

## Interpretive Divergence All the Way Down

A Response to Aaron-Andrew P. Bruhl and Ethan J. Leib,  
*Elected Judges and Statutory Interpretation*, 79 U Chi L Rev 1215  
(2012)

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### INTRODUCTION

Debates about methodological consensus are emerging as a hot topic in statutory interpretation scholarship. Recent articles in the field have explored whether judges are capable of following a unified interpretive methodology—and whether they *should* do so.<sup>1</sup> The dominant normative view has been that methodological consensus is a desirable goal that would serve important rule of law values such as predictability and clarity. But Aaron-Andrew Bruhl and Ethan Leib have offered important resistance to this view, arguing that interpretive diversity improves the quality of deliberation about statutory meaning and that different interpretive techniques may be appropriate for different courts depending on variations in judicial resources, a court’s place in the judicial hierarchy, and judicial selection methods.<sup>2</sup> In *Elected Judges and Statutory Interpretation*, these two authors join forces to consider the novel possibility that elected judges can, and perhaps should, interpret statutes differently than their appointed counterparts.<sup>3</sup> This is a stunningly heretical idea, but one that Bruhl and Leib examine with impressive elegance. In so doing, Bruhl and Leib are careful not to commit themselves to the idea that elected judges may be entitled to interpret statutes differently than their elected counterparts—what they call “interpretive divergence.”

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<sup>1</sup> See, for example, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L J 1750, 1829–32 (2010); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Georgetown L J 1863, 1884–86 (2008); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv L Rev 2085, 2151–53 (2002).

<sup>2</sup> See Ethan J. Leib and Michael Scrota, *The Costs of Consensus in Statutory Construction*, 120 Yale L J Online 47, 50–53 (2010), online at [http://yalclawjournal.org/2010/7/30/leib\\_serota.html](http://yalclawjournal.org/2010/7/30/leib_serota.html) (visited Jan 8, 2013). See also Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 Cornell L Rev 433, 441–42 (2012).

<sup>3</sup> See generally Aaron-Andrew P. Bruhl and Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U Chi L Rev 1215 (2012).

Rather, their goal is exploratory, “to see what would happen if one took seriously the line of reasoning that links judicial selection to interpretive methodology in statutory cases.”<sup>4</sup> Accordingly, they present the best cases for and against interpretive divergence and seek to begin a conversation about whether such divergence is appropriate in at least some cases.<sup>5</sup> Their article is an outstanding contribution and does an admirable job of forcing scholars to think outside the box.

Rather than rush to judgment on Bruhl and Leib’s fledgling idea—particularly given the authors’ own agnosticism<sup>6</sup> and exploratory approach—I wish to focus on an intriguing corollary question raised by their analysis. That is, if one takes seriously the proposition that it may make sense for elected judges to interpret statutes differently than do appointed judges, should judicial opinions written by elected judges look substantially different from those written by appointed judges? There are several levels on which this question operates. The first is substantive: In what ways should elected judges’ democratic pedigree affect their interpretive method in deciding cases? Bruhl and Leib engage this question to some extent, suggesting that, under certain circumstances, elected judges may be entitled to exercise greater interpretive independence than their appointed counterparts.<sup>7</sup> The second level is procedural: How, if at all, should the manner in which elected judges explain their reasoning in judicial opinions differ from how appointed judges explain their reasoning? Put differently, should elected judges write their opinions to speak primarily to the voting public as an audience rather than to lawyers and other judges? If we think that the answer to that question could

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<sup>4</sup> Id at 1217.

<sup>5</sup> Bruhl and Leib’s case *against* interpretive divergence lays out, inter alia, objections based on formalist and separation of powers arguments, rule of law concerns relating to predictability and judicial independence, and the practical limitations of obtaining meaningful accountability through judicial elections. See id at 1222–37. Their case *for* interpretive divergence points out, among other things, that many states adopted judicial elections in order to establish the judiciary as a check against legislative corruption, that the faithful agent model that underlies most statutory interpretation theory loses force when the court is elected by the people, and that the role of elected state judges already diverges from that of appointed federal judges in that state judges engage in common law decision making, which by its nature is dynamic and pragmatic. See id at 1237–54.

