, the leading law professor of the Lochner era, strongly supported the liberty-of-contract doctrines of the period).

76 See supra Part III.

77 See supra notes 64–74 and accompanying text.

78 See supra note 74 and accompanying text.
Part examines the empirically demonstrated effects of public opinion on elected state supreme court justices compared to those who, like federal judges, do not face election.79

IV. EMPIRICAL EVIDENCE ON STATE COURT RESPONSIVENESS TO PUBLIC OPINION

Undoubtedly, many state court judges are of similar cultural and socioeconomic background as federal judges.80 However, the electoral accountability of most state court judges makes public opinion likely to be a far more salient factor for which to account.81 Elected officials, including judges, strongly desire to keep their positions and must pay attention to public opinion in order to do so.82

Empirical studies demonstrate that public opinion affects judges facing election.83 Whether facing partisan or nonpartisan elections, or standing alone in a retention election, state judges are subject to the same accountability as other elected officials.84

“[T]he empirical evidence shows that, as compared to state judges in appointive and merit selection jurisdictions, judges facing elections, particularly partisan elections, are more likely to decide cases in a manner consistent with majority opinion.”85 A study of criminal sentencing decisions from trial judges, when those judges must run in an unopposed retention election every ten years, found “that judges become significantly

79 See infra Part IV.


81 See Daniel E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2070 (2010). But cf. Baum & Devins, supra note 3, at 1537 (“[T]he views of social and economic leaders are likely to matter more to the Court than to popularly elected lawmakers (who must appeal to popular sentiment in order to win elections).”).


83 Pozen, supra note 81, at 2070–71.

84 See Hall, supra note 82, at 319 (“The fact of the matter . . . is that [state] supreme court justices [on the ballot] face competition that is, by two or three measures, equivalent if not higher to that for the U.S. House [of Representatives].”).

85 Pozen, supra note 81, at 2070–71; Baum & Devins, supra note 3, at 1552; see also Robert M. Howard et al., *State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties*, 40 LAW & SOC’Y REV. 845, 864 (2006) (“State [supreme] court justices are sensitive to the attitudes of the citizenry, and their sensitivity is enhanced by the use of competitive elections to retain justices.”).
more punitive the closer they are to standing for reelection, and another study found that state supreme court justices become significantly more likely to uphold death sentences in years preceding reelection. Another highly salient social issue was examined in a study “of abortion cases decided by state courts of last resort between 1980 and 2006” in states where justices faced competitive elections, comparing results with state public opinion and finding that even “nonpartisan elections will not insulate state supreme-court justices from political pressure on the issue of abortion.”

Instead, the study found that judges without a partisan label are actually more likely to need to rule consistently with public opinion due to the lack of the ideological signal of a party label to act as a proxy for voters. Studies also show that elected judges suppress their own ideological and policy preferences when approaching an election.

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

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89 Id. at 63.

90 Id. at 63–64.

91 Elisha Carol Savchak & A.J. Barghothi, *The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking*, 7 ST. POL. & POL’Y Q. 394, 399, 402–06, 408 (2007) (examining merit selection states and finding that judges early in their terms are more likely to vote their own preferences, but the effect of citizen ideology on judicial decisions increases as retention election approaches).

92 See *supra* notes 81, 85, 87–91 and accompanying text.
V. ORIGINALISM AND CONSERVATIVE JUDICIAL OUTCOMES: PUBLIC VERSUS ELITE OPINION

Conservatives largely promote the interpretive doctrine of originalism as the proper mode for judging.93 Because the most important parts of the U.S. Constitution were adopted in the late eighteenth and late nineteenth centuries,94 when the predominant views on economics were far more laissez faire than today95 and views on crime and punishment, sexuality, and religion were far less liberal,96 interpreting textual provisions adopted during these periods according to their original meaning tends to lead to conservative jurisprudential results.

