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RESPONSE

STATE JUDICIAL ELECTIONS AND THE LIMITS OF CALIBRATING ACCESS TO THE FEDERAL COURTS

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ALMOST all state court judges are subject to some sort of popular election to attain or retain office. In some states, judges are selected by competitive elections (some partisan, some nonpartisan), much like those for other public offices. In other states, judges are initially appointed, putatively by merit selection, and then undergo periodic retention elections, where they run against themselves and must obtain a majority (or more) of the votes cast to retain their seat. In a few states, some judges are appointed for terms and do not face retention elections. There is substantial evidence that, for a variety of reasons, both competitive and retention elections, especially at the state supreme court level, have since the 1980s become more contentious, expensive, and salient to voters and interest groups. These changes have attracted considerable and mostly critical attention, both nationwide and within certain states, from the federal and state judiciary, bar associations, and academics. Over the same time period, there has been a seemingly unrelated development at the United States Supreme Court. Throughout much of the twentieth century, the Court decided well over 100 cases on the merits each Term. As late as the 1970s and 1980s, the Court was deciding up to 150 cases each year. In the early 1990s, that figure began to decline sharply to about 100, and since about 2000 has declined even further, to

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about 70 to 80 cases a year. Only about ten cases a year are appeals from state courts.

In their timely and provocative article,[1] Amanda Frost and Stefanie Lindquist do not argue that there is a causal connection between these phenomena. But they do argue that it is useful to consider the significance of these developments together. In short, they contend that the high-profile nature of state judicial elections is not a good thing, since it presents the "majoritarian problem" found in their title: nominally impartial state judges, in place to check the other branches of government, will be prone to bend to public opinion as expressed in elections. On this account, it is particularly a problem when state judges must enforce counter-majoritarian rights. But as Frost and Lindquist observe, "[l]ike it or not, elected judges are here to stay."[2] To deal with the majoritarian problem, they argue that life-tenured federal judges can adjust the gatekeeping criteria by which they review state court decisions. The authors suggest that the federal Supreme Court more often review decisions of courts from states with competitive election systems, and that lower federal courts take into account the same factors when collaterally reviewing state criminal decisions via habeas corpus. They further argue that federal courts should explicitly state that they are taking these criteria into account.[3]

In this response, I will briefly review Frost and Lindquist's arguments and their empirical study that indicates that the Supreme Court more often reviews decisions from elective states than appointive states. In my critique, I focus mainly on their remedy, that federal courts should candidly announce that they are taking into account the mode of state judicial election when reviewing, or deciding to review, decisions from a particular state. Among the issues I will address are whether such a blunt remedy is necessary in light of (1) existing empirical evidence about judicial elections, and on how state courts in general apply federal law; (2) assumptions about the presumed need or ability to ensure uniformity in federal law; (3) whether federal courts will be as candid as suggested by Frost and Lindquist; and (4) how such a remedy, if adopted, might affect decision-making in state courts.

[1] Amanda Frost & Stefanie A. Lindquist, Countering the Majoritarian Difficulty, 96 Va. L. Rev. 719 (2010).

[2] Id. at 721.

[3] Id. at 726–27.

THE RISE OF STATE JUDICIAL ELECTIONS AND RESHAPING FEDERAL COURT SUPERVISION

As Frost and Lindquist observe, there is a large literature on the significance of state court selection for the enforcement of federal rights. Given the potential popular accountability of state judicial elections, many critics question whether there is parity between federal and state courts, that is, the assumption that at some level federal and state judges have more or less equal competence and motivation to enforce federal rights.[4] The authors purport not to take a position on this debate,[5] but marshal considerable evidence from political scientists and others suggesting that elected judges do in fact take into account majoritarian popular preferences when deciding cases, particularly those involving the death penalty and other high-profile issues. This trend would seem to be exacerbated by the growing contentiousness of judicial elections in some states.