<sup>6</sup> The authors in several places acknowledge the attractiveness of the case against interpretive divergence and ultimately conclude that it is too soon to reach a definitive answer on the question whether the method of judicial selection should affect statutory interpretation methodology. Id at 1255.

<sup>7</sup> Specifically, they suggest that elected judges may be more qualified than appointed judges to update statutes in light of changed social circumstances, trump the legislature in the name of the people (when the legislature may be doing a poor job of reflecting the people’s preferences), and even go beyond popular preferences in pursuit of a more just society. See Bruhl and Leib, 79 U Chi L Rev at 1258–67 (cited in note 3).

be “yes”, in what ways might we want or expect elected judges’ opinions to differ from those written by their appointed counterparts? And third: Should elected judges abandon certain interpretive tools—or use them differently—than appointed judges?

This Essay offers some answers to the second and third sets of questions. Part I examines the relative roles of judicial opinions written by elected versus appointed judges in a world in which interpretive divergence is practiced. It suggests that if an elected judge’s electoral connection to the people justifies a different approach or focus in her evaluation of statutes, then it is important for such a judge’s opinions to reflect her reasoning in a manner that can be understood—and, ultimately, evaluated—by the voting public. Part II explores specific ways in which we might want or expect an elected judge’s statutory opinions, and use of interpretive tools, to differ from an appointed judge’s in light of the electoral connection and the need for public understanding.

#### I. THE ELECTORAL CONNECTION AND THE ROLE OF THE JUDICIAL OPINION

Let us begin by considering the case of the ordinary judicial opinion, written by an appointed judge. Who is the judge’s—and the opinion’s—audience? Aside from the litigants, there seem to be three distinct answers: (1) other judges on the same court, judges on lower courts bound by the decision, and perhaps also judges on sister courts who might be persuaded by the opinion; (2) attorneys seeking to understand the relevant rule of law and to advise clients; and (3) the general public. Of these, only the first two audiences are likely to read the opinion in large numbers, although some members of the public will read it and some will become aware of its contents through the news media. What, then, is the role of the ordinary judicial opinion with respect to each of these audiences? Again, the answers are distinct. For other judges, the opinion is a precedent whose reasoning they either will find persuasive or will disagree with and which they may seek to embrace or to distinguish in their own future opinions. Likewise, for attorneys, the opinion is a precedent whose nuances they will seek to understand so they can provide sound legal advice and present their clients’ cases in the best possible light. Finally, for the public, the judicial opinion itself will have little role to play, although the outcome of the case and the rule of law established in the opinion may become the focus of public attention. In other words, for judges, the opinion’s role is persuasion; for attorneys,

the opinion's role is to foster prediction; and for the public, the opinion's role is legitimation.<sup>8</sup>

The relevant question is whether any of these roles changes substantially when the author of the opinion, and the court that issues it, is elected by the people rather than appointed by the chief executive. With respect to the first two audiences, the answer seems to be “no.” The method of judicial selection should not change the precedential role of a judicial opinion vis-à-vis other judges<sup>9</sup> or attorneys, who still should pay close attention to the opinion's reasoning and follow or distinguish it in future cases.<sup>10</sup> But the electoral connection could change the role of judicial opinions vis-à-vis the public, who must vote to elect or reject individual judges every few years based, at least in part, on the quality of such judges' work in deciding cases.

This is particularly so if elected judges, following Bruhl and Leib's case for interpretive divergence, exercise greater interpretive freedom based on this very electoral connection. Consider the following justifications for interpretive divergence advanced by Bruhl and Leib: “[J]udicial elections give the citizenry a greater degree of ex post residual control over their judicial fiduciaries,” which means that “an elected judge is arguably justified in having even more flexibility than an unelected counterpart.”<sup>11</sup> And

perhaps one should not be so quick to exclude the possibility of overruling precedent on account of an intervening election. . . . [A] court does not have an *absolute* duty to follow its own precedents. . . . [S]houldn'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*?<sup>12</sup>

If we are to take these statements seriously—that elected judges may be entitled to greater interpretive freedom than appointed judg-

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<sup>8</sup> I thank Marc DeGirolami for this helpful categorization.