Elite academic legal opinion is overwhelmingly hostile to originalism97 because of these results,98 which run counter to much of the modern liberal

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93 Robin West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641, 648 (1990) (“Conservative constitutionalists . . . tend to advocate originalism, judicial restraint, or both, as guiding principles of constitutional adjudication.”).
94 See Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America 26 (2005) (noting that the original Constitution was ratified in 1789, the Bill of Rights was ratified in 1791, and the Fourteenth Amendment was ratified in 1868).
96 See Sunstein, supra note 95, at 63–65.
97 See John O. McGinnis, The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein, 71 Tex. L. Rev. 633, 662 n.127 (1993) (“The failure of the Senate Judiciary Committee to mount an attack on the general jurisprudence of [Justices] Souter or Kennedy (or Thomas for that matter) by invoking the noninterpretivist theories currently popular in the legal academy is good evidence that there is not substantial disagreement among the public about the proper role of the judiciary or the proper method of constitutional interpretation. Of course, it would be easy for those working in the academy to be misled about the extent of public disagreement with generally interpretivist theories of constitutional interpretation given the general academic rejection of those theories.”).
98 See Sunstein, supra note 94, at 72–73 (2005) (arguing against using originalism for interpreting the U.S. Constitution based on bad policy consequences to which it leads). Cf. Rexford G. Tugwell, Rewriting the Constitution: A Center Report, Center Mag., Mar. 1968, at 18, 20 (admitting, even though he was one of the principal architects of the New Deal, that post-switch-in-time Supreme Court rulings upholding the constitutionality of New Deal programs were “tortured interpretations of a document intended to prevent them”).
Popular opinion is more hospitable to conservative views generally, and is also more welcoming to originalism as an interpretive method than elite opinion.

99 West, supra note 93, at 648 (“Conservative constitutionalists . . . tend to advocate originalism, judicial restraint, or both, as guiding principles of constitutional adjudication. Progressives, by contrast, argue that constitutional interpretation should be in some sense ‘open’ . . . : that the Constitution is always open to multiple interpretations, which at least include interpretations capable of facilitating progressive causes and policies.”)

100 See Schauer, supra note 72, at 625 & n.51 (“[T]he . . . ten [Justices appointed by Republican presidents between 1968 and 2000] were Republicans at the time of appointment, and all ten of these were billed (whether correctly or not) at the time of nomination and confirmation as ‘conservatives.’” Id. at 625. “[The two Justices appointment by a Democratic president] were billed as centrist and balanced, which appears to be a coded way of saying that they were more conservative than, say, the center of gravity of the Democratic contingent in the House of Representatives.” Id. at 625 n.51.).

101 See, e.g., Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 HARV. J.L. & PUB. POL’Y 769, 833–34 (2006) (“[W]e call for a change to the life tenure rule for Supreme Court Justices.” Id. at 772. “[T]he post-1970 Supreme Court has become . . . too insulated from public opinion . . . .” Id. at 823. “[T]he general public is more likely than are nine life-tenured lawyers to interpret the Constitution in a way that is faithful to its text and history . . . . The general public has a great reverence for the constitutional text and for our history . . . . The lawyer class in this country, on the other hand, is still impued with a legal realist or post-modernist cynicism about the contrains imposed by the constitutional text.” Id. at 833–34.; id. at 852–53 (noting that elections since 1968 have seen presidential candidates advocating originalist jurisprudence win on that issue, including Democratic Supreme Court nominees in modern times, well to the right of Earl Warren or William Brennan; and further commenting that, when the Supreme Court issues opinions for public scrutiny, it “claim[s] to follow text and precedent rather than claiming to follow Rawls, Nozick, Dworkin, Ackerman, or Tribe”); John O. McGinnis, Impeachable Defenses, 95 POL’Y REV. 27, 27–29 (1999) (showing that, under the intense public scrutiny of congressional hearings, even nonoriginalist scholars resort to originalism to make constitutional arguments); John O. McGinnis & Michael B. Rappaport, Supermajority Rules and the Judicial Confirmation Process, 26 CARDOZO L. REV. 543, 553 (2005) (“When constitutional issues of great magnitude are engaged in the public sphere, the public has shown at least a default inclination toward[] originalism in the absence of obvious precedent to the contrary.”); McGinnis, supra note 97, at 662 (arguing that attacks on Supreme Court nominees failed because “their [declared] deference to the political branches or their view that the constitutional text should be interpreted with substantial reference to its original understanding must seem wholly unremarkable to the majority of Americans”); Saikrishna B. Prakash, America’s Aristocracy, 109 YALE L.J. 541, 578 (1999) (reviewing Mark Tushnet, Taking the Constitution Away from the Courts (1999)) (”[P]ublic opinion . . . has the ability to steer the courts toward the (continued)
Public opinion’s openness to originalism may be related to the understanding that interpreting words according to their original meaning is the default rule for attempting to understand all communications, other than works of poetry or fiction. Cass Sunstein, a noted critic of originalism in constitutional interpretation, concedes that originalism is the “ordinary thinking about interpretation. If your best friend asks you to do something, you are likely to try to understand the original meaning of his words; you will not select the interpretation that you deem best.”

