Economic Crisis and the Rise of Judicial Elections and Judicial Review

Jed Handelsman Shugerman

Abstract:

Almost ninety percent of state judges today face some kind of popular election. This uniquely American institution emerged in a sudden burst from 1846 to 1853, as twenty states adopted judicial elections. The modern perception is that judicial elections, then and now, weaken judges and the rule of law. When judicial elections swept the country in the late 1840s and 1850s, however, the key was a new movement to limit legislative power, to increase judicial power, and to strengthen judicial review. Over time, judicial appointments had become a tool of party patronage and cronyism.

Legislative overspending on internal improvements and an economic depression in the early 1840s together had plunged the states into crippling debt. In response, a wave of nineteen states called constitutional conventions from 1844 to 1853. In addition to direct limits on legislative power, most of these conventions adopted judicial elections. Many delegates stated that their purpose was to strengthen the separation of powers and empower courts to use judicial review. The reformers got results: elected judges in the 1850s struck down many more state laws than their appointed predecessors had in any other decade. These elected judges played a role in the shift from active state involvement in economic growth to laissez-faire constitutionalism. Oddly, the first generation of elected judges was the first to justify judicial review in countermajoritarian terms, in the defense of individual and minority rights against abusive majorities and the "evils" of democracy. The Article concludes with lessons about judicial independence and democracy from this story.

Rezumat:

Aproape 90% din judecătorii de stat de azi se confruntă cu un anumit tip de alegeri. Această unică instituție americană a cunoscut o izbucnire bruscă din 1846 până în 1853, 20 de state adoptând sistemul alegerilor judiciare. Percepția modernă este aceea că alegerile judiciare, ieși și azi, slăbesc judecătorii și statul de drept. Cu toate acestea, atunci când alegerile judiciare au măturat țara în 1840 și sfârșitul anului 1850, cheia a fost o nouă mișcare pentru a limita puterea legislativă, pentru a crește puterea judecătorească și pentru a consolida controlul judiciar. Cu timpul, numirile judiciare au devenit o unealtă pentru partidul patronatelor și nepotism.

Politica legislativă privind cheltuielile bugetare și și o depresie economică la începutul anilor 1840 au aruncat statele în datorii paralizante. Ca răspuns, un val de 19 state au solicitat convenții constituționale, din 1844 până în 1853. În plus față de direcția de limitare a puterii legislative, cele mai multe dintre aceste convenții au adoptat alegeri judiciare. Mulți delegați au statuat că scopul lor era întărirea separației puterilor și împuternicirea instanțelor de a utiliza controlul judiciar. Reformatorii au obținut

rezultatele: judecătorii aleși în anii 1850 au determinat eșecul a mai multor legi statale decât predecesorii lor din oricare altă decadă. Acești judecători aleși au jucat un rol în trecerea de la implicarea activă a statului în creșterea economică la laissez-faire-ul constituțional. În mod ciudat prima generație de judecători aleși a fost prima care a justificat controlul judiciar în termeni contramajoritari, pentru apăra drepturi individuale și minoritare împotriva abuzurilor majorității și relelor democrației. Articolul se încheie cu lecții despre independența puterii judecătorești și a democrației din această poveste.

Keywords: judicial system, magistracy, independence, public trust, judicial review, justice, judges, judicial elections, reform, economic crisis, separation of powers, checks and balances

INTRODUCTION

Almost ninety percent of state judges face some kind of popular election.[114] Thirty-eight states put all of their judges up before the voters[115]. Judicial elections are uniquely American: even though many countries have copied other American legal institutions, almost no one else in the world has ever experimented with the popular election of judges[116].Today, judicial elections weaken state courts and reduce their willingness to defend the rule of law against public opposition or special interests. Recent studies demonstrate that elected judges face more political pressure and reach legal results more in keeping with local public opinion than

[114] Assistant Professor, Harvard Law School. I thank Bruce Ackerman, Sven Beckert, Mary Bilder, David Blight, Christine Desan, Charles Donahue, Dan Ernst, Dick Fallon, Barry Friedman, Glenda Gilmore, Robert Gordon, Sally Gordon, Philip Hamburger, Morty Horwitz, Dan Hulsebosch, Duncan Kennedy, Mike Klarman, Larry Kramer, John Langbein, Renée Lettow Lerner, Ken Mack, Bruce Mann, John Manning, Bill Nelson, Caleb Nelson, Nick Parrillo, James Pfander, Bill Stuntz, Alan Tarr, Richard Tuck, Ted White, John Witt, Clement Shugerman, and Danya Handelsman, as well as the anonymous reviewers and the participants in the Boston College Legal History Roundtable, Harvard Law School Faculty Workshop, Harvard Law Junior Faculty Workshop, Harvard Center for History and Economics, NYU Legal History Colloquium, Princeton Government Workshop, Stanford-Yale Junior Faculty Forum, and Yale Legal History Forum. Leigh Peters-Fransen provided extraordinary and invaluable research assistance. I also thank Michael Admirand, Rose Dawes, Carol Igoe, Lauren Kuley, Nooree Lee, Christoph Luschin, Jon Menitove, Leif Overvold, Danny Rubens, Amelia Schmidt, Kim Rusthsatz Stephens, and the staffs of the Library of Congress, Buffalo Public Library, Jenkins Law Library, New York Public Library, and New York State Library. 1 Matthew J. Streb, *The Study of Judicial Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 1, 7 (Matthew J. Streb ed., 2007).

[115] The nine states that select judges by gubernatorial appointment are Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont. New York's lower court judges are elected, but not the judges on its highest court, the Court of Appeals. South Carolina and Virginia use legislative appointment

[116] The only other nations that elect even a small number of judges are Switzerland, Japan, and France, and these countries narrowly limit the scope of the elections. In Switzerland, some lay judges of canton courts are elected. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 691 n.3 (1995). In Japan, the cabinet initially appoints high court judges, who thereafter might stand for reelection once, unopposed, but they often retire before facing an election. The emperor selects the chief judge. *Id.*; *see also* J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331, 333 (2001). For a discussion of France's overlooked and "marginalized" commercial courts, see Amalia D. Kessler, *Marginalization and Myth: The Corporatist Roots of France's Forgotten Elective Judiciary* (Stanford Pub. Law & Legal Theory Working Paper Series, Paper No. 1470271, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=1470271.

appointed judges do[117]. Other studies have found that elected judges disproportionately rule in favor of their campaign contributors[118]. It has been a long-established practice for parties and lawyers to donate to the judges who will later hear their cases, but recently the size of such donations has increased dramatically[119]. Spending on judicial campaigns has doubled in the past decade, exceeding $200 million in total direct donations from 1999 to 2008[120]. In June 2009, the U.S. Supreme Court ruled for the first time that an elected judge must recuse himself from a case involving a major campaign contributor[121]. In that case, a coal company CEO who was appealing a $50 million verdict spent $3 million on the campaign of a challenger for a seat on the West Virginia Supreme Court[122], financing political attack ads alleging that the incumbent was soft on

[117] *See, e.g.*, Daniel R. Pinello, *The Impact Of Judicial-Selection Method On State-Supreme-Court Policy* (1995) (concluding that elected judges are more likely to respond to political pressure than are appointed judges); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (finding that elected judges are influenced by public opinion and thus are more pro–death penalty); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13 (1992); Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25 (1979); Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107 (2007) (finding that in Kansas, judges chosen by partisan elections sentence more severely than nonpartisan judges); F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205 (1999) (finding that judicial independence and decision uncertainty is impacted by selection methods); Gregory A. Huber & Sanford C. Gordon, *Accountability or Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004); Stefanie A. Lindquist & Kevin Pybas, *State Supreme Court Decisions To Overrule Precedent, 1965–1996*, 20 JUST. SYS. J. 17, 34 (1998) (suggesting that New Jersey's Supreme Court justices, appointed to seven-year terms, overturn precedents more often and are more "activist" than elected judges because they "may feel more insulated from the political process"); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999) (finding damage awards, particularly those against out-of-state businesses, higher in elected courts and highest in states with partisan elections, and concluding that judges, not juries, were the cause); Gerald F. Uelmen, *Elected Judiciary*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 170, 171 (Leonard W. Levy et al. eds., Supp. I 1992) (showing meaningful differences between judges selected by executive appointment and judges selected by other methods, such as elections). *But see* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical* VOL. 123 SHUGERMAN.DOC 02/27/10 – 4:03 PM *Study*, 72 S. CAL. L. REV. 465 (1999) (showing no significant effect from selection methods); Flango& Ducat, *supra*, at 34–35 (concluding that selection methods are less significant than some studies suggest).

[118] Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14; Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.

[119] *See, e.g.*, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 15 (2006), *available at* http://www.justiceatstake.org/media/cms/NewPolitics of Judicial Elections2006_D2A2449B77CDA.pdf; JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 19 (2004), *available at* http://www.justiceatstake. org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf.

[120] Justice at Stake Campaign, Candidate Fund-Raising in Supreme Court Races by Rank, 2000–2008, http://www.justiceatstake.org/media/cms/JAS_20002008CourtCampaignExpenditur_63951A4654869.pdf (last visited Jan. 31, 2010); Justice at Stake Campaign, Money and Elections, http://www.justiceatstake.org/issues/state_court_issues/money__elections.cfm (last visited Jan. 31, 2010).

[121] Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).

[122] *Id.* at 2257.

In the midst of modern controversies over judicial elections, skepticism of reform efforts to protect judicial independence is understandable. Judicial elections seem to have been inevitable and immovable.

child molesters[123]. The challenger, Brent Benjamin, won the election and became the deciding vote to overturn the jury verdict[124]. In a 5–4 ruling, Justice Kennedy held that "there is a serious risk of actual bias ... when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds ... when the case was pending or imminent[125]." Such political and financial influences on the court violate due process and "threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges[126].'" The conventional wisdom is that judicial elections have always been a means of weakening judges. The leading historical studies portray the adoption of judicial elections in the antebellum era as the direct result of Jacksonian democracy's backlash against judicial power. In the most recent study of the rise of judicial elections, Professor Caleb Nelson concludes, "[T]he rise of the elective system was part of a coherent program ... to hobble the power of the executive, the legislature, [and] the courts[127]. "Another major article offered the same interpretation: "The philosophical justifications for elective judiciaries seem to have been limited largely to invocations of democratic principles, with little explanation of how an elective judiciary could protect constitutional rights[128]."

In 1832, Mississippi became the first state to elect its supreme court judges, in an attempt to weaken them. However, no other state followed for fourteen years –

[123] *See* Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at N1; And For The Sake Of The Kids, McGraw Too Soft on Crime, http://www.youtube.com/watch?v=HpVTVg56gic&feature=related (last visited Jan. 31, 2010).

[124] *Caperton*, 129 S. Ct. at 2258.

[125] *Id.* at 2263–64.

[126] *Id.* at 2266 (quoting Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 4, *Caperton*, 129 S. Ct. 2252 (No. 08-22)).

[127] Caleb Nelson, A Re-Evaluation of the Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 AM. J. LEGAL HIST. 190, 207 (1993) (quoting Morton Keller, The Politics of State Constitutional Revision, 1820–1930, in THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 67, 72 (Kermit L. Hall et al. eds., 1981)). Nelson also documents some of the delegates to the state constitutional conventions arguing that judicial elections would increase judicial power. See id. at 200; see also F. Andrew Hanssen, Learning About Judicial Independence: Institutional Change in the State Courts, 33 J. LEGAL STUD. 431 (2004); James A. Henretta, The Rise and Decline of "Democratic-Republicanism": Political Rights in New York and the Several States, 1800–1915, in TOWARD A USABLE PAST 50, 72–77 (Paul Finkelman & Stephen E. Gottlieb eds., 1991). But in the article's conclusion, Nelson emphasizes that: [T]he elective judiciary was intended to enlist some officials – judges – in the process of weakening officialdom as a whole. At the same time, other reforms were curtailing the independent powers of judges themselves, in a concerted effort to rein in the power of all officials to act independently of the people. Nelson, supra, at 224. I address Nelson's arguments in sections III.D.1 and III.D.2. Professor Kermit Hall contends that lawyers in the conventions were moderates who were using the movement for judicial elections to advance their own professional interests. See Kermit L. Hall, TheJudiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860, 45 THE HISTORIAN 337 (1983). I respond to Hall's argument in more detail in section III.D.3. I am indebted to the excellent work of Hall and Nelson. In many ways, this Article elaborates, refines, and clarifies their interpretations, while also challenging some of them.

[128] Croley, *supra* note 3, at 722.

until New York's constitutional convention of 1846, the turning point. In just eight years, from 1846 to 1853, twenty states adopted judicial elections. This wave was part of a coherent program to increase judicial power in order to protect "the people's" constitutional rights from the other branches' encroachments (even though the idea of "the people" was less coherent and more symbolic)[129]. In practice, the first generation of elected judges fulfilled these goals dramatically, striking down far more statutes than appointed judges had.

This episode offers a number of puzzles. How did judicial elections grow from an aberration in Mississippi to a consensus in New York and then in most of the country? How did judicial elections change from a tool to weaken courts into a weapon for increasing judicial power against the other branches of government? The catalysts in the rise of judicial elections were reckless overspending on internal improvements and then the Panics of 1837 and 1839. A severe economic depression left state after state swamped in financial crisis in the early 1840s. Legislatures received most of the blame as many states plunged into crippling debt and eight states defaulted on their loans. In direct response, reformers organized their own American version of the European Revolutions of 1848: nineteen state constitutional conventions from 1844 to 1853. The economic crisis of the 1840s was the most important cause of this wave of conventions, and it fundamentally shaped the agenda at these conventions.

The Panics had left the legislatures disgraced as corrupt and incompetent, so new constitutional provisions and new institutions were believed to be necessary for limiting legislative power. Whereas populists, out of their desire to limit courts, had been the only early supporters of judicial elections, the Panics convinced moderates and even some conservatives that judicial elections could empower courts to limit legislative excess by making judges independent and more powerful. Without the economic crisis, there would have been no wave of conventions at this particular moment, and without the conventions, the adoption of judicial elections would have been a marginal experiment in some frontier states, at most.

But this answer to the puzzle raises another question: If elected legislators were the cause of the problem, why would elected judges produce better results? In fact, opponents of judicial elections used this argument to mock the reformers' notion that "the same people who appoint very bad representatives would appoint very good judges[130]." The basic answer is that the supporters of judicial elections understood the principal-agent problem, the gap between the people and their elected officials[131]. They believed the solution was (1) to separate judges from the legislatures and governors that they wanted judges to check; (2) to embolden judges and legitimize judicial review by connecting them directly to "the people"; and (3) to allow "the people" to elect

[129] This Article will refer to "the people's rights" as a prominent and powerful rhetorical device of the time, even though historians have demonstrated that this locution was more political imagination than social reality. *See* Louis Hartz, Economic Policy and Democratic Thought: Pennsylvania, 1776–1860, at 24–28 (1948); Edmund S. Morgan, Inventing the People (1988).

[130] George Brown Oliver, A Constitutional History of Virginia, 1776–1860, at 317 (May 11, 1959) (unpublished Ph.D. dissertation, Duke University) (on file with the Harvard Law School Library) (quoting Conway Robinson, Letter to the Editor, WHIG (Richmond, Va.), June 25, 1850) (internal quotation marks omitted).

[131] *See* Hanssen, *supra* note 14, at 440–41.

judges who would defend their constitutional rights. In the context of a financial crisis blamed on legislative action (and not inaction), these reformers waged a fiscally conservative revolution that sought to protect "the people's rights" through new, democratically inspired veto points.

Based on the most comprehensive study yet undertaken of the state courts' historical practice of judicial review, this Article finds that the reformers got the results they wanted: elected judges in the 1850s struck down many more state laws than had their appointed predecessors. The quantitative results alone merely suggest a correlation between judicial elections and judicial review[132], but the historical record confirms that the explicit purpose of judicial elections was to bolster judicial power and to propel the courts toward voiding more statutes. Whereas the established view is that state judicial review expanded after the Civil War and Reconstruction[133], the 1840s and 1850s were a key turning point for the wider acceptance of judicial review.

Moreover, some of these elected judges were the first to embrace the more modern theory of judicial review as protecting minorities, rather than majorities. State courts continued to strike down more statutes in the late nineteenth century and the twentieth century[134], building on the foundation set in what I label the American Revolutions of 1848 and in the elected courts of the 1850s. The Panics, the new state constitutions, and the elected judges of the 1840s and 1850s were a major part of the transition from the early republic's active industry building state to the laissez-faire constitutionalism that dominated the late nineteenth century and early twentieth century[135].

First, let me offer my perspective on methodology and historical causation. Isolating a single causal factor from the distant past is challenging, but more importantly, it is often misguided. Events are shaped by myriad causes, and this truism certainly applies to the rise of judicial elections and the spread of judicial review. I borrow Professor Lawrence Stone's helpful framework of long-term "preconditions," mid-term "precipitants," and short-term "triggers" to identify the stages of the most important factors[136]. The most powerful precondition was a democratic ideology with deep and spreading roots in America. One crucial precipitant was the economic crisis from 1837 to 1842, which was exacerbated by legislative overspending. Another

precipitant was the emergence of the two-party system, which posed a crisis of cronyism in appointments, but also offered the potential solution of more popular control through direct partisan elections[137]. The economic crisis led to the trigger, New York's pivotal convention in 1846, which aimed to limit the legislative excesses that had produced the crisis and which in turn triggered a wave of constitutional conventions over the next half-decade. Without this

[132] Though the number of decisions that void statutes is an imperfect proxy for judicial power, it is a rough approximation of the courts' power relative to the other branches.

[133] *See, e.g.*, Lawrence M. Friedman, A History of American Law 279–92 (3d ed. 2001).

[134] *See* Morton Keller, Affairs of State 362 (1977); G. Alan Tarr, Understanding State Constitutions 123–24 (1998); Edward S. Corwin, *The Extension of Judicial Review in New York: 1783–1905*, 15 MICH. L. REV. 281, 285 (1917).

[135] *See* Morton J. Horwitz, *The Transformation of American Law*, 1780–1860, at 259–66 (1977).

[136] Lawrence Stone, The Causes of the English Revolution 1529–1642, at vii (ARK Publ'g Co. 1986) (1972). VOL. 123 Shugerman.DOC 02/27/10 – 4:03 PM

[137] *See generally* Gerald Leonard, *The Invention of Party Politics* (2002).

combination of factors, it is unclear whether judicial elections ever would have spread beyond the frontier.