<sup>9</sup> If other judges are not themselves elected, that could affect whether they view themselves as capable of following the reasoning of a case that is the product of interpretive divergence—since they would not share the electoral connection-based qualifications of the court that authored the precedent. But because most states in which the members of the highest state court are elected also elect their lower court judges, this caveat would only apply to the relatively minimal role that elected judges' opinions play vis-à-vis judges on sister states' courts.

<sup>10</sup> It is possible that attorneys advising clients may adjust their reliance on certain precedents issued by elected judges. For example, when an attorney believes that a judicial decision is the product of electoral pressure or is vulnerable to electoral correction, she may view the precedent as less stable than a precedent issued by an appointed court, on the theory that electoral politics could change the composition of the court and, with it, the rule of law. I thank Jeremy Sheff for this insight.

<sup>11</sup> Bruhl and Leib, 79 U Chi L Rev at 1245–46 (cited in note 3).

<sup>12</sup> Id at 1257.

es because voters can ratify or reject their interpretive choices at the ballot box and that precedents rejected at the ballot box may be appropriate candidates for overruling—we must assume some public familiarity with and understanding of the content of elected judges' opinions. In other words, interpretive divergence as a concept presupposes a significant role for judicial opinions vis-à-vis the public as an audience. It also presupposes a high degree of sophistication on the part of that audience.

The enhanced role that judicial opinions play with respect to the voting public becomes even clearer when one considers the substantive forms of interpretive divergence that Bruhl and Leib suggest elected judges might pursue. For example, Bruhl and Leib argue that the institutional and personal circumstances of elected judges give such judges an advantage over appointed judges in understanding changing social circumstances and public opinion.<sup>13</sup> Elected judges accordingly may be more justified than appointed judges in practicing judicial dynamism—that is, updating statutes to reflect changed social circumstances.<sup>14</sup> In other words, the electoral connection forces elected judges to stay in touch with the public's policy preferences and current social values, and this in turn makes elected judges more capable than their appointed counterparts of interpreting statutes to reflect evolving social norms.<sup>15</sup> But if we are to accept this justification for greater judicial updating by elected judges, then we must presume or require judicial opinions that are honest about the social values underlying judges' decision making. We must also seek to ensure that the voting public comprehends such judicial opinions well enough to be able to identify when an elected judge has misgauged current social values—so voters can adequately punish the judge at election time. Otherwise, Bruhl and Leib's interpretive divergence will operate as a one-way ratchet, enhancing judicial power in the name of greater accountability without any corresponding mechanism for ensuring that that accountability is meaningful.<sup>16</sup>

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<sup>13</sup> *Id.* at 1258–59.

<sup>14</sup> *Id.* at 1258–59.

<sup>15</sup> Bruhl and Leib, 79 *U Chi L Rev* at 1250–52 (cited in note 3).

<sup>16</sup> Bruhl and Leib qualify their case for interpretive divergence by noting that only certain kinds of elections may justify such divergence—that is, competitive, partisan elections in which there is meaningful public engagement. And they acknowledge that many, perhaps most, judicial elections will not satisfy these criteria. Bruhl and Leib, 79 *U Chi L Rev* at 1231–35, 1252–53 (cited in note 3). However, even when an election does meet these criteria, it cannot truly justify interpretive freedom of the kind that Bruhl and Leib envision unless voters are able to understand and evaluate how well elected judges have gauged current public values in the years between elections.

Bruhl and Leib also suggest that the accountability conferred through elections could empower elected judges to decide cases in ways that move beyond the people's policy preferences in furtherance of a just society.<sup>17</sup> Moreover, they contend that such decisional freedom is bolstered by the fact that elected judges, unlike legislators, "have to provide the voters with a reasoned explanation for their actions in the form of a judicial opinion."<sup>18</sup> Again, this justification presumes—and requires—judicial opinions that are honest and clear about the bases for elected judges' decisions, such that the voting public can understand those decisions and make informed electoral choices based on them.