Just as with the question of whether public or elite opinion influences the Supreme Court, the question of whether originalism and conservative jurisprudential results are popular with the public is a relative one. This Article does not claim that originalism or conservative jurisprudential results are clear victors in the arena of public opinion, but that the terrain there is markedly friendlier than in elite legal academia. The following Part addresses how that may affect implementation of Supreme Court doctrine in the event of a shift from inferior federal courts to the mostly elected state courts.

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

If one accepts that (1) elite opinion disproportionately affects the Supreme Court, (2) elite opinion’s influence moves the Court’s doctrine in
a leftward direction compared to public opinion, and (3) judges not subject to election are more likely to be an effective tool for implementing the results of such influence, then anything that fragments that power to bring public opinion to bear on it would create a structure more amenable to originalist and conservative jurisprudential results. In order to understand the Court’s ability to move legal policy effectively and to sustain those shifts over the long term, the key is to examine the relationship among the Supreme Court and the inferior courts. “The true power of Supreme Court doctrine lies in its ability to influence the vast mass of cases decided at lower levels of the judiciary.”

“A number of political scientists have studied this particular issue and found that Supreme Court doctrine does appear to [affect significantly] lower court decisions.”

The effect of vertical precedent is real.

Given that the Supreme Court actually decides so few of the nation’s cases, the Court’s real power lies in the fact that lower courts enforce its doctrines in analogous cases. The Court uses its virtually unlimited discretion to select cases it sees as appropriate vehicles to move doctrine.

The Court has a principal-agent relationship with the lower courts, and the incentives faced by those courts can affect how much they see themselves as part of the Supreme Court “team” and to what extent they have other principals to please as well.

104 Tiller & Cross, supra note 1, at 525.
105 Id. at 526.
106 Id. (listing studies in particular areas of legal doctrine).

Soon after enactment of the Judges’ Bill [of 1925], the Court seized the new mode of discretionary review—through the writ of certiorari—to limit not only the number of cases it would hear, but the nature of its review. Rather than considering an entire case, the Court soon began reviewing only narrow legal questions, leaving aside legal and factual issues in which the Justices were uninterested. This reflected a departure from pre-Evarts Act practice, and it obviously increased the Court’s discretion to shape its own agenda. . . . Congress eliminated almost all of the remnants of mandatory Supreme Court review in 1988.

109 See id.
themselves as part of the federal system with the Supreme Court, and have no other principals to satisfy. In contrast, most state court judges must also keep one eye on the electorate of their states and the other state political branches because those entities often have more tools available to affect the state courts.\textsuperscript{110} Thus, state courts often have multiple principals, whereas lower federal courts are more insulated from influence other than the Supreme Court.\textsuperscript{111}

Just as horizontal precedents can be manipulated to facilitate ideological decision making in the Supreme Court or lower federal courts, those precedents also leave room for state courts to manipulate Supreme Court precedent for ideological goals.\textsuperscript{112} State courts, however, are mostly

\textsuperscript{110} See id. at 801.

\textsuperscript{111} See id. at 798–802.