To be clear, this Article does not propose a simple causal account. Judicial elections did not "cause" judicial review by themselves. Judicial review had been well established by appointed courts, and its practice grew incrementally. The depression of the 1840s, however, led to a series of connected results, including: (1) a national movement to limit legislative power; (2) new constitutional conventions with the purpose of limiting legislative power; and (3) the adoption of judicial elections (generally in those conventions) with the explicit purpose of creating a more independent and popular check on legislatures and governors. Even though some states do not fit the mold, the general pattern holds: judicial elections were designed to increase judicial checks on the other branches. Lo and behold, that is just what the first generation of elected judges did in the 1850s[138]. Part I, "Weakness and Panic," identifies some of the long-term and mid-term factors that built up momentum for judicial elections.

The long-term trend was the spread of democratic ideology, leading to an expansion of suffrage and a shift to the popular election of more offices in the early nineteenth century. Even though many populists attacked judicial independence, they used means other than elections, and judicial elections remained very rare. One turning point was the Panics of 1837 and 1839, which left overspending states in a financial crisis, disgraced legislatures, and sparked calls for new constitutions with stronger checks against legislative power.

Part II, "The Trigger: New York's Adoption of Judicial Elections in 1846," explains New Yorkers' sudden turn to judicial elections. Judicial elections were not a top priority for either party before the convention, but a number of twists and turns led to a bipartisan consensus in favor of them. A backlash against legislative spending abuses and governors' appointment abuses boosted the populist wings of both parties into power at the convention, and judicial elections were one solution for both problems.

Part III, "The Wave of Judicial Elections, 1846–1851," turns to the sweeping adoption of judicial elections throughout most of the country after 1846. Judicial elections rode a larger wave: a widespread constitutional revolution limiting legislative power and increasing the separation of powers in the wake of the financial crisis. Many delegates embraced judicial elections explicitly in order to increase judicial review.

Part IV, "A Boom in Judicial Review," demonstrates that the reformers succeeded. This Article offers the most extensive study of state judicial review to date[139], which shows that elected judges struck down statutes far more regularly than appointed judges had. These decisions marked two other significant changes in American legal history: first, the shift from the active industry-building state to the laissez-faire state, and

[138] For a fuller discussion of other factors, including rates of legislative activity, partisan politics, and the enforcement of new constitutional provisions, see *infra* section IV.A, pp. 1115–23.

[139] There have been some partial counts of state judicial review. For New York, see Corwin, *supra* note 21. For Virginia, see Margaret Virginia Nelson, *A Study of Judicial Review in Virginia, 1789–1928* (1947). One preliminary study offers totals for several states in this era, but no specific case citations, and I have been unable to contact the author. *See* Richard Drew, The Origins of Judicial Supremacy: State Courts, Party Politics and the Antebellum Surge in American Judicial Power (Aug. 28–31, 2003) (unpublished manuscript), *available at* http:// www.allacademic.com/meta/p_mla_apa_research_citation/0/6/3/0/6/p63069_index.html.

second, a shift in constitutional theory from majoritarian to countermajoritarian judicial review. Whereas *appointed* judges had been offering a *majoritarian* or republican theory of judicial review, the new generation of *elected* judges increasingly turned to *countermajoritarian* theories of judicial review. Section IV.B offers some tentative answers to this puzzle.

The Conclusion connects this story to the theory and history of popular constitutionalism, the rise of laissez-faire constitutionalism, and the popularity and complexity of "judicial independence" in American history.

II. WEAKNESS AND PANIC

A. Weakening the Courts and Shortening Tenure, 1800–1832

The existing interpretations of the rise of judicial elections understandably emphasize Jacksonian democratic ideology. Certainly the momentum for expanding democracy was a necessary cause of judicial elections, but it was not a sufficient cause. Early American history was more or less an ongoing evolution in popular sovereignty, marked periodically by revolutions[140]. States had widely expanded suffrage in the early nineteenth century, such that by 1821 all but three of the twenty-four states had decoupled voting from property holding[141], and in the 1810s and 1820s, states were switching over to elect virtually all state offices – except for judges[142]. After the expansion of suffrage, it took a few years for popular participation to increase, but when it did, the increase was dramatic. In 1824, only 25% of adult white males voted for president[143]. In the Jackson-Adams rematch of 1828, participation more than doubled, to 56.3%[144]. This level of participation remained steady for the next two elections[145]. The Whigs, using log cabins, alcohol, coonskin hats, and populist imagery, sought to steal the Democrats' claim to being the party for the people. Even if many Whigs rejected calls for popular control over the courts, that opposition was eroding under the force of Whig convergence with democratic ideology in the 1840s[146]. Whig efforts to embrace populism and mobilize more voters had a sudden effect on voter participation. In 1840, for Tippecanoe and Tyler, too, voter participation shot up to 78.0%[147]. In the first third of the nineteenth century, some populist leaders called for judicial elections in order to keep courts in check and reduce their power[148]. However, these critics of judicial power more often turned to direct attacks on the

[140] Professor Sean Wilentz interprets American history from the Revolution through the Civil War as a relatively unified march toward more inclusive democracy. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY (2005).

[141] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE app. tbl.A.9 (2000).

[142] *See* Jacob Katz Cogan, Imagining Democracy: Popular Sovereignty from the Constitution to the Civil War 156 n.59 (November 2002) (unpublished Ph.D. dissertation, Princeton University) (on file with the Harvard Law School Library) (listing Alabama, Connecticut, Delaware, Georgia, Kentucky, Maine, Maryland, New York, Ohio, Pennsylvania, Vermont, and Virginia as shifting to the direct election of executive and mixed executive/judicial officials, including justices of the peace and court clerks, by the early 1830s).

[143] *See* HARRY L. WATSON, LIBERTY AND POWER 232 (rev. ed. 2006).

[144] See id.

[145] See id.

[146] *See generally* LEE BENSON, THE CONCEPT OF JACKSONIAN DEMOCRACY (1961); DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815–1848 (2007); MARVIN MEYERS, THE JACKSONIAN PERSUASION (1957); WILENTZ, *supra* note 27.

[147] *See* WATSON, *supra* note 30, at 232.

[148] *See* Jed Shugerman, *The People's Courts: Judicial Elections and Judicial Independence in America* (forthcoming 2011) (manuscript at 65–176, on file with the Harvard Law School Library).

courts, such as the impeachment of judges and the abolition of courts[149], and judicial elections remained rare in the early republic. As judges backed down from those other kinds of attacks, state judicial review remained rare, too.

Alexis de Tocqueville predicted in 1835 that "sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked[150]." When only three states were electing any judges at all, he presciently recognized the beginnings of a movement and an emerging problem. His prediction of politically driven judges rings true with respect to today's declining judicial independence, and the Conclusion will suggest some lessons from history for twenty-first-century reform. However, de Tocqueville's prediction missed the more immediate future, when judicial elections promoted judicial independence and judicial power.

The early experiments with judicial elections were driven by localism and the goal of limiting judicial authority. The pre-state Republic of Vermont elected some lower court judges in reaction to bad experiences with New York judges, but as a state, Vermont fell into line by adopting judicial appointments[151]. In 1812, Georgia began electing its circuit judges to four-year terms in the wake of the Yazoo Land Fraud scandal and the corruption of the state legislature[152]. Indiana began electing lower court judges in 1816 as a reaction to the federal government's overbearing territorial officials, including territorial judges[153]. In each case, the primary goal was increasing local control of judges against outsiders. These experiments were outliers among more dominant methods of checking the courts in the early republic: limiting the tenure of judges from good behavior to a relatively short number of years, impeachment, "ripper bills" abolishing courts, and the creation of new courts[154].

In Andrew Jackson's lifetime (from 1767 to 1845), only one state – Mississippi – adopted judicial elections for all of its courts[155]. In the 1820s and 1830s, many other states rewrote their constitutions, expanded suffrage, and democratized their governments, but declined to elect judges. Jackson in the

[149] *See* Richard E. Ellis, *The Jeffersonian Crisis* (1971); Larry D. Kramer, *The People Themselves* (2004); SHUGERMAN, *supra* note 35 (manuscript at 65–137); Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of* Whittington v. Polk *and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58 (2002).

[150] Alexis de Tocqueville, *Democracy in America* 269 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835).

[151] VT. CONST. of 1777, ch. 2, § 27, *reprinted in* 2 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of The United States 1857, 1864* (Ben Perley Poore ed., 2d ed. 1878) [hereinafter POORE].

[152] *See* GA. CONST. of 1798, art. III, § 4 (1812), *reprinted in* 1 POORE, *supra* note 38, at 388, 396 (1877); SHUGERMAN, *supra* note 35 (manuscript at 32–64); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 576 (2001).

[153] *See* IND. CONST. of 1816, art. V, § 7, *reprinted in* 1 POORE, *supra* note 38, at 499, 506; SHUGERMAN, *supra* note 35 (manuscript at 32–64).

[154] *See generally* ELLIS, *supra* note 36; PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635–1805 (1984); KRAMER, *supra* note 36; DONALD F. MELHORN, JR., "LEST WE BE MARSHALL'D": JUDICIAL POWERS AND POLITICS IN OHIO, 1806–1812 (2003); SHUGERMAN, *supra* note 35 (manuscript at 65–137); Theodore W. Ruger, *"A Question Which Convulses a Nation": The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004); Shugerman, *supra* note 36.

[155] *See* Evan Haynes, *The Selection and Tenure of Judges* 117 (1944) (noting that all Mississippi judges were elected by 1832); *id.* at 101–35 (concluding that no other state elected all of its judges by Jackson's death in 1845).

1820s stated that constitutional rights "[are] worth nothing, and a mere bub[b]le" without "an independ[e]nt and virtuous Judiciary[156]." But as this history illustrates, judicial independence has multiple meanings, and Jackson later called for judicial elections and seven-year terms for federal judges[157]. He had been out of office for ten years when the next state heeded his call. Only in the late 1840s and 1850s – after the height of the Jacksonian era and at the start of a dramatically new era of American politics – did other states adopt judicial elections. From our vantage point today, the change seems to have been our manifest legal destiny. However, the study of these reforms state by state lifts the fog of inevitability, and the initial decision to elect judges appears to be a contingent result of local politics, partisan strategy, the timing and political framing of specific events, and then a bandwagon effect of legal reform. There are no signs of an organized movement, but rather a ripple that, state by state, gathered into a wave of reform around 1850.

Judicial independence has been a surprisingly popular concept in American history in part because of its flexibility or ambiguity. As American colonists pursued independence from England, many demanded judicial independence as well. In the years leading up to the Revolution, the independence of the judiciary from the Crown was a key issue in a majority of the colonies, and this debate focused on offices held during "good behavior.[158]" In the 1750s, some colonial leaders argued that "good behavior" was the "ancient and indubitable" common law[159], "by the usage and custom of ages; ... by the rules of reason; ... by covenant with the first founder of your government;... by the united consent of Kings, Lords, and Commons; ... by birthright and as Englishmen[160]." As Thomas Jefferson protested in the Declaration of Independence: "[King George] has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries[161]." Judicial independence meant independence from a tyrannical central power, not independence from public opinion. Such independence arguably was consistent with either life tenure by appointment or periodic popular elections.

Once the colonies won their independence, eight states adopted constitu-

[156] Letter from Andrew Jackson to Andrew J. Donelson (July 5, 1822), *in 3 Correspondence of Andrew Jackson* 167 (John Spencer Bassett ed., 1928).

[157] *See* WILENTZ, *supra* note 27, at 315.

[158] In 1759, pro–judicial independence colonists in the New Jersey Assembly battled the Crown over a "good behavior" judicial commission for Robert Hunter Morris. Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1125–28 (1976). A judge ruled that the commission was valid, and moreover, that it was a freehold property – the critical distinction for the writ of assize of novel disseisin. *Id.* at 1128. The pro-British governor continued to oppose Morris, and the confrontation escalated within the assembly. *Id.* New York, Pennsylvania, the Carolinas, and Massachusetts had similarly bitter confrontations, with assemblies passing acts establishing good behavior commissions, and pro-royal governors rejecting them. *See id.* at 1122–28. Benjamin Franklin took up the fight in the 1760s. In his *Causes of the American Discontents Before 1768*, Franklin called for good behavior judicial commissions, with permanent and ample salaries. *Id.* at 1125. The Crown won the battle after years of struggle, but the war for judicial independence and good behavior commissions continued. *See id.* at 1130.

[159] *Id.* at 1122.

[160] *Id.* (quoting Joseph Galloway, A Letter To The People Of Pennsylvania; occasioned by the assembly's passing that Important act, for constituting the judges of the suprem courts and common-pleas, during good behaviour (1760), *reprinted in* 1 *Pamphlets of the American Revolution*, 1750–1776, at 257, 271–72 (Bernard Bailyn ed., 1965)) (internal quotation mark omitted).

[161] The Declaration of Independence, para. 11 (U.S. 1776).

tions that guaranteed judicial commissions during good behavior[162]. Only four of those adopted the model of executive appointment and legislative consent[163]. The other four chose legislative election, which was less centralized than a single governor's power to choose[164]. Three other states combined legislative election and tenure "at pleasure" (no legal protection, but no specified limit)[165]. Pennsylvania and New Jersey provided their judges with seven-year terms, rather than life tenure[166]. These practices show that life tenure was not a dominant practice even in the Founding era. And even in the states granting life tenure, the legislatures controlled salaries, fees, and removal (often by the address of a simple legislative majority) in order to weaken real judicial independence[167]. For example, according to Professor Edward Corwin: [The New Hampshire legislature regularly] vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes. Nor do such practices seem to have been more aggravated in New Hampshire than in several other states[168].

In the 1830s, the states continued to reduce judges' terms, almost entirely without serious consideration of electing judges. By 1830, judges in twelve states held their positions during good behavior and judges in six states were term-limited, with the terms ranging from no term ("at pleasure" tenure) to seven years[169]. (In addition, Missouri and Kentucky had removed their entire supreme courts in the 1820s, a unique kind of ad hoc term limitation[170].) Then, in the 1830s, seven more states adopted term limits for judges, with the terms generally ranging between six and eight years[171]. By the end of the decade, a majority of states limited judges' terms (with a median of seven-year terms), and these states were distributed fairly evenly through every region of the country[172]. The overall effect

[162] These states were Delaware, HAYNES, *supra* note 42, at 106; Maryland, *id*. at 115; Massachusetts, *id*.; New Hampshire, *id.* at 121; New York, *id.* at 123; North Carolina, *id.* at 124; South Carolina, *id.* at 128; and Virginia, *id.* at 133.

[163] These states were Maryland, *id.* at 115; Massachusetts, *id*.; New Hampshire, *id.* at 121; and New York, *id.* at 123.

[164] These states were Delaware, *id.* at 106; North Carolina, *id.* at 124; South Carolina, *id.* at 128; and Virginia, *id.* at 133.

[165] These states were Connecticut (lower courts), *id.* at 105; Georgia, *id.* at 108; and Rhode Island, *id.* at 127–28.

[166] *Id.* at 121–22, 127.

[167] Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 161 (1998)*; see also* Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138–47.

[168] Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, *in* THE CONSTITUTION 93, 97 (James Morton Smith ed., 1971) (footnote omitted). *See generally* John Phillip Reid, *Legislating The Courts: Judicial Dependence in Early National New Hampshire* (2009).

[169] *See* HAYNES, *supra* note 42, at 108 (Georgia: three-year terms); *id.* at 110 (Indiana: sevenyear terms); *id*. at 121 (New Jersey: seven-year terms); *id.* at 125 (Ohio: seven-year terms); *id.* at 127–28 (Rhode Island: at pleasure of the legislature); *id.* at 132 (Vermont: one-year terms).

[170] *See* W.J. Hamilton, *The Relief Movement in Missouri, 1820–1822,* 22 MO. HIST. REV. 51, 89–90 (1927); Ruger, *supra* note 41, at 849–52.

[171] HAYNES, *supra* note 42, at 101 (Alabama: six-year terms in 1830); *id.* at 102 (Arkansas: four- and eight-year terms in 1836); *id.* at 107 (Florida: five-year initial terms in 1838); *id.* at 115 (Maine: seven-year terms in 1839, and Michigan: seven-year terms in 1836); *id. at* 117 (Mississippi: four- and six-year terms in 1832); *id.* at 130 (Tennessee: eight- and twelve-year terms in 1835).

[172] *See generally id.* at 101–35.

was to increase the governors' and legislatures' control over reappointment, and to weaken judges' power. The trend of departing from good behavior in favor of specific terms continued in the late 1840s and 1850s (with roughly similar term lengths of between six and ten years), but then it was mostly in the very different context of switching to popular election and highlighting the judges' democratic pedigree. Even then, only five states adopted judicial elections while shortening the judges' terms[173]. These two trends were mostly separate. In the 1840s, the handful of states that limited judicial terms were mainly reinforcing the democratic invigoration of the courts as they made the more significant shift to judicial elections.

C. Panic: Legislative Excess and Financial Disaster

Popular perceptions of legislatures and courts took sharp turns in opposite directions around 1840. One of the most disruptive forces of the 1830s and early 1840s was the economic crisis following the Panics of 1837 and 1839, which left many states in fiscal crisis through the 1840s. The Panics began in May 1837 in a banking crisis of illiquidity and suspended payments[174]. For a short period, urban unemployment increased sharply, industry shut down, and credit collapsed, but the crisis was short-lived[175] However, the recovery was also short-lived. The Panic of 1839 caused severe deflation and economic stagnation into the mid-1840s. Prices fell 42% from 1839 to 1843[176]. Bank notes in circulation plummeted from $149 million in 1837 to $58 million in 1843, a drop of almost two-thirds[177], and European investors pulled out of the American economy almost entirely[178].Four states defaulted on their debts in 1841, and five more defaulted in 1842[179]. Unemployment rates soared, food riots erupted in many cities, and a recession lasted until 1843. President Martin Van Buren remained committed, however, to the Democrats' ideology of negative government, even in the midst of calls for federal intervention and bailouts. "All communities are apt to look to government for too much ... We are prone to do so especially at periods of sudden embarrassment and distress ... The less government interferes with private pursuits, the better for the general prosperity," Van Buren answered[180]. Government favoritism and privilege had gotten the country into this mess, according to the Democrats, and government should stay out of the way of recovery.

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[173] New York shifted from life tenure to eight-year terms in 1846, *id.* at 123; Illinois from life to nine-year terms in 1847, *id.* at 110; Kentucky from life to six- and eight-year terms in 1850, *id.* At 112; Virginia from life to eight- and twelve-year terms in 1850, *id.* At 133; and Maryland from life to ten-year terms in 1851, *id.* at 115.