One might argue that even if the public does pay more attention to elected judges' decisions as a result of the electoral connection, the public will focus only on case outcomes, not on judges' reasoning—and that, accordingly, elected judges need not write their opinions any differently from their appointed counterparts. After all, the public also elects legislators but no one supposes that voters read the Congressional Record. This is a criticism with some merit, but one that is overstated. First, there is at least some evidence that voters pay attention to more than just the outcomes of judicial decisions and that they care (or can be made to care as a campaign issue) about judicial methodology and reasoning.<sup>19</sup> Second, we do not have to suppose a polity in which large numbers of ordinary citizens sit down to read judicial opinions at election time in order to believe that elected judges should write their opinions somewhat differently than do their appointed counterparts—at least if they practice interpretive divergence. Opinions that clearly explain a judge's public values-based reasoning will be filtered through to the voting public through other sources, such as the media and even judicial campaigns. But in order for that filtering to be meaningful, the opinions must candidly reflect any dynamic updating or social values that have formed the basis for the court's decision.

One may reasonably question whether elected judges will, in practice, be comfortable laying bare the public values that underlie their statutory interpretations. As I have discussed elsewhere, courts have sometimes been remarkably honest about the public values and

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<sup>17</sup> *Id.* at 1266.

<sup>18</sup> *Id.*

<sup>19</sup> Abbe Gluck's recent work examining state statutory interpretation methodology, for example, uncovered judicial elections in Michigan that focused on the merits of purposivism versus textualism, including the electoral defeat of a chief justice whose opponent "actively campaigned against, among other things, his textualist interpretive methodology." Gluck, 119 *Yale L J* at 1809 & n 221 (cited in note 1).

social circumstances that inform their rulings.<sup>20</sup> But such judicial candor and sincerity in opinion writing would have to become the norm for Bruhl and Leib's contemplated form of interpretive divergence to work.

## II. PRACTICAL AND METHODOLOGICAL IMPLICATIONS

The previous Part argued that if elected judges are to be entitled to greater interpretive freedom and updating in light of changed social circumstances than their appointed counterparts, a corollary to such freedom should be judicial opinions that candidly reflect those interpretive choices and that are written in a manner that the voting public can understand. This Part considers additional practical and methodological implications for judicial opinions that may follow from the theory that elections should affect how judges decide statutory interpretation cases.

I have already suggested one practical way in which we may want elected judges' written opinions to differ from appointed judges' opinions in a world where interpretive divergence is practiced—that is, we may want such opinions to be more upfront about any social values concerns or pragmatic policy reasoning underlying the court's decision. When appointed judges decide cases based on social values or policy considerations, the countermajoritarian difficulty looms large and may counsel against open emphasis on the court's pragmatic reasoning.<sup>21</sup> But for an elected judge who decides a case in light of what she genuinely believes to be the public's current values, this difficulty arguably is diminished. In fact, candor about the decision's basis is essential not only so the public can tell when a judge has misread its social values, but also so the court in later years can properly assess the precedent's viability. If an older decision is based on now-outdated public values, for example, this will be important for later courts to know.

In addition, one could make a normative case that elected judges' opinions should engage in more ordinary-meaning analysis and less rarified judicial puzzle working than their appointed counterparts' opinions. That is, in easy cases, where the traditional tools of

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<sup>20</sup> See Anita S. Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 *Wm & Mary L Rev* 1053, 1058–64, 1069–76, 1081–87 (2009) (highlighting, inter alia, the US Supreme Court's reliance on the role of the Christian religion in American history and life in *Church of the Holy Trinity v United States*, 143 US 457 (1892); baseball's status as the American national pastime in *Flood v Kuhn*, 407 US 258 (1972); and tobacco's important political and economic role in American life in *FDA v Brown & Williamson Tobacco Corp*, 529 US 120 (2000)).