How can federal courts doctrine counteract this majoritarian problem? As the authors point out, federal courts have several tools to supervise the application of federal law by state courts. Most notably, the Supreme Court can directly review state court decisions; separately, federal courts can collaterally review state criminal convictions. To be sure, neither avenue is a panacea. As already noted, the Supreme Court has considerably downsized its docket, while federal courts rarely grant habeas corpus petitions, in part because of Congress's narrowing of the habeas statute by passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996. Nonetheless, there is other evidence that state courts, by and large, adhere to federal law developed by federal courts. They observe that "the mere possibility of federal judicial oversight may serve as a counterweight to the majoritarian pressures on elected judges'

[4] The canonical critical work is Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977). For a survey and critique of the subsequent literature, see Michael E. Solimine, The Future of Parity, 46 Wm. & Mary L. Rev. 1457 (2005). For recent additions to the literature, see Sara C. Benesh & Wendy L. Martinek, Context and Compliance: A Comparison of State Supreme Courts and the Circuits, Marq. L. Rev. (forthcoming), available at http://epublications.marquette.edu/mulr_forthcoming (demonstrating empirically that state supreme courts and federal circuit courts similarly follow Supreme Court precedent in confession cases); Eve Brensike Primus, A Structural Vision of Habeas Corpus, 98 Cal. L. Rev. 1, 16–23 (2010) (presenting evidence that several states systematically violate criminal defendants' rights on access to counsel and other issues, though fault in all instances is not entirely with state judges).

[5] Frost & Lindquist, supra note 1, at 723.

decision-making."[6] Indeed, "[e]ven the mere possibility of federal judicial oversight can serve as political cover for state court judges issuing unpopular decisions."[7]

Despite these counteractions to the majoritarian problem in state courts, the authors feel it is not enough. The rise of state court elections evidently causes them enough concern to advocate that federal courts more proactively supervise state courts. As they point out, such a suggestion is not particularly revolutionary. The Supreme Court (albeit implicitly) has episodically shaped federal courts doctrine to make it easier for federal judges to review state court decisions, given the perceived ills at the time of the quality of state adjudication of federal rights. They give the example of the Warren Court expanding habeas review during the civil rights era, which enabled it to better supervise criminal convictions from southern state courts.[8]

In addition, the authors present their own empirical studies of how federal courts, in their review of state court decisions, apparently differentiate between modes of state court selection. First, the authors analyzed Supreme Court cases from 1960 to 2005, which reviewed, directly or collaterally, decisions of state courts. They found that the Court was more likely to reverse decisions from states with partisan elected state supreme courts, as opposed to nonpartisan elected courts or appointed courts.[9] Second, the authors examined data on the filing of habeas petitions by state prisoners, and assuming that the number of such petitions "may serve as a rough proxy for the rate of errors that occurred in the process of obtaining a conviction," found that "states with partisan-elected state supreme courts (whether at the selection or retention stage) generate significantly more habeas petitions than states with appointed systems."[10] Correctly conceding that these studies are not definitive, the

[6] Id. at 751.

[7] Id. at 754. When a state court bases its decision on both federal and state law, the Supreme Court held in *Michigan v. Long*, 463 U.S. 1032 (1983), that it can review the case unless the lower court clearly states that it is relying on the latter law. As Frost and Lindquist detail, there is considerable evidence that state courts often do not use the option made available by *Michigan v. Long*. As a related matter, despite the ballyhoo over the rise of state constitutional law as a source of independent protection for individual rights, most state courts follow federal law when interpreting state constitutional provisions. This supports the political cover thesis. Frost & Lindquist, supra note 1, at 754–57, 762–63.

[8] Id. at 788–89. For an excellent discussion, see Robert Jerome Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869 (1994).

[9] Frost & Lindquist, supra note 1, at 770–77.

[10] Id. at 778–80.

authors ask "whether federal courts can and should do more to offset majoritarian pressures on state court judges by taking judicial selection into account when making jurisdictional choices."[11] They conclude that federal judges should candidly and openly answer yes to that question.

ARE NEW FEDERAL JURISDICTIONAL CRITERIA DESIRABLE?

Frost and Lindquist summarize considerable evidence that state courts as a general matter follow federal law, and do not systemically undermine the assertions of federal rights. There are of course exceptions to this generalization—and no doubt always will be—and one can agree with the generalization without assuming that state judges have the same competence and independence of federal judges when it comes to the full and fair adjudication of federal rights. But federal courts already have authority to review state court decisions, and the empirical studies of the authors suggest, however roughly, that federal justices and judges currently take into account state judicial selection in their review.[12] So why change the status quo?