\textsuperscript{112} See WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 24 (1964) (noting that compromises in high court opinions enable discretion in lower courts to indulge their own policy preferences over the doctrines of higher courts, to “hamper execution of high-level policy decisions [as] . . . an everyday occurrence in the judicial process”); Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,” 80 B.U. L. REV. 967, 986 (2000) (“[E]vidence and observation suggest that more subtle, subterranean defiance [of Supreme Court precedent by lower courts], through means such as reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as (continued)
elected and, thus, must often suppress their individual ideological or policy views when they conflict with popular opinion.\textsuperscript{113} As a survival strategy, an elected state judge can manipulate precedents in order to avoid making an unpopular ruling when implementing Supreme Court precedents.\textsuperscript{114}

Lower courts are largely free to implement their preferences when there is an issue of first impression.\textsuperscript{115} In the case of judges facing election, these preferences would include being reelected and, thus, derivatively reflect public opinion.

Conversely, lower courts also have more freedom as large numbers of precedents accumulate, which often provide multiple reference points and contradictory language that those judges can latch onto in order to provide support for various outcomes.\textsuperscript{116}


\textsuperscript{113} See Benesh & Martinek, supra note 108, at 802, 816.
\textsuperscript{114} Frost & Lindquist, supra note 28, at 722–23.
\textsuperscript{115} Id. at 731, 736–37.
\textsuperscript{116} SEGAL & SPAETH, supra note 52, at 77 (“[P]recedents lie on both sides of most every controversy, at least at the appellate level.”); J. M. Balkin, \textit{Taking Ideology Seriously: Ronald Dworkin and the CLS Critique}, 55 UMKC L. REV. 392, 430 (1987) (“[T]he (continued)
Valerie Hoekstra examined state supreme court decisions on maximum hour and minimum wage laws in existence between 1900 and 1940.117 These topics were highly salient, controversial issues during that time, much like cultural and social issues today.118 In 89% of these cases, the state supreme court justices faced partisan or nonpartisan elections.119 Hoekstra found: “All else equal, when the U.S. Supreme Court is supportive of this kind of labor legislation, state high courts are more likely to uphold. When the high court is opposed, so too tend to be the state high courts.”120

This indicates that vertical precedent does have an effect in transmitting Supreme Court doctrine through the state courts. However, the study found:

[A]mong courts whose judges must face the electorate for reelection, the wider and deeper the support for progressive policies within a state, the more likely the state court is to uphold the legislation. Among the same judges, when there is little support, the state court judges will likely reject the legislation.121

Hoekstra’s findings are that both vertical precedent and public opinion have a statistically significant effect on elected state supreme court materials of the law already contain justifications supporting every variety of liberal and conservative positions.”); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 831 (1982) (“One implication of the inevitability of inconsistency [in Supreme Court doctrine] is that, as time goes on and the stock of precedents grows, the Court is likely to assert broader powers to review the substantive decisions of the other branches. The availability of inconsistent precedents allows the Justices to ‘prove’ anything they like, without fear of contradiction. The Court then either must return to first principles (disregarding its precedents) or decide cases on the basis of noninterpretive methods, such as beliefs about social consensus or the Justices’ own fundamental values (the only course left open by the conflicting precedents). It is unlikely that the Justices would do the former.”); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1156–57 (2005) (“[J]udges are indeed more free to decide [cases] based on their ideological preferences where no precedents [on the issue] exist,” but the more that precedents accumulate on an issue increases discretion in judges to so decide.).

117 Hoekstra, supra note 52, at 318.
118 Id.
119 Id. at 323.
120 Id. at 324.
121 Id.
decision making. Notably, if support for progressive policies by the public in the state is very intense, elected state supreme court justices were more likely to uphold the legislation even in the face of Supreme Court doctrinal opposition. Hoekstra concluded: “Thus, the Supreme Court’s ability to see its decisions implemented is not wholesale—intra-state constraints may, at some times, be more salient to judges.”