<sup>21</sup> See Bruhl and Leib, 79 *U Chi L Rev* at 1244–45 (cited in note 3).

interpretation yield only one clear answer, perhaps elected judges' opinions should place less emphasis on Latin maxims, complex reasoning from the corpus juris of surrounding statutes, the common law, and substantive canons based on judicial policy norms. Instead opinions should be written in a voice that ordinary citizens can understand. Fancy judicial puzzle working may be fine for an audience consisting primarily of other judges and lawyers—although one certainly can debate whether it leads to predictability or clarity of statutory meaning for practicing lawyers and lower courts<sup>22</sup>—but such legal gymnastics surely are incomprehensible to a lay audience. Indeed, it would be interesting to see future work in this area examining statutory opinions by elected judges to determine whether they tend to be written in a manner that is more accessible to the lay reader than opinions written by appointed judges or whether, conversely, elected judges use legalist reasoning as a shield to hide behind.

Beyond greater transparency about the public values underlying a judge's decision and simplification of expressed judicial reasoning, there are other ways in which it may make sense for elected judges' statutory opinions—and even interpretive focus—to differ from those of appointed judges. Bruhl and Leib suggest that in many cases, statutory text and other interpretive tools will yield only one plausible meaning and that in such cases elected and appointed judges' interpretations will not diverge.<sup>23</sup> But it is unclear why elected judges' entitlement to incorporate current public values into their decision making in certain cases might not bleed over into their application of traditional statutory interpretation tools as well. If, as Bruhl and Leib's case for interpretive divergence suggests, elected judges enjoy greater authority to take current social values into account when interpreting statutes in certain circumstances—that is, if the electoral connection makes them a little bit more like legislators than are their appointed counterparts—then they may be entitled (and inclined) to shift their focus away from the enacting legislature's intent even when employing traditional tools of statutory interpretation. Bruhl and Leib acknowledge, and indeed emphasize, that elected judges are not obligated to act as “faithful agents” of the

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<sup>22</sup> See, for example, *Dean v United States*, 556 US 568 (2009) (featuring majority and dissenting opinions that both rely on the complex whole act rule and other statutory interpretation canons); *Morrison v National Australia Bank Ltd*, 130 S Ct 2869 (2010) (rejecting the test that lower courts had followed for forty years based on a substantive canon known as the presumption against extraterritorial application of domestic laws); *Jones v United States*, 526 US 227 (1999) (calling three related robbery statutes more relevant than other criminal statutes, then relying on two of those robbery statutes plus several state statutes and rejecting the third robbery statute as dissimilar).

<sup>23</sup> See Bruhl and Leib, 79 U Chi L Rev at 1255–57 (cited in note 3).

legislature in the manner expected of appointed judges.<sup>24</sup> Consider what this might mean for elected judges' approach to just a few traditional tools of statutory interpretation.

#### A. Statutory Purpose

The traditional judicial method for using statutory purpose to construe a statute is as follows: the court identifies the statute's purpose, based on text or legislative history, and then seeks the meaning that best fits with, or fulfills, that purpose.<sup>25</sup> The court's focus, as I have explained elsewhere, is on the purpose of the enacting legislature and the meaning that best represents that legislature's objectives for the statute.<sup>26</sup> The mischief or evil that prompted the legislature to enact the statute often is discussed as part of the court's analysis.<sup>27</sup> An elected judge who views it as her right or duty to act as a faithful agent to the *public* rather than (or at least in addition to) the legislature, however, would not necessarily approach statutory purpose in this manner.<sup>28</sup> Rather, her focus may shift slightly, so as to seek the meaning that best achieves the statute's purpose in light of current public values and social circumstances.<sup>29</sup> The enacting legislature's intent would play a smaller role in this kind of analysis; the court would look to the statute's broad goals as a guidepost in updating the statute's meaning but would not be so interested in the enacting legislature's original motivation, given elected judges' superior capacity to gauge current—as distinct from time-of-enactment—public values.

#### B. Legislative History

What, then, of legislative history? Should elected judges, freed from the constraints of the traditional faithful agent model, pay any

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<sup>24</sup> See *id.* at 1243–45.

<sup>25</sup> See Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1374 (Foundation 1994) (William N. Eskridge Jr and Philip P. Frickey, eds) (summarizing the process a court should undergo when interpreting a statute).

<sup>26</sup> See Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 *Hastings L J* 221, 273 (2010).