[174] *See* Peter Temin, *The Jacksonian Economy* 113–47 (1969). Professor Peter Temin shifts blame for the crisis away from American political leaders and bankers by focusing on overwhelming foreign causes. *See id.* at 113–71. Professors Peter Rousseau and John Wallis have responded by defending the traditional view that American leaders played a primary role in causing the Panics. *See* Peter L. Rousseau, *Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837*, 62 J. ECON. HIST. 457 (2002); John Joseph Wallis, *What Caused the Crisis of 1839?* (Nat'l Bureau of Econ. Research, Working Paper No. H0133, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267421.

[175] *See* TEMIN, *supra* note 61, at 120, 138.

[176] *Id.* at 157.

[177] James Roger Sharp, *The Jacksonians Versus the Banks: Politics in The States after the Panic of 1837*, at 27 (1970).

[178] *See* TEMIN, *supra* note 61, at 154.

[179] *See id.* at 154 & n.12 (Florida, Mississippi, Arkansas, and Indiana in 1841; Illinois, Maryland, Michigan, Pennsylvania, and Louisiana in 1842).

[180] Edward Morse Shepard, Martin van Buren 332 (rev. ed. 1899) (1888) (omissions in original).

The Democrats' doctrine of limited government guided the party through the rest of the antebellum period, and it led them to shift in favor of judicial review, as well.

The crisis doomed Martin Van Buren's presidency, but many state political leaders also took a fall after the Panics. The reputations of the legislatures around the country took an enormous and long-lasting hit after they had banked so heavily on new banks and expensive internal improvements. The push for internal improvements and state spending had, interestingly, been the overreaction to an earlier economic crisis, the Panic of 1819[181]. Generally, internal improvements were the craze and the fix-all for both Whigs (on the national and state level) and Democrats (on the state level), building from the 1820s into the 1830s[182]. New York's legislative energy began innocently and successfully enough in the 1820s with the Erie Canal. Initially, the plan for a 350-mile canal between Lake Erie and the Hudson River was mocked as "Clinton's Folly" or "Clinton's Ditch," after Governor De-Witt Clinton. However, it was popular and profitable early on, and a grand celebration marked its completion in 1825[183]. Drunk with the success of the Erie Canal, New Yorkers went on a binge of internal improvements[184]. In 1825, the New York legislature authorized seventeen new canals, and many were completed at great expense[185]. In the mid-1830s, these projects generated huge surpluses.

In 1835, the Erie Canal's surplus was $600,000, which was larger than the state budget for general expenses ($450,000). Following New York's seemingly successful model, other states around the country followed, all promising that the projects would bring great riches, and that tolls would pay off the massive debts. State legislatures dramatically increased the number of special incorporations to accelerate economic growth and build infrastructure[186]. In 1835 and 1836, Indiana poured millions into internal improvements, but the choice of where to build new canals and roads sparked bitter fights between regions and between towns within those regions[187]. Before the Panic struck, Indiana's projects had shot so far over budget that the state teetered on the verge of bankruptcy[188]. Early in 1837, Ohio, undaunted by Indiana's disastrous experience, enacted afree-spending loan law to subsidize many new canals, roads, and railroads[189]. Again, designs failed and costs skyrocketed – sometimes to three times more than the budgeted cost[190]. In state after state, modernizers' dreams for the transportation revolution became a nightmare of political squabbling. The Panics of 1837 and 1839 further dashed those hopes. European banks refused to continue financing the states, and states paid off debts by liquidating assets – selling off land and stock in state corporations and raiding trust funds for schools and other programs[191]. Nine states defaulted on loans[192]. A severe depression stretched

[181] *See* John Lauritz Larson, *Internal Improvement* 136–41 (2001).

[182] *See id.*

[183] *See id.* at 78.

[184] *See* charles w. Mccurdy, *The Anti-Rent Era in New York Law and Politics*, 1839–1865, at 32–33 (2001).

[185] LARSON, *supra* note 68, at 221.

[186] From 1800 to 1809, "New York averaged 18 incorporations per year, Ohio 1, Maryland 2, Pennsylvania 6, and New Jersey 4. In the 1830s New York averaged 57, Ohio 43, Maryland 18, Pennsylvania 38, and New Jersey 18." John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842–1852*, 65 J. ECON. HIST. 211, 214 n.3 (2005)

[187] *See* LARSON, *supra* note 68, at 209–12.

[188] *See id.*

[189] *See id.* at 203.

[190] *See id.* at 213–14.

[191] *See* MCCURDY, *supra* note 71, at 58.

[192] *See id.* at 75, 77.

into the 1840s, with record lows in 1842[193]. Many states, including Pennsylvania, Maryland, most Midwestern states, and the cotton-belt states, faced bankruptcy[194]. New York literally tried to dig itself out of debt by building even more canals[195]. By 1842, New York's debt had climbed to $25 million, more than fifty times the size of the general state expenses, and it stayed at that level until the convention of 1846 (which this crisis had triggered)[196]. By 1841, Pennsylvania's spending on roads and canals had left it $40 million in debt, and the state could not pay the interest[197]. The government offered "interest certificates" instead of cash to its investors, outraging the public[198].The governor forced the banks to loan the state money to pay off the debt[199], and the state ratcheted up taxes as well[200]. The government of Illinois acted with similar excess, and with similar results[201]. During the state legislative session of 1836–1837, a host of projects, financed largely by loans, were passed together[202]. Construction began almost immediately, and the state quickly ran into financial difficulty, largely because the bill provided that many of the projects would begin simultaneously and further required that progress be proportionate among three districts of the state[203]. After July 1841, the state could no longer meet its payment schedule and defaulted on its interest payments, halting the internal improvements and crippling the second Illinois State Bank[204]. By 1842, the debt had grown, and state leaders talked openly of repudiating it[205] – with potentially devastating effects. Outraged citizens demanded a new constitution to "prevent future financial disasters by curbing and restricting the legislature[206]." A first effort to call a convention in the middle of the crisis failed, but the second try succeeded once the state regained control of its finances. With popular anger continuing to brew against the legislature, the 1847 convention delegates focused long discussions on the internal improvement debacle[207].The constitution's main purpose was to limit the power of the legislature because "excesses of the General Assembly had almost bankrupted the state through the creation of banks and internal improvements[208]." Ohio's first constitution in 1802 established a powerful legislature, as almost all of the states did in the Founding era, "as the embodiment of popular democracy and ideally as subject to as few restrictions as necessary to implement the public will[209]." However, by the 1840s, "the people began to see the legislature as the source of many, if not most, of the problems of government[210]." The chief problem in the 1840s was the legislature's "disastrous economic

[193] *See id.* at 104.
[194] *Id.* at 58.
[195] *See* PETER J. GALIE, ORDERED LIBERTY 96 (1996).
[196] *See id.*; *see also* MCCURDY, *supra* note 71, at 129.
[197] *See* 1 A.K. MCCLURE, *Old Time Notes Of Pennsylvania* 57–65 (1905).
[198] *Id.* at 60–64.
[199] *Id.* at 62–63.
[200] *Id.* at 64.
[201] *See* 2 Theodore Calvin Pease, *The Frontier State*, 1818–1848, at 198–99, 205 (1922).
[202] *See id.* at 212–15.
[203] *See id.* at 216.
[204] *Id.* at 303–14.
[205] Janet Cornelius, *Constitution Making In Illinois*, 1818–1970, at 27 (1972).
[206] *Id.*
[207] *See, e.g.*, *The Constitutional Debates of 1847*, at 406–07 (Arthur Charles Coleed., 1919) (remarks of delegate Onslow Peters).
[208] CORNELIUS, *supra* note 92, at 33. For a discussion of the wave of state conventions, see *infra* Part III, pp. 1093–1115.
[209] steven h. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 25 (2004).
[210] *Id.*

policies[211]." In Maryland, the General Assembly had put the state in significant debt for public works projects, which triggered sharp tax increases in the 1830s[212]. The most significant public works projects were the Chesapeake & Ohio Canal and the Baltimore & Ohio Railroad[213], which carried products from the Western states that competed with the products of Maryland's Eastern Shore[214]. The Eastern Shore had been declining in power since the eighteenth century, but it still wielded more political influence than it does today. Its citizens were furious that their taxes were financing their own region's demise[215]. Similar fates befell other states throughout the country[216].

Debt in antebellum America was a moral problem, not just a fiscal problem. In the eighteenth and early nineteenth centuries, personal debt was considered a moral failing with religious dimensions[217]. Catastrophic public debt took on similar meanings of collective moral failure. "Country Party" ideology emerged in England as a political and moral opposition to the "Court's" expansion of sovereign debt, because state spending was so accessible to insider "stock-jobbers" and "paper aristocrats." State debt was courtly corruption and corporate corruption[218]. This Country Party ideology was the foundation for the Whig Party's opposition to the Tory "Court Party." This English tradition carried on into the Founding and early republic with many American revolutionaries, Antifederalists, Jeffersonians, and some Jacksonians[219]. It was the basis for the Republican and Jacksonian resistance to the national bank, and even though in the 1820s and 1830s many American Whigs and Democrats conveniently ran up debts in practice[220], the underlying hostility to debt and the "paper aristocracy" was deep and powerful, especially once rekindled by the Panics[221]. This moral crisis prompted a movement for public resurrection with a new covenant of the people, for the people, by the people: a wave of constitutional conventions.

III. THE TRIGGER: NEW YORK'S ADOPTION OF JUDICIAL ELECTIONS IN 1846

A. An Unlikely Alliance: Radicals and Whigs

New York triggered the wave of judicial elections that spread throughout the country from 1846 to 1851. The fact that New York was a populist pioneer is somewhat surprising. Even though the Democrats held the upper hand in the state[222], the leading Democrats were

[211] *Id.* at 19.

[212] James Warner Harry, *The Maryland Constitution of 1851*, at 15–16 (1902).

[213] *See* 3 J. Thomas Scharf, *History of Maryland* 163–70 (1879).

[214] HARRY, *supra* note 99, at 35.

[215] *See id.* at 15–18, 21–22, 33–35; *see also* MD. CONST. of 1776, arts. I–V, XIV–XVI, *reprinted in* 1 POORE, *supra* note 38, at 817, 821–23.

[216] *See, e.g.*, MCCURDY, *supra* note 71, at 77 (discussing Michigan defaulting on its loans).

[217] *See* edward j. Balleisen, *Navigating Failure* 126 (2001); bruce h. Mann, *Republic of Debtors* 3 (2002).

[218] *See generally* P.G.M. Dickson, *The Financial Revolution in England* 33 (1967); J.G.A. Pocock, *The Machiavellian Moment* 478–83 (1975) (discussing the Country Party's ideology regarding state corruption). Professor Edmund Morgan documents a similar suspicion of the moneyed interest in early America. *See* MORGAN, *supra* note 16.

[219] James H. Hutson, *Country, Court, and Constitution: Antifederalism and the Historians*, 38 WM. & MARY Q. 337, 356–60 (1981); *see also* Lance Banning, *The Jeffersonian Persuasion* 200–01 (1978).

[220] *See generally* HOWE, *supra* note 33; LARSON, *supra* note 68.

[221] *See* Tony A. Freyer, *Producers Versus Capitalists* 35 (1994); LEONARD, *supra* note 24, at 156–57.

[222] *See* Herbert D.A. Donovan, *The Barnburners* 10, 31 (photo. reprint 2002) (1925).

conservative on many issues, including appointment power[223], because they relied heavily on gubernatorial appointments to fuel their patronage machine[224]. The Whigs also had been conservative on judicial matters and opposed populist reforms[225]. In the middle of the depression, the Democratic Party was fracturing bitterly into two competing factions, in part because of internal improvements and spiraling debt. The conservative faction, the Hunkers, was more powerful than the radical faction, the Barnburners, for most of the 1840s. Conservative Democrats had held the governorship from 1833 through 1838 (William Marcy)[226] and from 1843 through 1844 (William Bouck)[227], interrupted by William Seward, a Whig[228]. The first and only Democrat with Barnburner leanings to serve a full term as governor was Silas Wright, elected in 1845, and he served only one term before the Barnburners collapsed in the late 1840s[229]. The name "Hunkers" was derived from the fact that they "hunkered" for spoils or pursued a "hunk" of spoils from the appointment/ patronage system[230], so it is not surprising that they opposed direct democracy. They had formed a conservative coalition with the Whigs in the early 1830s to spend heavily on public works, and they continued to spend after the depression sent the state into heavy debt. They also supported the southern wing of the party and the Mexican-American War[231]. The name "Barnburner" was an allusion to a legendary Dutch farmer who burned down the whole barn to kill off the rats[232]. The implication was that they were willing to destroy the canals, corporations, and banks in order to curb the debts, corruption, and abuses associated with them[233]. One Radical leader commented, "They call us barnburners. Thunder and lightning are barnburners sometimes; but they greatly purify the whole atmosphere, and that, gentlemen, is what we propose to do[234]."The Barnburners were partly descended from the radical Loco-Focos of the 1830s, who also were named for fire[235]. The Barnburners generally were not working class radicals, but instead were a bourgeois coalition of rural

[223] *See* L. Ray Gunn, *The Decline of Authority* 183 (1988). VOL. 123 SHUGERMAN.DOC 02/27/ 10 – 4:03 PM

[224] Richard Hofstadter, *Anti-Intellectualism in American Life* 169 (1963).

[225] *See* GUNN, *supra* note 110, at 183.

[226] *See* DONOVAN, *supra* note 109, at 27–28.

[227] *See id.* at 20, 34–35, 58–59; 3 Jabez D. Hammond, *Political History of The State of New York*, JAN. 1, 1841–JAN. 1, 1847, at 696 (Syracuse, L.W. Hall 1852) (1848).

[228] *See* DONOVAN, *supra* note 109, at 10.

[229] *See* 2 Dealva Stanwood Alexander, *A Political History of The State of New York* 53–57 (Ira J. Friedman, Inc. 1969) (1909); DONOVAN, *supra* note 109, at 34–47; 3 Jabez D. Hammond, *The History of Political Parties in The State of New York* 696 (Buffalo, N.Y., Phinney & Co., 4th ed. 1850) (stating that Bouck "more than any other individual represented the hunker party," and that Marcy's and Bouck's appointments produced a "real state of feeling between the hunker and radical parties," that is, animosity); MCCURDY, *supra* note 71, at 122–23; WILENTZ, *supra* note 27, at 591–92.

[230] *See* DONOVAN, *supra* note 109, at 33; Jonathan H. Earle, *Jacksonian Antislavery & The Politics of Free Soil*, 1824–1854, at 62 (2004); WILENTZ, *supra* note 27, at 530–32; James A. Henretta, *The Birth of American Liberalism: New York, 1820–1860*, *in* REPUBLICANISM AND LIBERALISM IN AMERICA AND THE GERMAN STATES, 1750–1850, at 165, 174 (Jürgen Heideking & James A. Henretta eds., 2002). The term "hunk" comes from the Dutch "honk" (post, goal, or home), which eventually came to mean "office." GUSTAVUS MYERS, THE HISTORY OF TAMMANY HALL 140 n.1 (2d ed. 1917).

[231] *See* EARLE, *supra* note 117, at 62.

[232] DONOVAN, *supra* note 109, at 32.

[233] *Id*.

[234] *Id.* at 33 (quoting 1 LIFE OF THURLOW WEED 534 (Harriet A. Weed ed., Cambridge, Riverside Press 1883)) (internal quotation marks omitted) (statement of Samuel Young, a leading Barnburner).

[235] *See* Arthur M. Schlesinger, JR., *The Age of Jackson* 191–92 (1945).

smallholders, middle-class lawyers, and urban liberal professionals from modest backgrounds, in revolt against privilege and government corruption[236]. They were liberal in the classical sense: they embraced laissez-faire and the limited state because they perceived that the wealthy and the party insiders (both Whigs and Hunker Democrats) had captured state power and used the state for patronage, "class legislation," paper money, public debt, internal improvements, and redistributing property to play favorites and tighten their grip on power[237]. One scholar credits the Barnburners with the "birth of American liberalism[238]," in this sense of the laissez-faire era. Relatedly, the Barnburners also strongly opposed the extension of slavery[239]. In the midst of crisis over internal improvements and state debt, the Barnburners gained momentum, and the convention campaign played to all of their strengths and best issues. They campaigned so effectively that they overwhelmed the Hunkers and commanded a plurality at the Convention of 1846[240]. Unbeknownst to them, however, the convention was their last and best stand before fading away. A decade later, the ex-Barnburners reemerged in a coalition with ex- Whigs to form the state's Republican Party[241].

New York's Whigs were competitive with the Democrats, but they were generally the minority party in the 1830s and 1840s[242]. The political descendants of New York's arch-Federalists Alexander Hamilton and Chancellor James Kent, the Whigs were not traditionally populists. With the conservative Hunkers and the establishment Whigs holding far more power than the radical Barnburners, judicial elections should have been unimaginable in 1840s New York. However, a few factors altered the Whigs' calculations. A populist insurgency of small farmers – the Anti-Renters and their supporters – joined the Whigs and supported judicial elections, but they were only a small part of the Whig coalition[243]. More significant was a purely tactical calculation: the Whigs understood that the existing statewide politics of appointments gave the statewide Democratic majority the governorship and a monopoly on the courts, whereas elections with districts would give Whig areas an opportunity to control many trial courts and appellate districts. In New York's 1821 Constitutional Convention, the Whigs' conservative predecessors (the ex-Federalist Independent Republicans) had supported direct local elections for justices of the peace, in place of centralized appointment, for that very reason[244]. In this Article, I focus more closely on the Democratic factions and why so many Democrats supported judicial elections, even though appointments offered more partisan advantages. One truly surprising aspect of the story is that judicial elections

[236] *See* Henretta, *supra* note 117, at 167–68.

[237] *See id.* at 175.

[238] *Id.* at 165.

[239] *See* DONOVAN, *supra* note 109, at 111, 117.

[240] Philip L. Merkel, Party and Constitution Making: An Examination of Selected Roll Calls from the New York Constitutional Convention of 1846, at 2–6, 30 (May 2, 1983) (unpublished graduate seminar paper, University of Virginia) (on file with the Harvard Law School Library).

[241] *See* DONOVAN, *supra* note 109, at 117.

[242] *See id.* at 44; GUNN, *supra* note 110, at 183.

[243] *See* MCCURDY, *supra* note 71, at 223–28, 266–70. On the farmers' rebellion and violence, see generally Henry Christman, *Tin Horns and Calico: A Decisive Episode in the Emergence of Democracy 1*34–48 (Hope Farm Press 1975) (1945); MCCURDY, *supra* note 71; THOMAS SUMMERHILL, HARVEST OF DISSENT 73–80 (2005).