The answer is the threat of the new style of state judicial elections, amply documented in the article. State courts, and particularly state supreme courts, have, in the past several decades, confronted not only federal rights, such as those involved in death penalty cases, but also controversial state law issues, such as tort reform and educational funding. Interest groups have poured money into such races, and they are increasingly marked by expensive, high-profile campaigns and competitive races. The same can be said, of course, for many non-judicial races, but numerous studies also show that voters in judicial races often have little information about the candidates, and often vote for such candidates (when they vote for them at all) based on such cues as incumbency, par-

[11] Id. at 785.

[12] The data collected and analyzed by the authors can tell us only so much. The Supreme Court cases are those where the Court has already exercised discretionary review, and for all cases the Court disproportionately reverses the lower courts. A more comprehensive study, though one that would have required considerably more data collection and analysis, would have examined all cases where discretionary review was sought in the Court, but where certiorari was not granted. See Jonathan P. Kastellec & Jeffrey R. Lax, Case Selection and the Study of Judicial Politics, 5 J. Empirical Legal Stud. 407 (2008). Likewise, the rate of habeas filings by state is indeed a "rough proxy" for the rate of errors by state courts. Many such filings, one presumes, are by pro se state prisoners, and the vast majority are denied by federal judges. To their credit, Frost and Lindquist acknowledge the limits of the data, and their empirical work as is advances the debate and should helpfully spur further work.

ty affiliation, and name recognition. The whole notion of judges being held popularly accountable for their decisions in elections no doubt grates on the sensibilities of those in favor of an independent judiciary, and those who see life-tenured federal judges as the paradigm of that independence.

One does not have to embrace the normative desirability of judicial elections[13] to argue that Frost and Lindquist may overstate the case against those elections. They correctly survey the new era for judicial elections, but those developments do not cover all states, or all elections within one state. Not all state supreme court elections are contentious in any sense of that word, and the vast majority of elections for lower court judges in all states are remarkably uncontentious. Large numbers of lower court judges run unopposed in competitive elections, and incumbent judges have high rates of retention under all elective systems. Likewise, most studies show that in contested judicial elections, most voters lack full information about the candidates or the campaign.[14] In this environment it is hard to conclude that state judges are routinely punished at the polls for enforcing federal rights. That said, there are surely exceptions to this general rule,[15] and there is no doubt that the threat of an electoral sanction has an influence on how some state judges deal with controversial cases, involving federal rights or otherwise.

The need to ensure uniformity in federal law is a canonical assertion in federal courts jurisprudence.[16] The remedy of Frost and Lindquist, it would seem, would lead to less uniformity. They call for the Supreme Court and other federal courts to review cases from certain states more closely, and presumably to review cases from other states less closely. Over time, the courts of the former states will be more subject to federal court supervision and be more likely to uniformly follow federal law. In some quarters, this would be fighting words. Justices John Paul Stevens

[13] For a supportive argument by two political scientists, see Chris W. Bonneau & Melinda Gann Hall, In Defense of Judicial Elections (2009), *cited in* Frost & Lindquist, supra note 1, at 722 n.4.

[14] For further development of these points, see Michael E. Solimine, Independence, Accountability, and the Case for State Judicial Elections, 9 Election L.J. (forthcoming 2010) (book review).

[15] See, e.g., Paul Brace & Brent D. Boyea, State Public Opinion, the Death Penalty, and the Practice of Electing Judges, 52 Am. J. Pol. Sci. 360 (2008) (finding that public opinion and elections for state supreme court justices influenced judicial behavior in death penalty cases).