<sup>27</sup> See, for example, *Senne v Village of Palatine, Illinois*, 695 F3d 597, 614 (7th Cir 2012) (Flaum dissenting) (noting, in interpreting the Driver's Privacy Protection Act, that the murder of actress Rebecca Schaeffer by a stalker who obtained her address from DMV records was the catalyst for the statute).

<sup>28</sup> The idea here is that a statute passed years before the application at issue in the case will reflect stale public values, whereas a judge who was elected in a recent election and is deciding a case in the present can incorporate current public opinion. See Bruhl and Leib, 79 *U Chi L Rev* at 1249–52 (cited in note 3).

<sup>29</sup> This is an approach that William Eskridge has advocated that all judges adopt, but not one that enjoys broad support. See William N. Eskridge Jr and Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 *Mich L Rev* 707, 728–30 (1991).

attention at all to this interpretive source? Despite Justice Antonin Scalia's assiduous efforts to have legislative history banished from the realm of accepted statutory interpretation tools, appointed judges often give significant weight to a statute's legislative history—mining committee reports, floor statements, and other drafting-process documents in an effort to discern what those who crafted the statute thought about its application to situations such as the one before the court.<sup>30</sup> But if elections give judges the right and duty (and necessary information) to interpret statutes in a manner consistent with current public values, there may be little of relevance in what legislators acting years, or even decades, earlier had to say about the statute's meaning. Thus, if we accept Bruhl and Leib's case for interpretive divergence, the logical practical implication might be that elected judges should ignore a statute's legislative history, at least for older statutes whose history presumably reflects outdated values. Indeed, such an approach might foster greater public understanding as well, since judicial opinions would not need to engage in cumbersome and confusing examinations of the legislative record.

There are at least two ways, however, in which legislative history might continue to play a useful role in elected judges' written opinions. First, elected judges might find a statute's legislative history helpful in illuminating the statute's overall goals, which they may wish to take into account in giving the statute an updated, contemporary meaning. This is rather like the shift in emphasis we might expect to see in elected judges' approach to statutory purpose. Second, and more unorthodoxly, elected judges could use legislative history to justify their updating, their rejection of original legislative intent, or even their decision to move out ahead of the public's current preferences. For example, where a statute's legislative history reveals a legislative intent or goal that is markedly out-of-date or repulsive to modern sensibilities, elected judges could find that history helpful to illustrate how much social circumstances have changed since the statute was enacted, and to explain to the public why they must interpret the statute to reflect current circumstances.

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<sup>30</sup> See, for example, *Babbitt v Sweet Home Chapter of Communities for a Great Oregon*, 515 US 687, 704–08 (1995); *BankAmerica Corp v United States*, 462 US 122, 133–40 (1983); *Senne*, 695 F3d at 614 (Flaum dissenting); *Montana Wilderness Association, Nine Quarter Circle Ranch v United States Forest Service*, 655 F2d 951, 955–57 (9th Cir 1981). For examples of Justice Scalia's efforts to banish legislative history from accepted statutory interpretation tools, see *Zedner v United States*, 547 US 489, 509–11 (2006) (Scalia concurring) (writing separately to object to the majority's use of legislative history to interpret a statute); *Conroy v Aniskoff*, 507 US 511, 518–28 (1993) (Scalia concurring) (same).

An example may help to illustrate what I mean. In *Church of the Holy Trinity v United States*,<sup>31</sup> a case that famously raised the question whether the Alien Contract Labor Act<sup>32</sup> barred an American church from paying for the overseas passage of an English minister traveling to the United States under contract to serve as the church's rector, the legislative history contained much xenophobic talk that would offend many modern sensibilities. The relevant House committee report, for example, described the class of immigrant laborers at whom the statute was directed as follows:

They are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor, and to reduce it to the level of the imported pauper labor.<sup>33</sup>

If this statute were being interpreted today, by elected judges, these passages might be cited to demonstrate the enacting legislature's (and the statute's) inconsistency with modern notions of social equality and classlessness.<sup>34</sup> Based on this rejection of the original statutory design, a court composed of elected judges practicing interpretive divergence might conclude that the best way to read the statute was to cover all immigrant laborers, including the English rector. Conversely, the court might hold that, given its xenophobic and classist motivations, the statute as a whole is suspect, and might reinterpret it, in light of modern sensibilities, as one that protects immigrant laborers from indentured servitude and so covers only situations in which an employer seeks to recoup the costs of the overseas passage from the immigrant worker's wages upon arrival. It matters not how precisely a court of elected judges would choose to update the statute; the important point for our purposes is that elected judges could use the statute's legislative history to illustrate its outdatedness and to justify dynamic interpretation in a manner that appointed judges might hesitate to do.