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

Is there a problem with encouraging subtle defiance of a robust, aggressive implementation of controversial Supreme Court doctrines? Given the vastly increased power the Court has accumulated over the last century—including assertions of judicial supremacy and exclusivity regarding interpretation of the Constitution and the withering of the

122 Id.
123 Id. at 324, 327.
124 Id. at 327.
125 See Frost & Lindquist, supra note 28, at 748 (“[E]ven in cases squarely raising federal issues, Supreme Court review is too rare to provide much reassurance to those concerned about majoritarian influences on elected state court judges. Today, the Court grants approximately seventy-eight of the 9000 or so petitions filed every term and issues full opinions in an average of only twelve cases from the state high courts each year.”); Richard A. Posner, What Do Judges and Justices Maximize? (the Same Thing Everybody Else Does), 3 SUP. CT. ECON. REV. 1, 14–15 (1993) (arguing that appellate judges do not like to be reversed by the Supreme Court, but that the possibility “does not figure largely in the judicial utility function” because Supreme Court review is very rare and reversals primarily reflect ideological differences (rather than incompetence) and are, therefore, not perceived as criticism and do not affect promotion).
126 See Frost & Lindquist, supra note 28, at 770 (analyzing U.S. Supreme Court cases reviewing state court decisions from 1960 to 2005; finding that the Court was more likely to reverse decisions from states with partisan elected state supreme courts compared to those with nonpartisan elected courts or appointed courts; and noting that state courts are more likely to be reversed than lower federal courts).
127 See, e.g., Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 IOWA L. REV. 1267, 1292–93 (1996) (criticizing the Court’s assertions of supremacy and exclusivity in constitutional interpretation); Michael (continued)
original political checks on the power of the federal courts—such as impeachment and jurisdiction-stripping—devolution of doctrinal implementation to the state courts may be a necessary corrective. Just as the increase in presidential power over the last century has led Congress to attempt to fragment the unitary executive power by creating agencies within the Executive Branch independent of centralized presidential control, Congress may also have a legitimate interest in countering the accumulation of power by a rival department in which the judiciary is concerned.

Given the greater reception of popular opinion to conservative results and originalism as an interpretive method, increasing the influence of public opinion relative to elite opinion (which is overwhelmingly hostile to those results and that method) should push jurisprudence rightward. Because the state courts are more easily subject to the accountability of public opinion, abolishing or dramatically reducing the jurisdiction of the inferior federal courts in favor of state court implementation of Supreme Court doctrine should have this effect. As described above, studies show that state judges are affected by the political environment at


128 Bhagwat, supra note 112, at 1011.

129 Id. at 1009–11 (noting salutary effects of lower courts providing a check on the Supreme Court, which has accumulated significant unchecked power).

130 See Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 NW. U. L. REV. 62, 63 (1990) (noting a rise in congressional delegation of executive authority outside the control of the President, including delegation to the states and private groups and individuals).

131 This is not to say that fragmenting the Executive Branch—by granting executive officials more independence from the President—is as legitimate as fragmenting the judiciary by granting inferior courts more independence from the Supreme Court. The text and structure of the Constitution would seem to make fragmenting the judiciary more licit than fragmenting the Executive Branch. See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153, 1212–13 (1992).

132 There is some evidence that state supreme courts are to the right of the U.S. Supreme Court, which may support the general theory articulated here that public opinion, which affects elected state courts more significantly than federal courts, is to the right of elite opinion. See Howard et al., supra note 85, at 864 (“Only about 20% of the state courts in our [thirteen]-year [(from 1982 through 1993)], [forty-nine]-state sample fell to the left of the [U.S. Supreme Court] . . . .”).

133 See id.
the time of their taking office and are even more affected by the
c constituency charged with helping the judges retain office rather than that
which originally placed them on the bench.134 As Supreme Court
precedent is always subject to a variety of interpretations by lower court
judges,135 and the Supreme Court can only police a very small number of
cases,136 elected state judges are more likely than inferior federal judges to
reach conservative or originalist results regarding highly salient social
issues because of their increased accountability to public opinion.

Three other long-term consequences of this state of affairs could also
reinforce a move to the political center. First, drastically reducing the
power of federal appellate judges would make less attractive the source of
the vast majority of Supreme Court nominations of the modern era: the
United States Court of Appeals.137 State court judges would be more likely
to be the future source of nominations to the Supreme Court.