[244] SHUGERMAN, *supra* note 35 (manuscript at 176–209); *accord* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE 259–73 (2005) (discussing conservative strategy in the early nineteenth century regarding local elections and instrumental support for judicial elections); MYERS, *supra* note 117.

were so widely accepted that no one at the convention even called for an up-or-down vote on elections versus appointments[245]. In the middle of the convention, Charles Kirkland, an opponent of judicial elections, said, "A majority of this Convention have doubtless decided that the judicial office shall be filled by election, and with that decision, so far as this body is concerned, I am not to quarrel[246]." At that point, the opposition acquiesced to judicial elections as a *fait accompli*. They simply moved on to the "how": how to design the elections. Judicial elections suddenly emerged from an isolated practice in the marginal frontier slave state of Mississippi to become, more or less overnight, a foregone conclusion in New York and then most of the country.

The Panics and the depression of the 1840s led the way directly to New York's constitutional convention of 1846. In one prominent call for a convention, a New Yorker wrote in the *Democratic Review* (a Barnburner-affiliated magazine) that there were few calls for constitutional reform "until after the state had been threatened with bankruptcy," because of "the improvidence of the Legislature in contracting debts on behalf of the state[247]." The Barnburners took advantage of this call for change, running against the establishment free-spending Hunkers and Whigs. The *Democratic Review*'s motto was "The best government is that which governs least[248]," reflecting the Barnburners' laissez-faire version of populism and previewing the 1846 convention's reforms. Nevertheless, a convention was not inevitable. New York stumbled into judicial elections almost by accident. Democrats controlled the state and did not want a convention[249]. Even the radical Barnburners took a more piecemeal approach, proposing a series of constitutional amendments to the 1821 Constitution rather than a fullblown convention.

The first item on their agenda was a limit on the legislature's spending power. One anti-debt solution was called "stopand-tax[250]," which required taxation to cover each spending measure, similar to today's "pay-as-you-go" proposals. In fact, New Yorkers used "pay as it goes" to explain their fiscally conservative approach[251]. In addition, the measure

[245] *See* DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION 549–73 (S. Croswell & R. Sutton reporters, Albany, Albany Argus 1846) [hereinafter NEW YORK DEBATES AND PROCEEDINGS]. There were only roll call votes for the districting and structure of judicial elections. *See id.* at 544 (elections only on general ticket); *id.* at 546 (elections by districts); *id*. at 549 (selection of chief judge); *id.* at 550, 556 (mix of general statewide and districted elections – the ultimate winner); *id.* at 562, 564 (term length); *id.* at 573 (qualifications for the bench). The convention reporters Croswell and Sutton were affiliated with the *Albany Argus*, the Hunker newspaper. Another report was produced by William G. Bishop and William H. Attree, who were associated with the *Albany Atlas*, the Barnburner newspaper. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK (William G. Bishop & William H. Attree reporters, Albany, Albany Atlas 1846) [hereinafter NEW YORK REPORT].

[246] NEW YORK DEBATES AND PROCEEDINGS, *supra* note 132, at 587.

[247] *A History of Constitutional Reform in the United States* (pt. 2), 18 DEMOCRATIC REV. 403, 403 (1846).

[248] *E.g.*, 1 UNITED STATES MAGAZINE AND DEMOCRATIC REVIEW, at i (Washington, Langtree & O'Sullivan 1838).

[249] *See* GUNN, *supra* note 110, at 183.

[250] *Id.* at 173; *see also* GALIE, *supra* note 82, at 100.

[251] *See, e.g.*, Letter by Michael Hoffman, On Reforms Necessary in the Body of Law, in the Written Pleadings, and in the Practice of the Courts (Mar. 21, 1846), *in* CONSTITUTIONAL REFORM IN A SERIES OF ARTICLES CONTRIBUTED TO THE DEMOCRATIC REVIEW 63, 69–70 (Thomas Prentice Kettell ed., N.Y. 1846) [hereinafter Hoffman, 1846 Letter] ("This dangerous, corrupt, and corrupting power should be *stringently* limited, establishing substantially in practice the rule *that every administration, state and municipal, shall keep its expenditures within its means, and collect and pay as it goes.*").

required public approval by referendum for any debt exceeding $1 million[252]. Even though some Barnburners had endorsed judicial elections, they did not propose an amendment for judicial elections[253], probably because, at that point, judicial elections were merely on the backburner for the Barnburners. They had several other amendments as a higher priority, and they would have invested their political capital in getting those amendments ratified[254]. Many Whigs supported these amendments, and they could have formed a coalition with the Barnburners to pass these amendments and extract some deals for their own benefit. Instead, the Whigs gambled and voted against these amendments in order to force a convention[255]. As the minority party, the Whigs risked calling a convention that could have given Democrats even more power, gambling that they could play the Hunkers and the Barnburners against each other in a convention. Because the Radical Democrats could not achieve their reforms through the amendment process, thanks to the Whigs' tactical maneuver, they formed a new coalition with the Whigs for a convention.

For years, the reformist Barnburners had been shut out of appointments by the party machine of the conservative Hunkers, but, in a stunning result, the Radicals were able to dominate the elections to the 1846 convention, winning 52 seats (41%), compared to the Hunkers' paltry 17 seats (13%), and the Whigs' 50 seats (39%)[256]. The Whigs also resented the Hunker monopoly on appointments, and preferred elections by district as a better alternative to statewide selection (which the Democrats would control under either appointments or elections). Together, the Whigs and Radical Democrats had an overwhelming majority in favor of judicial elections, so long as their compromise mixed districted elections and statewide elections. Delegates from both parties argued that judicial elections would also strengthen the separation of powers and encourage the courts to check the legislature and strike down more statutes. Without a convention, New York's reformers would have pushed for smaller-scale changes to the courts by amendment, and the populist factions in each party would not have gained control of that process. And without New York's convention, it is not clear how many reformers in other states would have gained the political cover and inspiration to push for the same risky revolution in judicial politics. New York's adoption broke down resistance and

[252] *See* Wallis, *supra* note 73, at 231.

[253] In 1837, reformist Democrats and Loco-Focos drafted a constitution in their Convention of Friends of Constitutional Reform in Utica, which included a switch to direct judicial elections. *See* CONVENTION OF FRIENDS OF CONSTITUTIONAL REFORM, ADDRESS AND DRAFT OF A PROPOSED CONSTITUTION SUBMITTED TO THE PEOPLE OF THE STATE OF NEW-YORK art. IV, § 1, at 3 (1837) (reporting the proposed constitution from the convention held at Utica in September 1837).

[254] *See* HAMMOND, *supra* note 114, at 539; *A History of Constitutional Reform in the United States* (pt. 2), *supra* note 134, at 405.

[255] *See* MCCURDY, *supra* note 71, at 192–94.

[256] Merkel, *supra* note 127, at app. 1, pp. 2–3. Seven Democrats appear to be unaffiliated with either faction. The convention reports and journals do not list party affiliation or factional affiliation, so those facts must be reconstructed from contemporary newspapers. I made my own tally (which I began before finding Philip Merkel's more thorough count), and the combination of our two studies produces a complete accounting of factional affiliations at the convention. *See also* MEYERS, *supra* note 33, at 264 (identifying Conrad Swackhamer with the Radicals); ALB. ARGUS, May 4, 1846; *id.* Apr. 25, 1846; *id.* Apr. 24, 1846; *id.* Apr. 21, 1846; *id.* Apr. 17, 1846; *id.* Apr. 4, 1846; ALB. EVENING ATLAS, Apr.–May, 1846; N.Y. DAILY HERALD, Apr. 18, 1846; N.Y. DAILY TRIB., July 3, 1846; *id.* May 8, 1846; *id.* May 2, 1846; *id.* May 1, 1846; *id.* Apr. 30, 1846; *id.* Apr. 22, 1846; *id.* Apr. 20, 1846; *id.* Apr. 11, 1846; *id.* Apr. 5, 1846.

blazed a trail for a surprisingly broad consensus. Once the convention was called, it reflected primarily a Radical agenda, and secondarily a Whig agenda. One of the most important law reviews of the time reported: The four principal circumstances which led to the convocation of the body were the alleged abuses in the contraction of debt by the legislature; the accumulation of offices in the gift of the executive; the enormous growth of corporations together with the alleged irresponsibility of the banking companies; and the delays of right in the courts of justice. These were the principal sources of complaint... . [They] were beyond all doubt the real motives in the public mind[257].

The Radicals hated debt, state banks, and corporate monopoly power (while Whigs had been responsible for those villains of the financial crisis). The Radicals and Whigs together hated the Hunkers' executive patronage machine, and both supported streamlining the justice system. Judicial elections were not a top priority of either part of this dominating alliance, and it is not obvious how judicial elections tied into their other purposes. However, the delegates themselves explained how elected judges would provide a necessary check on legislative excess, party patronage, and corrupt monopolies, and how judicial elections would create a modern and responsive court system. Their finished product was called the "People's Constitution[258]." For the most part, it reflected the Barnburner agenda of limiting government and regulation, with some Whig compromises mixed in. The Barnburners' chief accomplishment was constitutionalizing the stopand- tax fiscal limits, which required popular referenda to approve new debts[259]. They entrenched (so to speak) a more limited canal building plan with strict budgeting rules and popular elections for canal commissioners and other formerly appointed officials[260]. The Barnburners also constitutionalized the Free Bank Law of 1838 (passed after the Panic of 1837), which sharply restricted special incorporation and charters, and adopted general incorporation statutes[261]. Legislation would be limited to a single subject[262], and numerous other measures limited taxing, spending, and other specific legislative powers[263]. As part of the shift from the active republic to the liberal state, the new constitution also granted to corporations the legal rights of "natural persons," including due process[264], and limited the traditional police powers that states had used to regulate daily life[265].

Barnburners and Anti-Rent Whigs fought for measures that abolished the feudal forms of property that had caused the upstate Anti-Rent uprising, although these reforms offered little relief from preexisting leases, consistent with the laissez-faire doctrine of vested property rights. Perhaps the most interesting new provision was the abolition of "[a]ll offices for the weighing, gauging, measuring,

[257] *The New Constitution of New York*, 9 LAW REP. 481, 481–82 (1847).

[258] GALIE, *supra* note 82, at 110.

[259] *See* N.Y. CONST. OF 1846 art. VII, §§ 10–12, *reprinted in* 2 POORE, *supra* note 38, at 1351, 1362–63.

[260] *See id.* art. V, § 3, *reprinted in* 2 POORE, *supra* note 38, at 1357.

[261] *See id.* art. VIII, § 1, *reprinted in* 2 POORE, *supra* note 38, at 1363.

[262] *See id.* art. III, § 16, *reprinted in* 2 POORE, *supra* note 38, at 1356.

[263] *See id.* art. VII, §§ 6–9, 11, 13–14, *reprinted in* 2 POORE, *supra* note 38, at 1362–63. *See generally* GALIE, *supra* note 82, at 100–05.

[264] N.Y. CONST. OF 1846 art. VIII, § 3, *reprinted in* 2 POORE, *supra* note 38, at 1351, 1363.

[265] *See id.* art. V, § 8, *reprinted in* 2 POORE, *supra* note 38, at 1358.

culling, or inspecting any merchandise, produce, manufacture, or commodity whatever[266]." This provision reflected three important goals of the 1846 Convention: the dismantling of the Hunker patronage machine that multiplied state offices and filled them with partisans; limiting state expenses; and reducing state regulation that delegates believed had been corrupted by self-dealing, favoritism, and bribery. Together, these impulses drove an overall laissez-faire, anti-regulation, anti-legislation ideology with a broad populist base[267]. Reflecting this ideology, a delegate had proclaimed: The acuteness of the great body of the people render them perfectly capable of taking care of themselves in all the transactions of life; and we have laws to enforce the fulfillment of contracts according to their plain, obvious and honest import. That is all the interference of government that is desired or wanted[268]. The Barnburners' "People's Constitution" would be a foundation for the spread of free market doctrines and judicial review that ascended through the rest of the century[269].

As the convention concluded, the delegates spoke for themselves. They included an official "Address of the Convention to the People" as they sent their draft to the people for ratification. The very first sentence of this address declared that the convention "wholly separated" the legislature from the judicial power, and then proclaimed that "[a]fter repeated failures in the legislature, [we] have provided a judicial system, adequate to the wants of a free people[270]." The address then touted the new constitution's measures "to reduce and decentralize the patronage of the Executive," with judicial elections being part of that solution[271]. It proceeded to emphasize all the ways that the new constitution limited legislative power, particularly with debt, corporations, and banking, but also over individual rights: "They have incorporated many useful provisions more effectually to secure the people in their rights of person and property against the abuses of delegated power[272]." The theme was that the delegates had drafted a constitution to restrict legislative power, and that they had created a judiciary independent of the legislature to serve that purpose[273]. The voters ratified the "People's Constitution" by an overwhelming vote of 221,528 to 92,436, but they also rejected a separate constitutional proposal to extend black suffrage[274].

B. Empowering the Courts

The opposition to judicial elections in New York's 1846 convention offered the expected arguments against judicial elections and in favor of judicial independence. Charles Kirkland, a conservative Whig lawyer on the judiciary committee, argued alliteratively that elections would lead judges "to yield to the popular caprices, or prejudices, or passions of a particular period[275]. "Conservative Democrat Charles

[266] *Id*.

[267] *See* GUNN, *supra* note 110, at 188–89; Henretta, *supra* note 117; Henretta, *supra* note 14.

[268] NEW YORK REPORT, *supra* note 132, at 513 (remarks of delegate Campbell White, Hunker). White espoused the free market ideology that more characterized the Barnburners, which illustrates that some Hunkers also adopted that philosophy.

[269] *See infra* section IV.B, pp. 1124–32.

[270] *New York Debates and Proceedings*, *supra* note 132, at 852 (address "To the People of the State of New York," Oct. 9, 1846).

[271] Id.

[272] *Id.*

[273] See The New Constitution of New York, supra note 144.

[274] GALIE, *supra* note 82, at 110.

[275] *New York Debates and Proceedings*, *supra* note 132, at 456.

O'Conor, also a lawyer on the judiciary committee, continued the same argument against the populist bias created by judicial elections, referring to their effects as "evils[276]." Horatio Stow, a young Whig lawyer, focused on the "wide and decided distinction" between a judge's role and that of a governor or a legislator: "A majority elect the legislature and executive; and the reasons for this are very obvious. But a very different mode of selecting the Judges should be adopted. They are as the shield of the minority; to protect from the oppression (if tried) of the majority[277]." Later, Stow added that an elective judiciary assumed "the right of the majority to be represented on the bench – whereas it was the law only that should be represented [278]." Stow believed that judges had countermajoritarian duties to the rule of law and individual rights, and that judicial elections would allow public passions to undermine those principles.

Some advocates of judicial elections embraced this criticism, celebrating judicial elections as a democratic reform to check the abuse of appointment powers and the resulting "aristocratic" courts. A few happily conceded that judicial elections were designed to limit judicial independence in the name of the people. Although there were some dissenting populists[279], more delegates wanted a constitution with stronger checks and balances[280]. Governors had used appointments to promote their own interests and to keep judges in line with those interests[281]. The Barnburners decried the corruption of the Hunker patronage machine. Along with the Whigs, they denounced the judicial appointment process for putting party insiders on the bench, rather than "the best men[282]." One delegate complained, "Who selects most of your judges now? The politicians of a party caucus[283]." A Radical leader added, "Judges were not only appointed on party grounds, but they were also removed to subserve party purposes... This system ... *must* be abolished[284]." If appointments were indeed abolished, judicial elections would liberate judges from partisan interests and "increase[] fidelity" to the people[285]. The Whigs had been skeptical of direct democracy in other times and contexts, but during the convention they were among the most vocal in their support for judicial elections, partly on the grounds of judicial independence.

Even though Hunkers had controlled the appointment process and the legislature, one of the most influential Hunkers in the convention, Charles Ruggles, called for more judicial resistance to legislation and for an end to the presumption that statutes were valid. His argument was that judges chosen by legislators would be too deferential to the legislature and fearful of its wrath[286].

[276] *Id.* at 503.

[277] *New York Report*, *supra* note 132, at 141.

[278] *Id.* at 770.

[279] *See id.* at 178 (remarks of delegate Alvah Worden, Whig); *id.* at 187 (remarks of delegate John Hunt, Barnburner).

[280] *See, e.g.*, *id.* at 181 (remarks of delegate Robert Morris, Barnburner); *id.* at 188 (remarks of delegate Ambrose Jordan, Anti-Rent Whig); *id.* at 199 (remarks of delegate Henry Nicoll, Barnburner); *id.* at 204 (remarks of delegate Richard Marvin, Whig); *id.* at 237 (remarks of delegate Charles Kirkland, Whig).

[281] *See id.* at 141 (remarks of delegate George Patterson, Whig); *id.* at 575 (remarks of delegate Charles Kirkland, Whig).

[282] *Id.* at 595 (remarks of delegate Richard Marvin, Whig).

[283] *Id.* at 651 (remarks of delegate Amos Wright, Whig).

[284] *Id.* at 613 (remarks of delegate Conrad Swackhamer, Barnburner).

[285] *Id.* at 645 (remarks of delegate Ira Harris, Anti-Rent Whig).

[286] *See New York Debates and Proceedings*, *supra* note 132, at 371 (remarks of delegate Charles Ruggles, Hunker).

Radical Democrats generally opposed the power of elites, but some of these populists surprisingly embraced judicial power. Michael Hoffman, one of the leading Radicals, argued that judicial elections were necessary to strengthen a judiciary that had been too permissive of legislative abuses in the past. Born to an immigrant father in upstate New York, Hoffman was a small-town lawyer before he linked up with Martin Van Buren's faction as it rose to power in the 1820s[287]. He had written in 1842 that "under the pretence of public works equally useful to all and charging all with taxes [insiders and corrupt legislators] have authorized such [projects] as are only beneficial to certain *districts* and *persons*[288]." As a result, he became an adherent of Adam Smith's *Wealth of Nations* and laissez-faire philosophy, and was the chief leader of the fiscally conservative "stop-and-tax" movement in the early 1840s[289].