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<sup>31</sup> 143 US 457 (1892).

<sup>32</sup> Ch 164, 23 Stat 332 (1885).

<sup>33</sup> *Holy Trinity*, 143 US at 465.

<sup>34</sup> Of course, a judge who is herself xenophobic, or who was elected by a xenophobic electorate, or who perceives the electorate recently to have become xenophobic (perhaps in response to some national trauma) would not use the legislative history in this fashion because she would not view the statute as outdated and would not perceive any need to update it.

### C. Ordinary Meaning

Traditional ordinary meaning analysis often, though not always, focuses on the meaning that statutory words or phrases had at the time that the statute was enacted.<sup>35</sup> Thus courts looking to the dictionary to supplement their ordinary meaning analysis tend to use dictionaries published at the time that the statute was enacted.<sup>36</sup> As we have seen, however, an elected judge who views her fidelity as belonging to the public rather than to the enacting legislature may not—and perhaps should not—consider herself so bound. Elected judges may instead seek the meaning most consistent with contemporary popular understandings and public values. And if they consult a dictionary to assist in their search for contemporary meaning, they may choose to do so in a manner that turns the traditional dictionary rule on its head—viewing recent dictionaries, rather than ones published at the time of the statute’s enactment, as most relevant.

### D. Other Statutes

The traditional judicial approach to using other statutes as an interpretive aid is as follows: the court looks to see whether the statutory word or phrase at issue has been used in other statutes dealing with similar subject matters and whether the relevant language in those other statutes has been previously interpreted by the instant court or a higher court in the jurisdiction. If so, those prior interpretations may be deemed incorporated into the statute at issue. The reasoning behind this interpretive technique is that “when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations

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<sup>35</sup> See, for example, *Perrin v United States*, 444 US 37, 42 (1979) (“[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.”). See also *BedRoc Ltd v United States*, 541 US 176, 177 (2004) (“The proper inquiry in interpreting mineral reservations focuses on the reservation’s ordinary meaning when it was enacted.”); *Director, Office of Workers’ Compensation Programs, Department of Labor v Greenwich Collieries*, 512 US 267, 275 (1994) (“We interpret Congress’ use of the term ‘burden of proof’ in light of this history, and presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment.”).

<sup>36</sup> See, for example, *Taniguchi v Kan Pacific Saipan, Ltd*, 132 S Ct 1997, 2003 (2012) (“It is telling that all the dictionaries cited above defined ‘interpreter’ at the time of the statute’s enactment as including persons who translate orally.”) (emphasis added); *Resource Conservation Group, LLC v United States*, 597 F3d 1238, 1243 (Fed Cir 2010) (“In construing statutory language, we look to dictionary definitions published at the time that the statute was enacted.”).

as well.”<sup>37</sup> This reasoning suggests that the traditional application of the other-statutes tool has a temporal connection—that is, newer statutes should be given a meaning that is consistent with the meaning courts have given to older ones.<sup>38</sup> An elected judge accustomed to interpreting statutes in light of current public values, and to overruling outdated statutory precedents when such values warrant, however, may view this approach as exactly backwards. She might instead seek to give older statutes a meaning that is consistent with more recently enacted ones (and the recent public values reflected therein), either through the overruling of older statutory constructions that have become outdated or by analogizing to recent statutes when interpreting an older one for the first time.<sup>39</sup>