[16] See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005); Michigan v. Long, 463 U.S. 1032, 1040 (1983).

and Antonin Scalia have engaged in an extended debate through opinions on a version of this question, regarding direct Supreme Court review of state court decisions. Justice Stevens has argued that the Court should rarely review state court decisions that interpret federal constitutional rights more expansively than would (or might) a federal court. In those situations, he argues, there is an equal if not greater interest in the vindication of a federal right, albeit by a state court, than the interest in federal uniformity.[17] With characteristic vigor, Justice Scalia disagrees. He argues that it is the responsibility of the Supreme Court to correct, if necessary, the declaration of federal law by state courts, and in doing so he refuses to institutionalize the vindication of federal rights as such. Other values are important as well, such as deference to other institutions of state governance. To adopt Justice Stevens's position, he says, will change uniform federal law into a "crazy quilt."[18]

But other writers will not be alarmed. They argue that achieving perfect uniformity in the judicial declaration and application of federal law is difficult in practice and may not always be desirable in theory. All things being equal, the provisions of the national Constitution and congressional statutes ought to be applied equally to everyone, no matter what state they are in. But the Supreme Court cannot decide or review every case, so of necessity the vast majority of the development and application of retail federal law is by lower federal courts and state courts. It is impossible for those courts to be completely uniform at all times, and unless the Court would vastly increase its merits docket, nonuniformity will remain. Moreover, in certain situations the lack of uniformity can lead to useful experimentation and percolation on issues of federal law, which can lead to a better eventual resolution of those issues if one is needed. From this perspective, the authors' remedy is not especially problematic.[19]

[17] See, e.g., Kansas v. Marsh, 548 U.S. 163, 202 n.* (2006) (Stevens, J., dissenting). The main doctrinal import of Justice Stevens's position is that the Court should interpret *Michigan v. Long*, 463 U.S. 1032 (1983), to make it easier to presume that a state court decision relying on both federal and state law ultimately relies on the latter. See, e.g., Florida v. Powell, 130 S. Ct. 1195, 1206–10 (2010) (Stevens, J., dissenting). For an extensive discussion and endorsement of Stevens's position, see Jason Mazzone, When the Supreme Court is Not Supreme, 104 Nw. U. L. Rev. (forthcoming 2010), available at http://ssrn.com/abstract=1348593.

[18] *Marsh*, 548 U.S. at 182–85 (Scalia, J., concurring).

[19] For arguments from a variety of perspectives calling for toleration, to varying degrees, of nonuniform federal law, see Richard A. Posner, The Federal Courts: Challenge and Reform 288–90 (1996); Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567

THE REACTION OF UNITED STATES SUPREME COURT AND STATE SUPREME COURT JUSTICES

Several practical problems would attend the adoption of the proposals of Frost and Lindquist. For the Supreme Court, it would seem fairly easy to identify those state supreme courts which are elected rather than appointed, and to give weight to that fact when deciding certiorari petitions. How much weight is another matter. But for the Court, it would add to existing gate-keeping criteria (for example, the importance of the case, or splits among lower courts on an issue), and not do any more substantive work after certiorari is granted. This stands in contrast to federal district judges confronted with habeas petitions. State prisoners have the right to file such petitions, so there is no analogy to the certiorari process. So, the proposal would call for district judges to undertake a "more searching review"[20] of petitions in states with elective systems. How that can be squared with the existing habeas corpus statute and its interpretative jurisprudence is not clear. The AEDPA calls for *less* searching review of the state court decisions that uphold the conviction and sentence of the petitioner.[21]

More importantly, it seems unlikely that the Supreme Court would voluntarily and publicly adopt this proposal. It is true that some of the Justices have criticized various aspects of state judicial elections, and call for adoption of some sort of appointive system through merit criteria (with or without retention elections).[22] While this might suggest that they would be amenable to the proposal, the Justices also jealously guard their prerogative to grant or deny certiorari. The declining merits docket of the Court has received much comment and criticism in recent years from a variety of perspectives, but these arguments seem to have

(2008); Wayne A. Logan, Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights, 51 Wm. & Mary L. Rev. 143 (2009); Mazzone, supra note 17; Solimine, supra note 4, at 1481–86. See also Frederic M. Bloom, State Courts Unbound, 93 Cornell L. Rev. 501 (2008) (describing "rare events" where state courts intentionally flouted then-valid federal law, but were subsequently approved by the Supreme Court).

[20] Frost & Lindquist, supra note 1, at 794.