As the convention began, Hoffman wrote two articles laying out the Barnburner agenda, with twelve pages on detailed law reform, both procedural and substantive. He complained that the judicial system had collapsed due to "an unfortunate use of the patronage of the courts[290]." He also blamed the legislature's "unlimited power to create debts[291]," often spent to purchase political support, for "failures, frauds, and crimes most appalling[292]." His solution was to separate the powers by ending the Senators' role in the Court for the Correction of Errors[293], to "stringently limit[]" the legislature[294], and to empower the courts to engage in "Judicial Legislation"[295] in order to reverse "unjust" rules and laws[296]. Hoffman, seeking more limited government, wanted a stronger activist court exercising more judicial review on behalf of the people and against special interests. In the convention itself, Hoffman was the key advocate for judicial elections. Hoffman conceded that he never would have supported judicial elections "if some strong and irrepressible evil did not require it," but maintained that the abuse of legislative power was such an evil[297]. He recognized that, in an ideal world, legislatures should be trusted to legislate, and judges should merely interpret and apply the legislation. However, New Yorkers could no longer trust their legislators. The convention thus made the new legislature "less powerful ... than it should be," and by "inevitable necessity, if the judges should not find the rule fixed by society itself, that he must make the law[298]." Hoffman did not envision a passive judiciary that would defer to "the people," but rather, an activist judiciary making "judicial legislation" based on the judges' understanding of "natural right" as set by "God himself."[299] "In reorganizing the legislative depart-

[287] James A. Henretta, The Strange Birth of Liberal America: Michael Hoffman and the New York Constitution of 1846, 77 N.Y. HIST. 151, 153 (1996).

[288] Henretta, *supra* note 117, at 175 (quoting Letter from Michael Hoffman to Azariah Flagg (Aug. 9, 1842)) (internal quotation mark omitted).

[289] *See id.*

[290] Letter by Michael Hoffman, *On a Reorganization of the Judiciary of the State of New York* (Sept. 12, 1845)*, in Constitutional Reform in a Series of Articles Contributed to the Democratic Review*, *supra* note 138, at 58, 59 [hereinafter Hoffman, 1845 Letter].

[291] Hoffman, 1846 Letter, *supra* note 138, at 69.

[292] *Id.* at 70.

[293] *See* Hoffman*,* 1845 Letter, *supra* note 177*,* at 59.

[294] Hoffman, 1846 Letter, *supra* note 138, at 69 (emphasis omitted).

[295] *Id.* (internal quotation marks omitted).

[296] *Id.*

[297] *New York Report*, *supra* note 132, at 672.

[298] *Id.* at 671.

[299] *Id.*

ment, we have made it less powerful for general legislation ... [Thus] a large share of judicial legislation will be inevitable, and we must endeavor to supply it[300]." But most fundamentally, elected judges would defend the written constitution against usurpations of power: [T]here can be no Constitution in this country, unless the judges, or part of them, can be made to depend for their offices upon the people of the state. I looked in vain in any state, in our own state, or in the federal power, for a judiciary that had been able to stand by a Constitution, and to defend it against [legislative] usurpation ... [U]nless your judges are elected by the sovereign body, by the constituent, you will look in vain for judges [who] can stand by the constitution of the State against the encroachments of power[301]. Hoffman conceded that judicial appointments produced judges of "talent and integrity" and "intellect[302]," but he concluded that these judges had not used their power to protect the people's rights[303].

Churchill Cambreleng, another leader of the Radical Democrats in the convention, denounced the "unrestricted and unlimited ... legislative despotism[304]" and argued that the new constitution would give the courts a popular foundation comparable to that of the other branches. Whigs embraced the same message that judicial elections would lead to aggressive judicial review for the protection of individual rights against the legislature[305]. Even the populist Anti-Rent delegates, representing a farmers' insurgency in upstate New York, echoed the same goals of *increasing* judicial independence and power[306]. The Anti-Rent movement had been clashing with courts for years, whether in a futile search for a legal remedy for their subservient feudal relationships with landowners, or in the criminal convictions that resulted from their protests. Even though judicial review threatened their legislative proposals, the Anti-Rent delegates still embraced judicial power, perhaps with the hope that they could win judicial elections and have that power serve their interests against the landlords[307]. And even the conservative critics, O'Conor and Kirkland, abandoned their criticism of the "evils" of judicial elections, and in the end voted in favor of them. New Yorkers promoted this reform to others by touting judicial power. As one New York law journal explained, without popular elections: [T]he vital principle of a republic – the separation and division of powers, has been sported with and set at nought... . [T]hat very branch of the government which is the most important of all others – which gives force and efficiency to the laws – which administers justice between man and man, and keeps the other departments from shooting madly from the spheres allotted to them, is the very one, which has been removed beyond the reach of all responsibility[308].

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[300] *Id.*

[301] *Id.* at 672; *see also* NEW YORK DEBATES AND PROCEEDINGS, *supra* note 132, at 492 (remarks of delegate Michael Hoffman, Barnburner) ("[If judges] were not elected by the sovereign body, [New Yorkers] would look in vain for judges to stand by the constitution against the encroachments of power [by the other branches].").

[302] NEW YORK REPORT, *supra* note 132, at 672.

[303] *See id.* at 672–73.

[304] *Id.* at 404.

[305] *See* NEW YORK DEBATES AND PROCEEDINGS, *supra* note 132, at 411–12 (remarks of delegate Alvah Worden, Whig); *id.* at 540 (remarks of delegate James Tallmadge, Whig).

[306] *See id*. at 483–84 (remarks of delegate William B. Wright, Anti-Rent Whig); NEW YORK REPORT, *supra* note 132, at 645 (remarks of delegate Ira Harris, Anti-Rent Whig).

[307] *See* MCCURDY, *supra* note 71, at 198–206, 254–56. Charles McCurdy concludes that the Anti-Renters did not trigger the convention, but that they did have an effect on the convention and New York politics generally. *Id.* at 200–02.

[308] *Elective Judiciary,* 22 U.S. DEMOCRATIC REV. 199, 199 (1848).

In this context, responsibility to the other branches was the problem and responsiveness to the people was the solution.

C. New York as Trigger

New York was an indispensable trigger for judicial elections. While some have questioned whether New York influenced the next states to adopt judicial elections all that much[309], the state convention debates were full of references to other states' practices. Before New York's convention, delegates in Pennsylvania's 1838 convention and New Jersey's 1844 convention had relied on their neighbors' practices as valid: New Jersey's delegates in 1844 referred far more to their neighbors New York and Pennsylvania for guidance, dismissing the relevance of other states. One delegate mocked the idea that Tennessee or Mississippi might have anything relevant to teach them[310]. In Iowa's 1844 convention, one delegate opposed judicial elections by denouncing Mississippi as "an instance of badly-administered laws, connected with popularly elected Judges[311]." After New York's convention, many conventions studied and copied its new constitution. For example, Wisconsin, the first state to fol low New York in 1846, was settled mainly by New Yorkers in the Jacksonian era, a fact that highlights the importance of frontier migration in spreading New York's influence. Wisconsin's settlers retained their connections to New York, and their delegates studied New York's convention closely, copying both New York's factional names and its constitutional provisions[312]. Delegates in Illinois in 1847[313] and Maryland in 1850[314], and commentators in Pennsylvania in 1847[315] sought support from New York's decision, and in 1849, California's delegates relied heavily on New York's new constitution[316]. New York's adoption was pivotal in lending credibility to judicial elections and demonstrating that voters would choose established, experienced, and qualified candidates. Without New York both calling a convention and taking the plunge into electing judges, it is not clear whether any existing states would have had the courage to be associated with Mississippi on this issue. These conventions and the turn to judicial elections demonstrate a national movement and horizontal federalism, but judicial elections were also a movement in favor of localism. Whereas appointments gave power to the governors in the state capital, elections gave local populations control over their courts. State supreme court elections were often districted, rather than made statewide.

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[309] *See, e.g.*, Nelson, *supra* note 14, at 193.

[310] JOURNAL OF THE PROCEEDINGS OF THE CONVENTION TO FORM A CONSTITUTION FOR THE GOVERNMENT OF THE STATE OF NEW JERSEY 129 (Trenton, Franklin S. Mills 1844).

[311] FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at 105 (Benjamin F. Shambaugh ed., 1900) (remarks of delegate Elijah Sells).

[312] *See* THE CONVENTION OF 1846, at 291 (Milo M. Quaife ed., 1919); Ray A. Brown, *The Making of the Wisconsin Constitution* (pt. 1), 1949 WIS. L. REV. 648, 657; Ray A. Brown, *The Making of the Wisconsin Constitution* (pt. 2), 1952 WIS. L. REV. 23, 59; Edward P. Alexander, *Wisconsin*, *New York's Daughter State,* WIS. MAG. HIST., Sept. 1946, at 11, 24–25.

[313] *See, e.g.*, THE CONSTITUTIONAL DEBATES OF 1847, *supra* note 94, at 477, 505, 749.

[314] *See, e.g.*, 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 540, 548, 557, 569–71, 585 (Annapolis, William M'Neir 1851).

[315] *See, e.g.*, PENNSYLVANIAN, June 14, 1847; *id.* June 12, 1847; *id.* June 11, 1847; *id.* June 8, 1847; *id.* June 2, 1847; *id.* June 1, 1847; *id.* May 28, 1847.

[316] *See* Owen C. Coy & Herbert C. Jones, *California's Constitution* 15 (1930).

IV. THE WAVE OF JUDICIAL ELECTIONS, 1846–1851

A. The American Revolutions of 1848

Recently, historians of the antebellum era have compared Americans and Europeans during the violent European Revolutions of 1848. In Professor Sean Wilentz's *The Rise of American Democracy*, the chapter "War, Slavery, and the American 1848" focuses on the Mexican War's aftermath, the westward expansion of slavery, and the resulting growth of the Free Soil movement, the forerunner of Lincoln's Republican Party[317]. Professor Daniel Walker Howe, in *What Hath God Wrought*, similarly titles one chapter "The Revolutions of 1848," which, like Wilentz's chapter, focuses on slavery, the Mexican War, Manifest Destiny, and the "crumbling away of the second party system.[318]" Indeed, America had its own overlooked revolutions of 1848, roughly speaking. In Europe, the poor and lower middle classes arose with the sword, but their ethnonationalist leaders also arose with the pen, writing more than twenty new constitutions[319]. Some Americans were inspired by these efforts, though some were horrified by the sword[320]. Instead, they took up the same pen of constitutional revision. This was not the first period of constitutional revision in the states. However, the sheer volume of revisions between 1844 and 1853 was unprecedented. Sparked by the Panics and the depression[321], twelve existing states adopted new constitutions with more widespread democratic power, and four states entered the Union with new constitutions[322]. In 1848, the Democratic Party platform hailed the European revolutions for following the principle of "the sovereignty of the people[323]," just as American states were increasing popular sovereignty through new constitutions. Democratic rhetoric reached an even higher pitch, with some skeptics complaining that the public was getting "carried away by the humbug of those omnipotent though often meaningless terms 'people's rights,' reform and democracy[324]."

Professor Louis Hartz finds the conclusion "inescapable that the 'people' had become, in a real sense, a mystical entity of the popular consciousness," a "unified, morally infallible entity" that was "mainly myth[325]." But the myth was powerful. In contrast with many of the

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[317] WILENTZ, *supra* note 27, at 602–32.

[318] HOWE, *supra* note 33, at 792–836.

[319] *See* Charles Breunig, *Age of Revolution and Reaction*, 1789–1850, at 259–66, 272–76 (2d ed. 1977); Mike Rapport, 1848: *Year of Revolution* 65, 79–91, 99–100, 135–36, 335–40 (2008); Priscilla Robertson, *Revolutions of 1848*, at 99, 129, 139, 232, 268, 325–30 (1952).

[320] *See* Tim Roberts, *The United States and the European Revolutions of 1848*, in *The European Revolutions of 1848 and The Americas* 76 (Guy Thomson ed., 2002). Professor Tim Roberts focuses on media reactions and the Presidential campaigns of 1848 and 1852, European refugees, and the "Dorr War" in Rhode Island, but does not discuss the American state constitutional conventions.

[321] TARR, *supra* note 21, at 111; *see also* Wallis, *supra* note 73, at 212; John Joseph Wallis, Richard E. Sylla & Arthur Grinath III, *Sovereign Debt and Repudiation: The Emerging-Market Debt Crisis in the U.S. States, 1839–1843*, at 26–27 (Nat'l Bureau of Econ. Research, Working Paper No. 10753, 2004), *available at* http://ssrn.com/abstract=590763.

[322] States revising their constitutions between 1844 and 1853 were New Jersey, Louisiana (twice), Missouri, New York, Illinois, Kentucky, Ohio, Michigan, Virginia, Maryland, Indiana, and Tennessee. New states were Iowa, Texas, Wisconsin, and California. *See* HAYNES, *supra* note 42, at 101–35; Wallis, *supra* note 73, at 219 tbl.2; *see also* TARR, *supra* note 21, at 94 ("[D]uring one decade, from 1844 to 1853, more than half the existing states held constitutional conventions.").

[323] HOWE, *supra* note 33, at 793 (internal quotation marks omitted).

[324] *An Elective Judiciary*, Monthly Intelligence, 7 PA L.J. 247, 249 (1848) (emphases omitted).

[325] HARTZ, *supra* note 16, at 26.

European revolutionaries of 1848, these overlooked American revolutionaries were economically libertarian and fiscally conservative. Howe writes that, in 1848, the Democrats' "Young America" movement had taken over with an agenda of state spending on internal improvements[326], but the history of the state conventions reveals a bipartisan consensus to limit state spending and legislative power. In the state constitutional conventions occurring between 1800 and 1830, the expansion of suffrage and legislative reapportionment were among the most important issues[327]. In the wave of conventions in the 1840s, the focus was on limiting legislatures and restraining government[328]. Hartz observes that in the wake of the economic crisis, "businessmen were heroes and politicians were villains, a balanced budget was a mark of state morality, and the menace of communism was ... ground for constitutional argument... [T]his philosophy comes closer to fitting the 'laissez-faire' label[329]." De Tocqueville had remarked in 1835 that "the legislature of each state is faced by no power capable of resisting it[330]." De Tocqueville had not seen the power of state conventions, which a decade later were determined to curtail the legislatures. One Ohio delegate complained in 1850, "I wish to see the State Government brought back to its simple and appropriate functions, [leaving] railroad, canal, turnpike and other corporate associations, to get along on their own credit, without any connection or partnership with the State whatever.[331]" An Indiana delegate in 1850 explained: The great vice of republics, of all popular governments, is excessive legislation. This is an evil which has afflicted our State, and all the States. It has cried aloud for correction. The new Constitutions have provided various means for the prevention of hasty, injudicious, fraudulent, or unconstitutional legislation. This has been one of the great objects of constitutional reform. A single bad law may, in mere money, cost the people of the State more than many sessions of the Legislature. Dearly has this State paid for improvident legislation[332].

One historian describes the wave of conventions as "[h]orizontal [f]ederalism," as states learned from one another's mistakes in the 1830s and borrowed heavily from one another's constitutional innovations in the 1840s and early 1850s[333]. The conventions first restricted state debt and eliminated "taxless finance[334]." Similar to the "stopand-tax" measure in New York's 1846 convention, the new state constitutions required states

[326] HOWE, *supra* note 33, at 829; *see also* Edward Ladd Widmer, Young America: Democratic Cultural Nationalism in Antebellum New York (May 4, 1993) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard Law School Library).

[327] *See* Merrill D. Peterson, *General Introduction* to *Democracy, Liberty, and Property: The State Constitutional Conventions Of The 1820's*, at xiii–xvi (Merrill D. Peterson ed., 1966).

[328] Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in *Toward a Usable Past*, *supra* note 14, at 388, 401. Professor Alan Tarr, however, assesses the constitutions as "an opposition to a particular way of conducting government rather than to government per se." TARR, *supra* note 21, at 133.

[329] HARTZ, *supra* note 16, at 314–15.

[330] DE TOCQUEVILLE, *supra* note 37, at 89.

[331] TARR, supra note 21, at 112 (quoting KERMIT L. HALL, THE MAGIC MIRROR 103–04 (1989)) (internal quotation marks omitted).

[332] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1346 (H. Fowler ed., Indianapolis, A.H. Brown 1850) [hereinafter INDIANA REPORT] (remarks of delegate Daniel Read).

[333] TARR, *supra* note 21, at 98.

[334] Wallis, *supra* note 73, at 213; *see also id.* at 215–18, 230–33.

and localities to tax to cover all spending, and hold referenda to authorize tax increases. The conventions also mandated uniform taxation, requiring tax burdens to be spread evenly throughout the state or locality. Of the fourteen conventions held between 1844 and 1851, thirteen restricted state debt, and eleven equalized taxation[335].

Even the states that did not experience their own financial crises learned from the others and adopted these provisions. Thirteen conventions also prohibited special incorporation – which was often identified with special privileges and cronyism[336] – and adopted general incorporation provisions[337]. Special privileges were a bipartisan affair, and the new constitutions limited corruption through more open access to incorporation[338]. The conventions also adopted broader procedural restraints on legislatures, including supermajority voting rules on particular issues, shorter legislative sessions, fewer meetings (moving from annual sessions to biennial sessions), and recorded votes legislator-by-legislator for taxing and spending measures[339]. New constitutional provisions also required open deliberation, committee procedures, multiple readings (often three separate readings before a final vote), rules against alterations, single-subject-per-bill rules, and accurate titles and plain language for bills, as well as imposing other obstacles to legislation and measures for greater transparency[340].

In the 1850s, therefore, it became much harder to pass legislation and to spend state money. Historians focusing on the history of state constitutions have given little attention to the adoption of judicial elections[341], but this change was closely related to the other restrictions on legislatures. The constitutional revolutionaries of the time believed elected judges were more likely to enforce these new limits against legislative excesses. From 1846 to 1851, twelve states adopted judicial elections for their entire court systems, and five states adopted partially elective systems. By 1860, out of thirty-one states in the Union, eighteen states elected all of their judges, and five more elected some of their judges. There were also proposals to subject federal judges to election, but the federal constitution imposed a stronger barrier[342].

B. The Purpose of More Judicial Review and More Judicial Power

The conventions created a double mandate for more judicial review: a mandate creating new substantive and procedural limits on legislative power, and a mandate creating a new institution (the elected judiciary) to make those paper limits a reality. This double mandate was a strong expressive signal to judges to assert themselves for the people, and that is exactly what the judges did[343]. Although adopting judicial elections carried strong symbolic content, the delegates also intended judicial elections to encourage

[335] *Id.* at 219 tbl.2.

[336] Martin Van Buren and the Albany Regency limited access to bank charters to Democratic insiders, *see id.* at 214, 238, a state-level version of the Whigs' Henry Clay-Nicholas Biddle selfdealing with the federal Bank of the United States.

[337] *Id.* at 219 tbl.2. New York had adopted a general banking provision in 1838, and expanded the same principle in 1846. *Id.* at 238.

[338] *See id.* at 215.

[339] *See* TARR, *supra* note 21, at 118–19.

[340] *See id.* at 119.

[341] *See, e.g.*, John j. Dinan, *The American State Constitutional Tradition* (2006).