Second, the close working relationship likely to develop among the
state judges and Supreme Court Justices could lead to indirect influence of
public opinion on the Court itself, through a sort of reverse osmosis.

Third, increasing the relative power of state judges could advance
federalism interests. When the Progressives succeeded in ratifying the
Seventeenth Amendment to the Constitution,138 the states, as entities, lost
their direct control over the selection of U.S. Senators, who have the power
to confirm Supreme Court nominees.139 By taking away the lower federal
courts’ power, the implementation of Supreme Court doctrine would be
through instruments of state governments. Empirical studies show that the
loss of control over the selection of U.S. Senators coincided with a large
increase in nullification of state laws compared to federal laws,140 and the
reforms outlined here could apply counterpressure to that trend.

134 See Benesh & Martinek, supra note 108, at 801.
135 See Donald J. Kochan, State Laws and the Independent Judiciary: An Analysis of the
Effects of the Seventeenth Amendment on the Number of Supreme Court Cases Holding
136 Id.
137 See Tracey E. George, Judicial Independence and the Ambiguity of Article III
Protections, 64 OHIO ST. L.J. 221, 245 (2003).
138 U.S. CONST. amend. XVII.
139 See George, supra note 137, at 233.
140 See Kochan, supra note 135, at 1027; see also Hoekstra, supra note 52, at 320 (“[A]t
least in recent times, the Supreme Court appears more likely to overturn legislation when
the state is a party than when the federal government is a party.”).
As state judges are part of the machinery of their state governments, federalism interests could become more salient to them.\footnote{Benesh & Martinek, supra note 108, at 800–01 (“The state supreme courts . . . may be inclined to separate themselves from the federal system, thereby strengthening their position as major players in their respective state governments.”). \textit{Cf.} John O. McGinnis, \textit{Justice Without Justices}, 16 \textit{Const. Comment.} 541, 546 n.16 (1999) (“The optimal constitutional provision might well also have permitted Congress to choose state supreme court judges on a random basis to ride to the Supreme Court. Their service would create yet another force for preserving federalism.”).} The loss of state control over the selection of U.S. Senators resulted in a serious weakening in the structural protections of federalism. The most direct effect was the loss of the Senate as a veto point over legislation, harming the institutional interests of the states.\footnote{See Kochan, supra note 135, at 1028.} However, more relevant to the inquiry here, the Senate’s role in the confirmation of federal judges, including those on the Supreme Court, provided the states, as institutions, with a protection against the federal judiciary.\footnote{See \textit{id.} at 1032.} That protection was lost with the Seventeenth Amendment,\footnote{\textit{Id.}} but forcing the Supreme Court to rely on state judges—who are part of state governments\footnote{\textit{Id.}}—would regain the balance, while still ensuring that the national Supreme Court would be able to step in to protect federal interests.

\section*{VII. Conclusion}

Public opinion is more open than elite legal opinion to conservative jurisprudential outcomes and originalist methods of interpretation. By forcing the Supreme Court to rely on the mostly elected state court judges to implement its doctrine, Congress could provide a check on the Supreme Court’s ability to push constitutional and statutory interpretations favored by legal elites. Disempowering the lower federal courts would provide upward hydraulic pressure from public opinion below by fragmenting the Supreme Court’s ability to have its doctrines implemented aggressively. The result would be judicial doctrine that is more reflective of the political and legal values of the American public.

\footnote{141 Benesh & Martinek, \textit{supra} note 108, at 800–01 (“The state supreme courts . . . may be inclined to separate themselves from the federal system, thereby strengthening their position as major players in their respective state governments.”). \textit{Cf.} John O. McGinnis, \textit{Justice Without Justices}, 16 \textit{Const. Comment.} 541, 546 n.16 (1999) (“The optimal constitutional provision might well also have permitted Congress to choose state supreme court judges on a random basis to ride to the Supreme Court. Their service would create yet another force for preserving federalism.”).}