[21] E.g., Renico v. Lett, 130 S. Ct. 1855, 1862 (2010) (emphasizing limited review permitted by the AEDPA). See generally Larry W. Yackle, Federal Courts 582–83 (3d ed. 2009) (summarizing adoption and consequences of AEDPA).

[22] E.g., Republican Party of Minn. v. White, 536 U.S. 765, 788–92 (2002) (O'Connor, J., concurring); see also id. at 803–21 (Ginsburg, J., dissenting); N.Y. Bd. of Elections v. López Torres, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring).

had little effect on any of the current Justices.[23] Breaking with this trend, the proposal would seem to call for additional cases to be reviewed. Furthermore, even Justices who are sympathetic to the proposal might recoil at the blunt criticism of a state electoral system implied by the proposal.

The proposal does not need the approval of state court judges, but it is unclear how they might react. Some state supreme court justices might not react at all, and simply decide cases with federal issues as they have done before. But it is conventional wisdom that federal and state appellate judges take into account, to varying degrees, the possibility of review by the Supreme Court and the likely resolution of the merits if certiorari were to be granted. Studies have shown that state supreme courts take into account the ideological makeup of the Supreme Court when making decisions, including the decision to attempt to insulate the holding from Supreme Court review by explicitly relying on state law.[24] So it would not be surprising if a change in review criteria might have a feedback effect on state courts.

Several counteractive changes in judicial behavior might take place. In those states with appointive systems, judges might be (consciously or not) less likely to follow federal law faithfully, secure in the knowledge that they are less likely to be reviewed by the Court. In states with elective systems, judges will know that Court review is more likely no matter what they do, and indeed some might take personally the implication that the method by which they attained their office is of second-class status. Perhaps some of those judges might be less likely to follow Court precedent, and more likely to welcome the political cover provided by Court review and even reversal. Conversely, judges in these states might be more motivated than they are now to rely on state law to prevent Supreme Court review, given the higher likelihood of review on federal issues. I have expressed skepticism that state supreme courts routinely engage in such strategic behavior, or that the electorate would pay much attention to it even if they did.[25] But the higher profile of current judicial

[23] For an overview, see Frederick Schauer, Is It Important to be Important?: Evaluating the Supreme Court's Case-Selection Process, 119 Yale L.J. Online 77 (2009), http://yalelawjournal.org/2009/12/09/schauer.html.

[24] See Scott A. Comparato & Scott D. McClurg, A Neo-Institutional Explanation of State Supreme Court Responses in Search and Seizure Cases, 35 Am. Pol. Res. 726 (2007); Robert M. Howard et al., State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties, 40 Law & Soc'y Rev. 845 (2006).

[25] Michael E. Solimine, Supreme Court Monitoring of State Courts in the Twenty-first Century, 35 Ind. L. Rev. 335, 343 (2002).

elections might suggest that my conclusion should be revisited.[26] If so, the explicit adoption of the authors' proposal might, in these ways, make some state supreme court decisions more insulated from Supreme Court review.

CONCLUSION

Frost and Lindquist have made an original and significant contribution to the scholarly debate over several interrelated issues: the capacity of state courts to fairly adjudicate issues of federal law; the capacity of the Supreme Court to supervise those decisions; and the significance of the new wave of high-profile and contentious state court elections. Their empirical study of Court decisions, showing that it more often reverses cases from states with elective judiciaries, alone sheds new light on the interrelationship between the federal and state judiciaries. They normatively defend the appropriateness of the Court engaging in harder look review of decisions from those states.

I am skeptical that the Supreme Court will adopt their proposal that it explicitly incorporate that factor into the criteria it ostensibly uses to review certiorari petitions. But my skepticism is a minor point. The Court, according to the authors, appears to be using that factor to some degree already. Perhaps it can be used in a more nuanced (if less transparent) way by the Court, as opposed to announcing it formally as a criterion for certiorari.

[26] Frost & Lindquist, supra note 1, at 753–54; cf. Edward Hartnett, Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?, 75 Tex. L. Rev. 907, 973–84 (1997) (discussing how Supreme Court review of state courts' decisions insulates the latter from political accountability).