[342] *See* Cogan, *supra* note 29, at 203 (citing H.R. REP. No. 141 (1852)). *Dred Scott* prompted some northerners to call for an amendment establishing federal judicial elections. *See id.*

[343] The delegates might have renamed the state supreme court "The Court of Statute Voidance" to send this message and the effect could have been the same.

more judicial review through institutional design. They had a three-step theory as to how judicial elections would produce more judicial review: (1) elections would free judges from legislatures; (2) elections would embolden judges by providing them with legitimacy; and (3) elections would threaten judges who did not defend popular constitutional rights against legislative encroachments. For example, in the Illinois convention of 1847, future U.S. Supreme Court Justice David Davis complained that appointed judges had "none of the confidence of the people," whereas elected judges "would always receive the support and protection of the people[344]." He acknowledged that elected judges might abuse their power, but he said he "would rather see judges the weather-cocks of public sentiment, in preference to seeing them the instruments of power, to see them registering the mandates of the Legislature, and the edicts of the Governor[345]." Davis also commented that if the federal judges were elected, the people "would have chosen judges, instead of broken down politicians" nominated by the President[346]. Soon after, an Illinois opponent of judicial elections mocked the supporters for "preach[ing] to us continually – distrust to the Legislature[347]." But "distrust to the Legislature" was the prevailing mood of this period: [T]he people have desired a change, and have come to the wise conclusion to elect the judiciary themselves, and relieve it from any dependence on the other branches of the government... . The old system was to place the judiciary independent of the people, and dependent on the Governor and Legislature; the elective plan was to make them independent of the Governor and Legislature, and dependent on the people for support against the other branches of the government. The object of the distribution of powers of the government was that the one department may check another. Suppose you give a few men the power to make laws and carry them into execution, it is simple and plain. Why not try that government? Because those few men may become corrupt. Gentlemen say, Let the Legislature and the Governor pass the laws, and before those laws can go into effect, the judiciary must give them an approval; therefore the judiciary has a control over the others. But they say to the Governor and Legislature you may appoint that judiciary yourself![348]

Illinois newspapers echoed these same views[349]. Delegates throughout these conventions argued for judicial elections to increase courts' independence and their power to check the legislature. In Indiana, supporters of judicial elections warned that, unless judges were removed from "the control of the other branches of the government[350]," the state constitution's promises "to protect the rights of the people, and to preserve a proper equilibrium between the different departments" would be no more than "parchment barriers.[351]" In Kentucky[352], Virginia[353], Ohio[354], and

[344] *The Constitutional Debates of 1847*, *supra* note 94, at 461–62 (remarks of delegate David Davis).

[345] *Id.* at 462.

[346] *Id.*

[347] *Id*. at 752 (remarks of delegate John Dement).

[348] *Id.* at 466 (remarks of delegate Archibald Williams).

[349] *See, e.g.*, *The New Constitution – The Tendency of Its Power*, WKLY. NW. GAZETTE (Galena, Ill.), Sept. 17, 1847, at 2.

[350] INDIANA REPORT, *supra* note 219, at 1809 (remarks of delegate Judge Borden).

[351] *Id.* at 1808.

[352] *See* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 173 (R. Sutton reporter, Frankfort, Ky., A.G. Hodges & Co. 1849) [hereinafter KENTUCKY REPORT] (remarks of delegate Ninian Gray); *id*. at 268 (remarks of delegate James Guthrie); *id*. at 409 (remarks of delegate Philip Triplett).

[353] *See* Hall, *supra* note 14, at 350 n.62 (citing R.D. Turnbull, *To the People of Brunswick, Lunenberg, Nottoway and Dinwiddle*, RICH. ENQUIRER, June 28, 1850, at 3–4).

[354] *See infra* notes 271–73.

Maryland[355], delegates offered similar arguments for judicial independence and judicial power. Virginia's 1850 convention adopted judicial elections and explicitly introduced within its courts' appellate jurisdiction cases involving "the constitutionality of a law[356]." Earlier Virginia constitutions had not mentioned such a power[357]. The European Revolutions of 1848 had their various manifestos, including Karl Marx and Friedrich Engel's *The Communist Manifesto*. The American Revolutions of 1848 also had a manifesto, Samuel Medary's *The New Constitution*, which one might call (a bit anachronistically) *The Libertarian Manifesto*. In 1849, Medary edited and published a series of pamphlets calling for a constitutional convention in Ohio, which he distributed nationally[358]. *The New Constitution*'s issues commented frequently on the European Revolutions, sometimes reprinting other papers' socialist, pro-labor views[359], but more often embracing a simpler pro-democracy, anti-despotism message that fit *The New Constitution*'s anti-legislature and anti-regulation perspective[360]. Written against the backdrop of the wars in Europe, *The New Constitution* reported on American "riot, confusion and violent contention" and "the cry of *revolution* which has come up from almost every part of the State" of Ohio, but called instead for a revolution "through the ballot box, what other nations and States are struggling to accomplish with the sword[361]." Writers often juxtaposed their peaceful movement for constitutional reform against European "anarchy and violence.[362]"

The New Constitution also reported on the constitutional reforms in every region of the country[363], and celebrated New

[355] *See* 2 DEBATES AND PROCEEDINGS OF THE MARYLAND-REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, *supra* note 201, at 501.

[356] VA. CONST. of 1850, art. VI, § 11, *in* 2 POORE, *supra* note 38, at 1933.

[357] NELSON, *supra* note 26, at 31.

[358] SAMUEL MEDARY, THE NEW CONSTITUTION (Columbus, Ohio, Samuel Medary 1849). Medary later became the pro-slavery governor of Kansas during its Bloody Kansas battles in the late 1850s. *The New Constitution* reflects no pro-slavery agenda, but it does have some essays opposing black suffrage.

[359] See, e.g., Constitutional Reform in Ohio – This Representative District, NEW CONST., Aug. 18, 1849, reprinted in MEDARY, supra note 245, at 241, 255 (reprinting an article from the Toledo Daily Republican).

[360] *See, e.g.*, *The Carbonari*, NEW CONST., Sept. 8, 1849, *reprinted in* MEDARY, *supra* note 245, at 289, 293–94 (reprinting an article from the *New York Albion*); *Change of the State Constitution*, NEW CONST., July 21, 1849, *reprinted in* MEDARY, *supra* note 245, at 177, 184; *The Convention*, NEW CONST., Sept. 8, 1849, *reprinted in* MEDARY, *supra* note 245, at 289, 303–04 (reprinting an article from the *Urbana Expositor*); *The Discovery of America by the Northmen*, NEW CONST., Oct. 6, 1849, *reprinted in* MEDARY, *supra* note 245, at 353, 362; *Europe – The Debates on Hungary in England – On the Press in France – The Fate of Italy*, NEW CONST., Sept. 1, 1849, *reprinted in* MEDARY, *supra* note 245, at 273, 276 (reprinting an article from the *Boston Post*); *Germany, in 1849*, NEW CONST., Aug. 4, 1849, *reprinted in* MEDARY, *supra* note 245, at 209, 214; *Radicalism*, NEW CONST., Sept. 22, 1849, *reprinted in* MEDARY, *supra* note 245, at 321, 327–28 (reprinting an article from the *Democratic Review*).

[361] K., *Necessity of a New Constitution,* NEW CONST., Sept. 8, 1849, *reprinted in* MEDARY, *supra* note 245, at 289, 292.

[362] *The New Constitution*, NEW CONST., Sept. 8, 1849, *reprinted in* MEDARY, *supra* note 245, at 289, 302 (reprinting an article from the *Kalida Venture*).

[363] *Constitutional Reform in Missouri*, NEW CONST., July 28, 1849, *reprinted in* MEDARY, *supra* note 245, at 193, 193; *The Constitutions of the Different States*, NEW CONST., July 21, 1849, *reprinted in* MEDARY, *supra* note 245, at 177, 185–88; *Convention Law of New York*, NEW CONST., June 8, 1849, *reprinted in* MEDARY, *supra* note 245, at 81, 92; *Debts of the State – Prohibition of Its Increase Without the Assent of the People*, NEW CONST., June 23, 1849, *reprinted in* MEDARY,

York's willingness to "dare[] the experiment" in electing judges that was spreading around the country[364]. Medary and his writers were populist Democrats, but they still embraced stronger courts and judicial review. "Judicial independence" was a slogan throughout their essays, aimed at independence from a bumbling legislature. Again and again, *The New Constitution*'s essays railed against legislative excesses and offered a libertarian view: the motto on its masthead in each issue was, "Power is always stealing from the many to the few[365]," and by "power," they clearly meant the legislature's power. Each issue was filled with statements like the following: "'The people are governed too much.' ... We have too much law... Give us but few laws and a simple government, and the people will be prosperous, happy and contented."[366] "Too much Legislation is the bane of all Republics."[367] "[T]hat Government is best which governs least ..."[368] In one issue, *The New Constitution* argued that: "[T]he great evil of all free governments is a tendency to *overlegislation ...* [I]t is the people we would preserve from the tyranny of *legislators*... Legislators also favored the tyranny of property in place of protecting the meritorious and poor... We want a Republican Constitution – laws few and simple – and above all, means devised to prevent the Legislature from heaping debts upon us ... We want a new Constitution, to give back to the people the power taken from them without their consent, to elect Judges ... As it now is, we see legislators spurning the good and wise [candidates], and bribing men to become hypocrites, and to rob us, as has been done in our public works, where knaves have made fortunes in a few years out of the tax-ridden, oppressed people."[369] Again and again, these writers attacked legislative errors in the areas of debt, self-dealing patronage, banking, incorporation, unequal taxation, and selective internal improvements benefiting some communities at the expense of others.

Some writers of *The New Constitution* favored debtors over creditors, but even though judges in the past had blocked debtor relief, these writers still embraced judicial power. They called for judges' salaries to be constitutionally protected[370]

supra note 245, at 113, 114; *Election of Judges*, NEW CONST., Aug. 25, 1849, *reprinted in* MEDARY, *supra* note 245, at 257, 271–72 (reprinting an article from the *Urbana Expositor*); *Election of Judges*, NEW CONST., July 21, 1849, *reprinted in* MEDARY, *supra* note 245, at 177, 190–91 (reprinting an article from the *Kentucky Yeoman*); *Election of Judges by the People*, NEW CONST., June 8, 1849, *reprinted in* MEDARY, *supra* note 245, at 81, 91; *Indiana – Her New Constitution*, NEW CONST., Sept. 8, 1849, *reprinted in* MEDARY, *supra* note 245, at 289, 289; *The States – Their Constitutions, &c*, NEW CONST., May 5, 1849, *reprinted in* MEDARY, *supra* note 245, at 1, 8.

[364] *The Constitutional Convention*, NEW CONST., June 9, 1849, *reprinted in* MEDARY, *supra* note 245, at 81, 95 (reprinting an article from the *South Bend Register*); *see also Election of Judges by the People*, NEW CONST., Oct. 20, 1849, *reprinted in* MEDARY, *supra* note 245, at 385, 395 (hailing New York's "more pure [and] able Judiciary").

[365] *See, e.g.*, NEW CONST., May 5, 1849, *reprinted in* MEDARY, *supra* note 245, at 1, 1 (the masthead of *The New Constitution*).

[366] *Reform*, NEW CONST., Nov. 17, 1849, *reprinted in* MEDARY, *supra* note 245, at 401, 405 (reprinting an article from the *Georgetown Standard*).

[367] *Ordinance of July 13, 1787*, NEW CONST., May 19, 1849, *reprinted in* MEDARY, *supra* note 245, at 33, 47.

[368] *Biennial Sessions of the Legislature*, NEW CONST., June 2, 1849, *reprinted in* MEDARY, *supra* note 245, at 65, 68 (internal quotation marks omitted) (reprinting an article from the *Piqua Enquirer*).

[369] *The New Constitution Assuming Shape*, NEW CONST., Aug. 25, 1849, *reprinted in* MEDARY, *supra* note 245, at 257, 268 (reprinting an article from the *St. Clairsville Gazette*).

[370] *Constitutional Reform*, NEW CONST., Sept. 29, 1849, *reprinted in* MEDARY, *supra* note 245, at 337, 349 (reprinting an article from the *Findlay Democratic Courier*).

and increased[371], and for judges to serve longer terms with the goal of attracting better candidates and strengthening their hands[372]. Judicial elections themselves would "improve and heighten the character of our judiciary," and the legislatures would no longer fill the courts with weak and "broken down or defeated politicians.[373]" One letter writer rejected judicial review[374], but that letter triggered a more vocal and impassioned defense of judicial review by other writers[375]. In a first reply, "Madison" attacked the legislatures as undeserving of trust, and alluded to the Ohio legislature's recent failures.[376]"There is much less danger of political bias in a judge than in a legislator," he observed[377]. Judges feel the weight of expectations of "honesty and integrity," and "[a] judge should know and feel that the power conferred upon him is a *sacred* trust[378]." In a second letter, "Madison" again hailed the separation of powers and the "duty of the Judicial branch to determine all questions of civil right.[379]" Without judicial review, there would be no separation of powers, and there would be "anarchy and many evils.[380]" Another writer, "Veto," asked: Why have a constitution at all, if the legislature is unrestrained and may violate its plainest provisions with impunity? ... Give [the judges] this power – make them elective by the people, and then indeed will we have an independent judiciary. But withhold it, and let the legislature continue to appoint them, and you make our judges mere tools in their hands – puppets who dance to any tune their masters play[381]... The nom-de-plume "Veto" was appropriate because these writers adhered to a philosophy of negative liberty, championing more and more hurdles against legislative action.

The writers in *The New Constitution* also called for expanding the governor's veto power, as a defense not only for the "people's" rights, but also for "the rights of minorities.[382]" In the late 1840s, Ohioans shared *The New Constitution*'s view that the legislature was corrupt and incompetent. The convention delegates revealed a general distrust of the legislature, and their answer was to make more state offices elected. On the eve of the convention, an Ohio editorial proclaimed that its "great work" would be "limiting ... the power of legislators.[383]" One Ohio delegate proposed: Whereas, There is a deep and just dissatisfaction

[371] Id.

[372] *Revision of the State Constitution*, NEW CONST., June 23, 1849, *reprinted in* MEDARY, *supra* note 245, at 113, 118 (reprinting an article from the *Ohio Patriot*).

[373] *The Constitutional Convention*, *supra* note 251.

[374] *See* Homo, Letter to the Editor, NEW CONST., June 9, 1849, *reprinted in* MEDARY, *supra* note 245, at 81, 90–91. This writer granted, "All will admit, that the object of law is the protection of the rights and liberties of our citizens," *id., reprinted in* MEDARY, *supra* note 245, at 90, but he feared giving judges the power to enforce these rights against legislatures, *id.*

[375] *See, e.g.*, Madison, Letter to the Editor, NEW CONST., July 21, 1849, *reprinted in* MEDARY, *supra* note 245, at 177, 189 [hereinafter Madison Letter II]; Madison, Letter to the Editor, NEW CONST., June 23, 1849, *reprinted in* MEDARY, *supra* note 245, at 113, 116 [hereinafter Madison Letter I]; Veto, Letter to the Editor, NEW CONST., July 28, 1849, *reprinted in* MEDARY, *supra* note 245, at 193, 205–06.

[376] Madison Letter I, *supra* note 262, *reprinted in* MEDARY, *supra* note 245, at 116.

[377] *Id.*

[378] *Id.*

[379] Madison Letter II, *supra* note 262, *reprinted in* MEDARY, *supra* note 245, at 189.

[380] *Id.*

[381] Veto, *supra* note 262, *reprinted in* MEDARY, *supra* note 245, at 206.

[382] *The New Constitution Assuming Shape*, *supra* note 256 (emphasis omitted) (internal quotation mark omitted).

[383] Constitutional Reform in Ohio – This Representative District, supra note 246.

amongst the people in regard to appointments to office – especially by the legislative department of government; converting that body, as they do to some extent, into a mere political arena, embittering the feelings of party spirit, and corrupting the pure fountain of legislation; Therefore –*Resolved*, That the new Constitution provide for the election of all State, County, and Township officers immediately by the people[384]. These sentiments were echoed by other delegates, who linked the problem of legislative power to the solution of increasing elections of other officials, including judges. Some delegates argued that a popu larly elected court would better protect the rights of the people against the government. One declared: It seems to me necessary and important, that the Judicial Department, who are representatives of the people, should stand as sentinels to guard the constitutional rights of the people. If a law of the General Assembly should conflict with any right of the people – any constitutional guarantee– there should be a department, proceeding from the people, and responsible to them, which can revert to those great fundamental principles at the foundation of the State government, and preserve the landmarks of the Constitution[385]. Another delegate based stronger judicial review on a social contract argument: The people were the source of all power, and with the people should be left all power, except so far as it became necessary to take a part of it away in order to protect them in their rights and liberties under the form of a government. It became necessary that the people should delegate a part of the powers lodged with them, in order the more effectually to guard and protect them in that which they retained in their own hands[386].

The new Ohio constitution limited legislative appointment powers, and restricted economic and special legislation. In Pennsylvania, which adopted judicial elections by amendment, not in a recorded constitutional convention, the newspapers raised similar arguments to the public. When a Democrat was governor, Whig newspapers called for judicial elections so that judges would have more power and independence to check him[387]. Then, as soon as the Democratic governor died and was replaced by a Whig, Democratic newspapers adopted the same argument[388]. One Pennsylvania legislator argued: Election always has and always will give us better men and better officers

[384] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio*, 1850–1851, at 86 (J.V. Smith reporter, 1851) [hereinafter *Ohio Report*] (remarks of delegate J. Milton Williams).

[385] *id*. at 217 (remarks of delegate James W. Taylor).

[386] *id.* at 562 (remarks of delegate Joseph Vance); *see also* 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 771 (Boston, White & Potter 1853) (remarks of delegate Edward L. Keyes) ("[Judges, once elected] will thus know that they are in the hands of the people, and knowing that, and feeling that their business is to administer the law to the people, they will be more likely to discharge their duties with fidelity [to the people]."). Kermit Hall cites Keyes in this speech as also claiming that judicial elections will "energize" judges and make them "independent" and "on par" with the other branches, Hall, *supra* note 14, at 350, and other legal academics have quoted this passage from Hall, *see, e.g.*, Hanssen, *supra* note 14, at 447. However, I can find no record of this passage in the Massachusetts Debates or elsewhere. Similar sentiments were also expressed in Indiana. *See* 2 INDIANA REPORT, *supra* note 219, at 1808–09 (remarks of delegate James W. Borden).

[387] *See, e.g.*, N. AM. & U.S. GAZETTE (Phila.), Oct. 12, 1847, at 2.