In sum, elected judges who view themselves as faithful agents of the voting public, rather than of the enacting legislature, may be inclined to shift their interpretive focus in a manner that preferences contemporary over historical meaning, even when applying traditional tools of statutory interpretation. To be sure, elected judges might reject all of these traditional interpretive tools entirely—even ordinary meaning—if they are exercising their interpretive freedom in a manner that goes against the legislature or beyond the public.<sup>40</sup> But in ordinary cases, where they are not taking such large interpretive liberties, the above analysis suggests that the electoral connection nevertheless may affect elected judges’ interpretive methodology in less obvious ways. That is, elected judges may suffer from inter-

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<sup>37</sup> *Rowe v New Hampshire Motor Transport Association*, 552 US 364, 370 (2008), quoting *Merrill Lynch, Pierce, Fenner & Smith Inc v Dabit*, 547 US 71, 85 (2006). See also *Atlantic Sounding Co v Townsend*, 557 US 404, 428 (2009) (Alito dissenting).

<sup>38</sup> See generally David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 NYU L Rev 921 (1992) (arguing generally that most interpretive canons and guides foster statutory interpretations that promote continuity of legal rules and relationships, rather than change).

<sup>39</sup> Again, a concrete example might be helpful. In *Kasten v Saint-Gobain Performance Plastics Corp*, 131 S Ct 1325 (2011), the US Supreme Court construed the Fair Labor Standards Act of 1938 (FLSA), which makes it unlawful to retaliate against an employee who has “filed any complaint.” Id at 1329, quoting FLSA § 15(a)(3), Pub L No 75-718, ch 676, 52 Stat 1060, 1068, codified as amended at 29 USC § 215(a)(3). The interpretive issue was whether the phrase “filed a complaint” includes oral as well as written complaints. Several other statutes on similar subjects had been enacted. For our purposes, assume that those statutes provided as follows: The National Labor Relations Act of 1934 (NLRA) and a 1934 Executive Order signed by President Franklin Delano Roosevelt covered retaliation only in response to written complaints. Several more recent statutes enacted post-2000 clearly covered retaliation in response to oral complaints. If the statutes at issue all were state statutes and the case were being decided by an elected state judge practicing interpretive divergence, that judge might interpret the FLSA’s retaliation provision to cover oral complaints as well, in keeping with the modern trend and public values reflected therein, despite the fact that the FLSA was enacted in 1938. That judge might also, if confronted with a case involving the NLRA, update that statute to cover oral complaints in order to conform with current public values.

<sup>40</sup> See Bruhl and Leib, 79 U Chi L Rev at 1263–65 (cited in note 3).

pretive “creep,” such that the authority to update, go against the legislature, and go beyond the public in certain cases may foster a jurisprudential outlook that elected judges carry with them to all statutory cases, even those that involve matters on which the public has no specific view. This is a possibility that Bruhl and Leib do not address,<sup>41</sup> but one worth exploring because it suggests that the implications of interpretive divergence may be even greater than they recognize.

#### CONCLUSION

I offer the above thoughts about the ways in which elected judges’ written opinions may need to differ from those of appointed judges in the exploratory spirit of Bruhl and Leib’s article—“to see what would happen if one [takes] seriously”<sup>42</sup> the idea that the method of judicial selection should affect statutory interpretation methodology. If we follow this idea *all the way down*, to its logical end, it teaches that elections might affect not just statutory interpretation methodology, but also the role of judicial opinions in the public sphere. And that in turn might affect the way that we want elected judges to write their opinions. Moreover, following interpretive divergence all the way down shows that what begins as a limited form of interpretive freedom readily could produce subtle shifts in elected judges’ interpretive focus that transfer to all statutory cases. I would urge Bruhl and Leib to consider further the latter possibility—that electorally driven divergence, once unleashed, may not be containable only to certain cases. But this is a small quibble with an excellent article. Bruhl and Leib have taken a heretical idea—one that runs counter to deep-seated intuitions about how judges should decide cases—and have made it seem almost logical. We may expect scholars to be teasing out the implications of their idea for some time to come.

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<sup>41</sup> On the contrary, Bruhl and Leib argue that electorally driven divergence should apply in limited fashion because, among other things, “not all cases will allow room for it to operate.” *Id.* at 1221.

<sup>42</sup> *Id.* at 1217.