[388] *See, e.g.*, *The Election of Judges,* PENNSYLVANIAN*,* Oct. 5, 1850, at 2.

than appointment – more independent men, sir, for I hold a man elected to office by the will of the people, and having the confidence of the people, is freer to act than the autocrat of Russia.[389]

The *American Law Journal*, published in Philadelphia, embraced judicial elections because they would protect judicial power: When the Judges derive their authority immediately from the people, and can take an appeal to the same paramount power, the fear of removal ... for resisting Legislative usurpations will no longer exist, and we shall probably hear less of the validity of retrospective acts destroying vested rights – of legislative reversals of Judgments without notice to the parties – and of other usurpations of Judicial power, under the new definition of *law*, that it is "a rule *postscribed*" instead of being "a rule *prescribed*." It is a prevalent opinion that the present Judicial tenure has failed to secure either the independence of the Judiciary or the rights of the people[390]. As the judicial election amendment was proceeding through its successive stages, an appointed justice on the Pennsylvania Supreme Court wrote: [Unconstitutional] retroactive legislation began and has been continued, because the judiciary has thought itself too weak to withstand; too weak, because it has neither the patronage nor the *prestige* necessary to sustain it against the antagonism of the legislature and the bar. Yet, had it taken its stand on the rampart of the constitution at the onset, there is some little reason to think it might have held its ground. Instead of that, it pursued a temporizing course till the mischief had become intolerable, and till it was compelled ... to invalidate certain acts of legislation, or rather to reverse certain legislative decrees...Yet the legislature attempted to divest it, by a general law it is true, but one impinging on particular rights[391].

According to this justice, the courts had lacked the confidence and "prestige" to confront the legislature over its constitutional encroachments until those abuses became intolerable. Once a consensus emerged to curb the legislatures, judicial elections were one way of giving courts more confidence and democratic prestige. Prestige is often gained by eliteness, by rising above the people. But in midnineteenth-century America, it was "the people" who bestowed prestige with their ballots. This account of the legislature's disgrace and the judiciary's rise helps to explain another puzzle in the annals of legal history. The codification movement – the agenda to replace court-created precedentbased common law with legislated codes of legal rules – had been growing from the Founding through the 1820s. However, it faded rapidly from the 1830s through the 1840s[392]. In this era, only New York adopted a code – David Dudley Field's code – and that code was narrowly limited to civil procedure reforms. How can we explain the sudden demise of codification in the 1840s? In the wake of the Panic of 1837, legislatures were less trusted, and as a result, courts were relatively less suspect. Courts increasingly became the defenders of the people and their rights against the

[389] Cogan, *supra* note 29, at 212 (quoting *Debate in the House of Representatives on the Proposed Amendment to the Constitution, Remarks of Mr. Biddle of Philadelphia, February 8, 1850*, PA. TELEGRAPH, Feb. 20, 1850).

[390] *Election of Judges*, 8 AM. L.J. 481, 481 (1849).

[391] Greenough v. Greenough, 11 Pa. 489, 495 (1849).

[392] *See generally* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT (1981); Robert W. Gordon, *The American Codification Movement: A Study of Antebellum Legal Reform*, 36 VAND. L. REV. 431 (1983) (reviewing COOK, *supra*).

excesses of reckless or corrupt legislatures. As the demise of codification followed the legislatures' decline, judicial elections were part of the judiciary's ascent.

C. Strong Parties, Strong Courts, Strong Constitutions

Another question is whether the advocates of judicial elections were cynically partisan or simply naïve about partisanship. The answer, more or less, is neither: They embraced "partyism" as a means of protecting constitutional values. Some delegates surely believed that judicial elections gave their party a better chance of winning seats on the bench than appointments had, but this partisan strategy was probably a minor factor, because many pro-election delegates belonged to the party already securely in power. It is true that New York Radicals and Whigs opposed the Hunker monopoly of the courts[393], and that one reason they favored judicial elections was to allow the Radicals and Whigs to gain seats on the bench. But in most of the states adopting judicial elections, the Democrats already controlled the governorship and the legislature[394], so the Democrats' turn to judicial elections in these conventions only created potential problems for their maintaining control over the courts. If anything, judicial elections in these states created openings for the Whigs to win seats in judicial districts within their local strongholds[395]. Thus, the Democrats in these states took the risk of adopting judicial elections for purposes bigger than partisanship. At first glance, the convention delegates seem to have been critics of political parties. Opponents warned that, in popular elections, partisanship would take over the courts and would produce only "evil and evil continually.[396]" Supporters argued that popular elections were simply the lesser evil: direct elections at least would be less partisan than appointments[397].

Whereas governors and legislators had exploited appointments for their own partisan benefit, the voters would be a check on party intrigue, cronyism, and abuse of power, even if parties played a major role in both systems. The problems with party politics increased as direct popular control decreased. But with more direct control over partisan judicial elections, the parties were a powerful mechanism for organizing the people against other monster institutions and against special interests. This faith in party-run judicial elections connects with the longterm transformation of mass party politics from a threat to democracy to a vigilant guardian of democracy[398].

From England to early republic America, the consensus was that organized political parties undermined authority, elevated faction above country, and subverted popular sovereignty. The Framers designed a "Constitution Against Parties,[399]" but in the 1830s, a constitution *through* parties emerged[400]. Jacksonians (or more precisely, Van Burenites) feared

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[393] *See* SHUGERMAN, *supra* note 35 (manuscript at 176–209); *see also supra* section II.A, pp. 1080–88.

[394] *See* Jed Handelsman Shugerman, Chart of State Partisan Balance (Jan. 2010) (unpublished chart, on file with the Harvard Law School Library) (based on W. Dean Burnham, Partisan Division of American State Governments, 1834–1985, http://dx.doi.org/10.3886/ICPSR00016 (last visited Jan. 31, 2010)).

[395] Factional politics may have factored into some delegates' thinking, but outside of New York, such factionalism did not trump partisan loyalties.

[396] *The Constitutional Debates of 1847*, *supra* note 94, at 483 (internal quotation marks omitted) (remarks of delegate Onslow Peters).

[397] *See, e.g.*, *New York Debates and Proceedings*, *supra* note 132, at 480, 484.

[398] *See* LEONARD, *supra* note 24, at 1–17.

[399] Richard Hofstadter, *The Idea of a Party System* 40 (1969).

[400] LEONARD, *supra* note 24, at 10–11.

that democratic government could not, by itself, withstand the overwhelmingly corrupting forces of the increasing concentration of wealth and corporate power and the seductiveness of banks, public projects, and selfdealing[401]. The only way to save democracy from a corrupt aristocracy was to counterbalance those forces with organized popular power: mass political parties. Parties could simultaneously concentrate political power for the people and also localize that power to mobilize the "country" against capture of the government by insider "court" parties and juntos. The only way to fight monster banks and monster corporations was with monster democracy: the political party[402]. By 1840, Illinois had a permanent two-party political system built on this ideology of parties as protectors of democracy and constitutional limits on power[403]. Van Burenite Democrats mobilized their party to fight a powerful "Paper Aristocracy" (bank and corporate power and special privileges)[404]. Whigs mobilized their party to fight the "Spoils Aristocracy" (the Democrats' party machines that exploited appointments for patronage)[405].

This development maps directly onto the perceived role of parties in appointing or electing judges. In appointments, Whigs and Democrats came to agree that parties had been a problem in concentrating power and increasing aristocratic self-dealing. But in elections, many believed parties could be a solution by organizing opposition to government abuses. The key to that solution was returning the parties and offices to direct popular control, and moving them away from appointments and special privileges. Most delegates argued not that political parties were intrinsically good, but rather that they were a necessary evil. Professor Stephen Skowronek observed that antebellum America was simply a state of "courts and parties."[406] In the rise of judicial elections, Americans in the Revolutions of 1848 merged courts and parties to harness the power of both in the fight against corrupt and concentrated power.

D. Addressing Other Historical Interpretations

In this section, I assess three interpretations of the rise of judicial elections from the work of Caleb Nelson and Kermit Hall. First, Nelson concludes that the convention delegates sought to "rein in the power" of judges to "act independently of the people.[407]" In other words, one might think that the delegates sought to collapse law into popular politics[408]. Second, Nelson argues that judicial elections were part of a longer-term trend of procedural reforms "curtailing the independent powers of judges themselves," such as increasing the power of the jury[409]. The third interpretation is Hall's contention that moderate lawyer-delegates led the adoption of judicial elections in order to serve their own professional interests[410].

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[401] *See id.* at 35–47.

[402] *See generally* Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* (1957); LEONARD, *supra* note 24; John Joseph Wallis, *The Concept of Systematic Corruption in American History*, *in* CORRUPTION AND REFORM 23 (Edward L. Glaeser & Claudia Goldin eds., 2006).

[403] See generally LEONARD, supra note 24.

[404] *Id.* at 156–61.

[405] *Id.* at 156–57.

[406] Stephen Skowronek, *Building a New American State* 24 (photo. reprint 2003) (1982).

[407] Nelson, *supra* note 14, at 224.

[408] *Id.* at 207, 223–24.

[409] *Id.* at 224.

[410] Hall, *supra* note 14.

1. Separating Law and Politics. – Nelson offers a nuanced account that wisely identifies the delegates' multiple and often conflicting purposes for judicial elections. In contrast to Hall's emphasis on the professional bar's interest in judicial strength and status, Nelson concludes by focusing on a different strand: that the delegates "intended to enlist" judges "in the process of weakening officialdom as a whole," and that they were tethering the courts to "the people.[411]"

This interpretation suggests that the delegates aimed to undermine the separation of law and politics. However, some historians have concluded that the 1840s and 1850s witnessed the opposite: the increasing separation of law and politics[412]. Many convention delegates favored judicial elections not because they would merge law and politics, but because direct elections were better than partisan appointments in separating law from politics and protecting the unique judicial role. Nelson himself notes that both pro-appointment and pro-election delegates differentiated judicial duties from politics[413]. In fact, the pro-election delegates offered substantial arguments that appointments were a greater threat to the rule of law. One of the vocal defenders of judicial elections in New York warned that, while the legislature preferred partisan judges, the voters would never tolerate political judges, stating: [If a judge yields to political interests] instead of holding the scales of justice with an unswerving hand, and administering the law with fidelity, he could not for a moment, have stood the ordeal of a popular election. The great mass of the people are intelligent and virtuous. They appreciate, as fully as this [judiciary] committee does, the vital importance of an intelligent, faithful administration of the law. The honest, conscientious and upright judge will always command their approbation and support, and no other recommendations will atone for a deficiency in these qualifications[414]. He continued on to argue that judicial independence was vital to protecting constitutional rights from politics: [Judicial independence] secur[es] to all – the high and the low – the rich and the poor – protection of their dearest interests – protection of life and those domestic relations dearer than life – protection in the acquisition and enjoyment and transmission of property – guaranteeing equal rights to all ... You may have the best possible code of laws – you may have the most efficient executive department – all will be in vain, liberty will be but another name for licentiousness and anarchy, unless the supremacy of the laws is fearlessly maintained by a faithful and independent judiciary...

The judiciary is the only beneficent power to which the weak and defenceless can look for protection... Holding the shield of the law, it is the avenger of wrong – the only protector of innocence[415]. Wisconsin delegates emphasized that the "confidence of the people" would improve and strengthen the judiciary, and would make it less partisan than patronage

[411] Nelson, *supra* note 14, at 224.

[412] *See* Maxwell Bloomfield, *American Lawyers in a Changing Society*, 1776– 1876, at 136–90 (1976); Maxwell Bloomfield, *Law vs. Politics: The Self Image of the American Bar (1830–1860)*, 12 AM. J. LEGAL HIST. 306 (1968); *see also* Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War*, *in* 2 *Cambridge History of Law in America* 68 (Michael Grossberg & Christopher Tomlins eds., 2008).

[413] *See* Nelson, *supra* note 14, at 212.

[414] New York Report, *supra* note 132, at 645 (remarks of delegate Ira Harris).

[415] *Id.*

appointments had[416]. To the objection that elected judges would shape their decisions to secure their reelection, the delegates replied that elected judges would have more integrity than appointed judges. Voters would never tolerate a feckless, wavering judge: Nothing in this country would sooner seal the political doom of any judge, by all parties and every honest man, than the attempt to bend his decisions from the line of justice to make political capital... He alone can be a popular judge who is honest, impartial, decided, and fearless[417]. In short, the only popular judge was an independent judge above politics, and elections, not appointments, would produce such a judge.

The law periodicals of the time echoed the same view, arguing that the voters would pick "wiser and far better" judges than would legislators with their political "intrigue.[418]" Such a judge would "be a bold man, utterly fearless in the discharge of duty, regardless of any thing but the right, and unmoved by fear, favor, or affection.[419]" The supporters of judicial elections in other conventions echoed the views that judges had a unique and "strict" duty to rise above political pressure, and that voters would elect judges who performed these duties and toss out the ones who caved to politics[420]. These countermajoritarian defenses of judicial duties and judicial review – paradoxically occurring in the context of direct judicial elections – would reemerge in the constitutional decisions of elected judges in the 1850s, the most widespread assertion of these theories in case law.

2. A Trend Toward Limiting Judges and Empowering Juries?

Caleb Nelson concluded that the conventions aimed to "rein in"[421] the courts by placing them in a very different context than the post–fiscal crisis, anti-legislature wave. He locates the adoption of judicial elections among reforms "curtailing the independent powers of judges themselves[422]" and shifting power from judge to jury, both in the conventions and more generally in the nineteenth century[423]. However, there are several problems with emphasizing that context. First, the conventions themselves were not focused on increasing the power of the jury. Nelson is turning to long-term developments that had little to do with these conventions, rather than the more relevant context of the events that prompted these conventions. Second,

[416] The Convention of 1846, *supra* note 199, at 286 (remarks of delegate Charles M. Baker).

[417] *Id.* at 290.

[418] *The Election of Judges*, 3 W.L.J. 423, 423 (1851).

[419] *Id.* at 426.

[420] At the Ohio Convention, for example, a delegate said: I hold, sir, that democracy looks to a pure and disinterested judiciary; that democracy seeks for the sacrifice of no right; that it seeks for the promotion of law and order, and for a proper and consistent state of things; that it asks not for the government of lynch law; that it asks not to make the judiciary subservient to the wishes and caprices of individuals or cliques – all these things I openly disclaim as constituting any part of my democracy; yet I am in favor of the election of judges by the people. [As opposed to the partisan appointment process, elections] will have the effect to ensure the strict performance of their duties as judges; it might have the effect of making them more expert; and attend more promptly to their business; labor harder, and with more diligence and efficiency . . . . If the judges are good men, they will be re-elected, and if they are bad men, or bad judges, they will have served too long if their term be but four years. 1 OHIO REPORT, *supra* note 271, at 691 (remarks of delegate J. McCormick). Kentucky's debates echoed the view that judicial elections would produce a "pure" judiciary, as well as one more powerful in exercising judicial review. KENTUCKY REPORT, *supra* note 239, at 408–09 (remarks of delegate Philip Triplett in reply to delegate Nathan Gaither, *id.* at 404).

[421] Nelson, *supra* note 14, at 207.

[422] *Id.* at 224.

[423] *See id.* at 207–10.

trends matter, but the weakening trend was before these conventions, and largely ended after the Panics. Most of these states had already "rein[ed] in" the judges before the Panics by shortening their terms from good behavior to relatively short terms of years, a more direct way of constraining their independence[424]. In the era after the depression of the 1840s, only five state conventions shortened judicial tenure while they adopted judicial elections[425]. Nelson interprets judicial elections as part of a program to rein in the courts, but the courts had already been reined in, and to extend his horse-riding metaphor, the conventions had the judges switch horses mid-race: from the weaker horse of appointment to the stronger (more legitimate and emboldening) horse of popular election. As noted above, the delegates sought more confident, assertive judges through popular elections. Recall that Michael Hoffman, the Radical who led the reform effort in New York, called for elected judges to engage in "judicial legislation" (that is, judicial lawmaking) and to enforce natural rights as "God himself" has established – a vision of transformative judicial power, not limitation[426]. Third, and most importantly, juries do not seem to have gained power relative to judges in either the conventions or in this period more generally. Nelson emphasizes that juries gained more power as finders of fact[427]. True, legislatures passed procedural rules curtailing judicial comment on the evidence to juries, making trial judges more like "passive moderator[s]" during aspects of a trial[428]. However, this development was more a division of labor than a shift of power. Judges were gaining exclusive control as "finders" of law, as jury nullification receded over this period. Even in questions of fact, state judges increased their power with new procedures for jury instructions and for ruling on the sufficiency of the evidence. Moreover, the law of evidence emerged, giving judges more power to exclude evidence entirely from the jury factfinder.

Judges also gained dramatic new powers to direct verdicts (although a directed verdict was not at the time considered a binding final order) and to order new trials for verdicts "against law" or "against evidence[429]." By the 1830s, judges in many states routinely granted new trials for verdicts against the law, and the power was codified in New York's 1848 Field Code of Civil Procedure[430]. Judges also used interrogatories and special verdicts to guide and control juries[431]. The power to comment simply had shifted into new forms, as bold new judicial powers over juries. Judges were building their power over law, and judicial review was gradually increasing. If anything, the broader developments of nineteenth-century civil procedure confirmed that judges were gaining power

[424] *See supra* section I.A, pp. 1070–75.

[425] *See supra* section I.A, pp. 1070–75.

[426] *See supra* pp. 1089–91. Nelson relies on Hoffman for the proposition that the delegates in the New York convention generally "believed that the judiciary's task was objective, not discretionary." Nelson, *supra* note 14, at 208. However, Hoffman's letters and speeches suggest a very different version of "objectiv[ity]" – one premised on natural law and a judiciary empowered to declare it.

[427] Nelson, *supra* note 14, at 208.

[428] Bloomfield, *supra* note 299, at 306; *see also* Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505 (1996).

[429] Lettow, *supra* note 315, at 508; *see also* Stephen C. Yeazell, Essay, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 641–42.

[430] Lettow, *supra* note 315, at 507–08.

[431] *Id.* at 522, 527–29.

over juries, as well as over other branches of government.

3. A Lawyers' Professional Agenda? – An earlier and somewhat overlooked interpretation of the rise of judicial elections is Kermit Hall's suggestion that it was part of a hidden professional agenda of lawyer-delegates. He explicitly diminishes the role of "radicals," whom he describes as opposing judicial power[432]. Instead, he argues that the key supporters of judicial elections were moderate lawyers with a professional agenda of using popular elections to increase the popularity and status of the bench and bar[433]. Suggesting that a stronger court system chiefly would benefit the legal profession, Hall supports his interpretation primarily by noting that so many of the delegates were lawyers[434]. However, this argument oversimplifies the politics of these lawyer-delegates. New York's convention, the catalyst for this movement, is a good example. True, many of the strongest supporters of judicial elections, such as Michael Hoffman, Alvah Worden, Charles Ruggles, Ambrose Jordan, Ira Harris, and William Wright, were lawyers.

But most of these lawyers were not the kind of "professional" representatives of the established bar that Hall imagined. Only Worden and Ruggles fit this description. Hoffman was perhaps the leading Radical Barnburner in the convention, and he had been a smalltown lawyer-politician, not an elite bar leader[435]. Without the Radical Barnburner Democrats prevailing over the more "professional" Hunker Democrats in the convention, the convention would have ignored proposals for judicial elections. The Radical Barnburners do not fit Hall's "professional agenda" thesis. Moreover, Jordan, Harris, and Wright were Whigs who identified with the radical Anti-Rent uprising[436]. The supporters of the Anti-Rent movement were not Hall's "moderate lawyers," and they had little in common with the bar's professional elite. The delegates who were most identified with the legal profession, such as the Whigs Kirkland and Stow and the Hunker O'Conor, tended to oppose judicial elections. Moreover, as I mentioned earlier, the convention so broadly favored judicial elections that it never needed a roll call vote on the issue.

Of the 128 delegates, only 48 were lawyers[437], and many of those lawyers opposed judicial elections. Nonlawyers thus were essential to the broad consensus. The same dynamic was present in Wisconsin and Illinois, the next two states to adopt judicial elections. Furthermore, the conventions did not enact other items that would have been important to a lawyer's professional agenda. The professional bar had more to gain from a courtroom where lawyers had relatively more power than the judge, because a talented lawyer would be the most important person in the courtroom and would command higher fees[438]. Instead, the conventions sought to make the judge more influential, thereby making lawyers relatively less significant. Above,

[432] Hall, *supra* note 14, at 348.

[433] *Id.* at 343.

[434] *See id.* at 342.

[435] Over 40% of the delegates at New York's state constitutional convention of 1846 were Barnburners. *See supra* p. 1085.

[436] *See* MCCURDY, *supra* note 71, at 157–58, 257, 261, 266; Merkel, *supra* note 127, app. 1, at 2–3, 6.

[437] *See* Merkel, *supra* note 127, app. 1; *see also* NEW YORK DEBATES AND PROCEEDINGS, *supra* note 132, at vii–viii (listing delegates by profession).

[438] *See* Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 202 03 (2000) (discussing lawyers' interest in preventing judicial comment on the evidence during jury trials).

I noted Nelson's argument that juries gained power in the nineteenth century and pointed out that, in fact, judges gained power over juries[439]. The weakened jury might have been support for Hall's elite bar thesis, but the conventions themselves neither attacked nor undermined the jury. The New York convention preserved the jury's existing powers – an unlikely result if it were driven by the bar's agenda – and, moreover, provided a more exclusive power over factfinding. In drafting a new bill of rights for New York, the Committee on the Rights and Privileges of Citizens proposed a jury trial provision that read as follows: "The right of trial by jury in all cases in which it has been heretofore used, shall remain inviolate.[440] "The committee explained that it had added the words "right of" before "trial by jury" to "enlarge the expression.[441]" In final form, the Constitution stated, "The right of trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever. But a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.[442]" Delegates from all four major factions in the convention – Barnburner, Hunker, Whig, and Anti-Rent – spoke in favor of the jury as a vital safeguard against legislative power and corruption. As noted above, the convention did not expand the jury's power, but it also fought off attempts to reduce its power. Barnburners opposed efforts to "give the Legislature absolute and uncontrolled power over trial by jury.[443]"

The legislature, Stow argued, "shall have no right to lessen the people in their representation in the courts of justice," that is, the jury[444]. Whig Alvah Worden advocated for preserving "[t]he trial of questions of fact by twelve men,[445]" or at least not including a clause to allow the legislature to "decrease the number of jurors.[446]" Even a leading Hunker, O'Conor, agreed that it should not be put in the power of the legislature to change the number of men on a jury[447]. Two Whigs argued that the jury was chiefly a check on judicial power – not on the legislature[448]. However, the general sentiment was that the jury could work in tandem with judges to create a court system that would defend the people's rights against abuses of power. Some delegates argued that judicial elections would improve the courts by opening them to lay judges, unless the constitution said otherwise. New York delegates from both populist and conservative factions welcomed this possibility. Charles Ruggles, a conservative Hunker Democrat, supported judicial elections in part because: The presence of a portion of laymen ... may in many cases be useful. It may serve to correct the tendency which is said to exist in the minds of professional men, to be led away by habits of thought, from the just conclusions of natural reason into the track of technical rules, inapplicable to the circumstances of the case and at variance with the nature and principles of our social and political institutions[449].

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[439] *See supra* section III.D.2, pp. 1110–11.

[440] New York Report, *supra* note 132, at 543.

[441] *Id.* at 538 (remarks of delegate James Tallmadge, Chairman of the Committee on the Rights and Privileges of Citizens).

[442] *Id.* at 1054.

[443] *Id.* at 544 (remarks of delegate John Brown).

[444] *Id.* at 547.

[445] *Id.* at 544.

[446] *Id.* at 545.

[447] *See id.*

[448] John Porter argued that the American jury was not primarily intended to protect the individual from the legislature, but rather "to protect the people from the encroachments of the judiciary," which had, in England, powers equal to that of the monarchy. *Id.* Elijah Rhoades agreed that the jury system existed "to interpose a check between the people and the arbitrary power of the Judiciary." *Id.* at 546.

[449] *Id.* at 483.

Other New York delegates and delegates in other conventions embraced lay judges as more aggressive defenders of the people's rights and more able to clean up the bench and bar[450]. Only two conventions, Kentucky's and Maryland's, limited the courts to practicing lawyers and prohibited lay judges[451].

Many of these conventions were filled with anti-lawyer rhetoric, even from lawyer-delegates themselves[452]. New York's, Maryland's, and Indiana's conventions also included constitutional measures that allowed lay people more access to courts and opened up the legal profession to the broader public[453]. Such inclusiveness was not part of the bar's agenda. The New York convention adopted the following: "Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this State[454]." A Hunker supported this language as a way to rid the profession of the corrupt and incompetent by freeing the law market from the bar's limits and giving parties more freedom to choose their own advocates[455]. Other New Yorkers heaped scorn on the bar and argued for reforms that would reduce not only litigation and lawyers' fees, but also the number of lawyers[456].

New York's Convention created a committee for procedural codification, a process meant to simplify the law and to reduce the courts' and the bar's exclusive control over its arcane rules[457]. As discussed above, codification was most decidedly not part of the bar's agenda. Furthermore, the growing number of legal periodicals – the mouthpieces of the legal profession – generally opposed judicial elections throughout this period. The *Western Law Journal*, *American Jurist and Law Magazine*, *Law Reporter*, and *Monthly Law Reporter* all opposed judicial elections[458]. Only the *American Law Journal* supported them, reporting that "some of the members of the Legal Profession[459]" opposed judicial elections because:

The education, habits of thought, and professional practice of lawyers, are calculated to make them ultra

[450] *Id.* at 585–86 (remarks of delegate Ansel Bascom); *id.* at 756–57 (remarks of Levi S. Chatfield).

[451] *See* KY. CONST. of 1850, art. IV, § 8, *reprinted in* 1 POORE, *supra* note 38, at 675; MD. CONST. of 1851, art. IV, § 4, *reprinted in* 1 POORE, *supra* note 38, at 848–49.

[452] *See, e.g.*, *The Constitutional Debates of 1847*, *supra* note 94, at 464 (remarks of delegate Nathan Morse Knapp) (stating that the people have "discover[ed] that it was not necessary to have lawyers on the bench" and suggesting that the "abuse" hurled at lawyers has been "merited"); NEW YORK REPORT, *supra* note 132, at 483 (remarks of delegate Charles Ruggles); *id.* at 586–87 (remarks of delegate Ansel Bascom) (describing the "vicious system and influences" by which the legal profession has been afflicted, *id.* at 586, such that the law became "sometimes the mere engine of craft and oppression," *id.* at 587); *id.* at 756–57 (remarks of delegate Levi S. Chatfield) (favoring lay judges); *id.* at 607–09 (remarks of delegate Conrad Swackhamer) (criticizing lawyers' "false systems, and aristocratic establishments," *id.* at 609).

[453] *See* IND. CONST. of 1851, art. VII, § 21, *reprinted in* 1 POORE, *supra* note 38, at 521; MD. CONST. of 1851, art. IV, § 31, *reprinted in* 1 POORE, *supra* note 38, at 853; N.Y. CONST. of 1846, art. VI, § 8, *reprinted in* 2 POORE, *supra* note 38, at 1359.

[454] N.Y. CONST. of 1846, art. VI, § 8, *reprinted in* 2 POORE, *supra* note 38, at 1359.

[455] NEW YORK REPORT, *supra* note 132, at 780 (remarks of delegate Henry C. Murphy, Hunker).

[456] *Id.* at 581–82 (remarks of delegate William G. Angel); *id.* at 607 (remarks of delegate Enoch Strong).

[457] *See* N.Y. CONST. of 1846, art. I, § 17, *reprinted in* 2 POORE, *supra* note 38, at 1352–53.

[458] *See, e.g.*, *The New Constitution of New York*, *supra* note 144.

[459] *Election of Judges*, *supra* note 277, at 482.

conservative; and it must be confessed that, unless the effects of the studies and practice of their profession be counteracted by other liberal studies, they are in no little danger of becoming bigoted and intolerant in regard to all changes in law and government[460].

The lawyers in these conventions were either very bad at pursuing their professional interests, or their professional interests were not their major concern. The agenda of these delegates – lawyers and nonlawyers – was roughly the public's agenda in the aftermath of a financial crisis. Without recognizing the context of the Panic of 1837, it is difficult to imagine why judicial power and judicial review suddenly became so broadly popular. Judicial elections commanded support from across the professions and the political spectrum because delegates believed that they would promote judicial power, constitutional constraints, and the rule of law.

V. A BOOM IN JUDICIAL REVIEW

A. Elected Judges: From Design to Practice

In the conventions, supporters of judicial elections hoped for a more aggressive and populist judiciary. The first generation of elected judges fulfilled these expectations – or more accurately, half of these expectations. They certainly were aggressive: with an explosion of decisions striking down state statutes, this generation was a turning point in establishing a more widespread practice and acceptance of judicial review in America. However, their legal theories were not reliably "populist." Whereas appointed judges in the early republic relied mainly on majoritarian theory (the defense of the people and their constitutions against the excesses of legislators), elected judges in the late 1840s and early 1850s increasingly turned to counter majoritarian theories (the defense of individual rights against the excesses of majority rule).

This Article offers the results of the most thorough study that has been conducted of state judicial review from the Founding era to the Civil War. The study represents a search of electronic databases for the twenty-four states that joined the Union by 1820, plus California[461]. This comprehensive list builds on a handful of intensive studies of judicial review in the 1780s[462] and of particular

[460] *Id.* at 482–83; *see also Election of Judges*, 9 AM. L.J. 378 (1850).

1116 *HARVARD LAW REVIEW* [Vol. 123:1061 1840s and early 1850s increasingly turned to countermajoritarian theories (the defense of individual rights against the excesses of majority rule). This Article offers the results of the most thorough study that has been conducted of state judicial review from the Founding era to the Civil War. The study represents a search of electronic databases for the twenty-four states that joined the Union by 1820, plus California.

[461] Leigh Peters-Fransen, a remarkable research assistant, and I searched for the words "Constitution," "constitutional," and "unconstitutional" in each state database from 1790 to 1865, and culled through the cases caught in that broad net for successful and unsuccessful constitutional challenges to statutes. I then added these cases to the more focused studies listed *infra* notes 349–51, as well as other cases that appear in various historical sources. *See* Jed Handelsman Shugerman, Economic Crisis and the Rise of Judicial Elections and Judicial Review: Appendices and List of State Judicial Review Cases, 1780–1865 (Jan. 27, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542870.

[462] *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008); KRAMER, *supra* note 36; William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005). For a much more complete list of antebellum federal judicial review precedents that challenges the notion that *Marbury* and *Dred Scott* were the only two examples, see Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257 (2009). For other studies of judicial review in the antebellum era, see DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 19–23, 92 nn.70–74, 93 nn.75–79, 94 nn.80–84 (1989); and William E. Nelson, Commentary, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166 (1972).

states such as New York[463] and Virginia[464], and it shows a modest increase in judicial review in the 1840s, and then an explosion in the 1850s. Details of the results of this study are presented in Appendices B and D[465].

There are other potential explanations for the increasing number of cases striking down statutes, but either the evidence does not support them, or at most, they have some partial effect. First, these numbers do not seem skewed by the uneven reporting of cases. Certainly, the reporting of cases in the early nineteenth century was inconsistent or spotty in a few states[466], but almost all of the states in this era were reporting hundreds of cases per decade[467]. The issue of case reporting does not appear to affect the results of this study. For example, New York's reported cases shrank markedly from the 1830s through the1850s, declining by almost a third (in part because of judicial reorganization). Meanwhile, the number of New York cases voiding statutes skyrocketed. Pennsylvania's and Ohio's reported cases remained steady over that same period, while judicial review increased sharply. Similarly, Tennessee's reported cases remained steady from the 1840s to the 1850s, while judicial review doubled in the 1850s. In Missouri, the number of reported cases increased rapidly over the 1830s, 1840s,and 1850s, but cases voiding statutes first declined in the 1840s and then increased in the 1850s (once the state started electing judges). Indiana's explosion of judicial review in the 1850s (growing from two to thirty-three cases) was accompanied by a doubling of reported cases – a large increase, but not enough to come close to explaining the burst of judicial review. Louisiana and Illinois were similar. Generally, once the number of reported cases reached a certain threshold (perhaps fifty or one hundred), there was enough coverage to capture relatively highprofile challenges to statutes. Any large fluctuations of total reported cases after that point are probably in garden-variety cases and thus should not affect the amount of judicial review. Massive increases in reported cases might affect the number of decisions voiding statutes, but the pattern does not appear in this study.

Second, the increases in judicial review do not appear to be skewed by a sharp increase in the amount of legislation in the 1840s and 1850s. It is true that legislatures generally passed more statutes over the course of the nineteenth century, so there were more and more targets to strike down over time. In New York, the most pivotal state in this study, the increasing rate of legislation did not line up with the rise of judicial review. New York's legislature gradually increased its pace over this era, with a more pronounced increase in the 1850s. However, New York's legislative pace had been stable at about 400 statutes per year from the mid-1830s to the early 1850s, and New York's elected courts began striking down many more statutes in the

[463] *See* Corwin, *supra* note 21.

[464] *See* NELSON, *supra* note 26.

[465] For a chart showing the number of state supreme court cases declaring state laws unconstitutional from 1780–1865, disaggregated by state and by decade, see *infra* Appendix B.1, p. 1147. For a year-by-year bar graph showing the total number of cases striking down state statutes as unconstitutional, see *infra* Appendix C, p. 1149.

[466] New Hampshire did not publish any cases until 1816. Georgia did not have a supreme court until 1845 and did not publish decisions until then. Rhode Island published only one decision in the 1820s, ten in the 1830s, and twenty-six in the 1840s. Ohio did not report cases until the 1820s, but then reported hundreds per decade. *See infra* Appendix B.2, p. 1148.

[467] *See infra* Appendix B.2, p. 1148 (listing numbers of reported cases by state and decade).

early and mid- 1840s[468]. Pennsylvania's legislature had two jumps in the number of statutes passed: one starting in 1844 (when the number of acts jumped from an average of about 200 per year to about 400 per year), and another starting in 1854 (from 400 to 600 per year), which seems to line up generally with Pennsylvania's increase in judicial review. However, the Pennsylvania Supreme Court began its surge in judicial review before those jumps, starting in 1843–1844. Pennsylvania's second boom in judicial review was in the 1860s, after the amount of legislation had been level for several years[469].

Indiana's judicial review at first glance also seems to track the pace of legislative activity. While the number of general statutes was level from the 1830s through the 1860s, the number of "local" statutes increased in the mid-1840s before the Constitution of 1851 effectively ended that type of statute. Indiana's enormous wave of thirty-three decisions voiding statutes immediately followed the sharp rise and sudden fall of local statutes. However, most of the acts struck down in the 1850s were not of the local type, but rather of the general type, which gradually ranged back and forth between 100 and 200 statutes per year from 1840 through 1865. Indiana's burst of judicial review in the 1850s occurred as the number of general statutes had been gradually declining. Moreover, the Indiana Supreme Court continued exercising judicial review long after the disappearance of the "local" statute, striking down general statutes from 1860 to 1865 at the same pace as it had during the 1850s (about three per year)[470]. Similarly, in Ohio, the number of local statutes increased sharply in the 1840s before the convention in 1850 reduced them, but the amount of general legislation remained steady at about 100 general statutes per year. In Ohio's surge of judicial review in the 1850s, the targeted statutes were general acts, and moreover, most of those acts were passed in the 1850s, when overall legislative activity had already dropped sharply and remained level[471]. Tennessee's sharp increase in judicial review in the 1850s came long after a sharp drop in the number of statutes passed in the early 1840s, and occurred when the legislature was consistently passing around 300 acts per year[472]. In the 1850s, the Tennessee Supreme Court was not striking down acts passed during the state's flurry of legislative activity in the 1830s, but rather, during the more stable period of the 1840s and 1850s. From these five states, one can conclude that increasing legislative activity sometimes contributed to the number of statutes struck down, but judicial review increased even when legislative activity was flat or declining.

Third, one might wonder if legislatures were enacting new kinds of legislation in

[468] *See* Jed Shugerman, Legislative Activity: New York, 1790–1865 (Jan. 31, 2010) (unpublished chart, on file with the Harvard Law School Library).

[469] *See* Jed Shugerman, Legislative Activity: Pennsylvania, 1790–1865 (Jan. 31, 2010) (unpublished chart, on file with the Harvard Law School Library).

[470] *See* Jed Shugerman, Legislative Activity: Indiana, 1790–1865 (Jan. 31, 2010) (unpublished chart, on file with the Harvard Law School Library); Jed Shugerman, Overturned Statutes: Indiana, 1840–1865 (Jan. 31, 2010) (unpublished chart, on file with the Harvard Law School Library).

[471] *See* Jed Shugerman, Legislative Activity: Ohio, 1790–1865 (Jan. 31, 2010) (unpublished chart, on file with the Harvard Law School Library); Jed Shugerman, Overturned Statutes: Ohio, 1840–1865 (Jan. 31, 2010) (unpublished chart, on file with the Harvard Law School Library).

[472] *See* Jed Shugerman, Legislative Activity: Tennessee, 1790–1865 (Jan. 31, 2010) (unpublished chart, on file with the Harvard Law School Library).

the 1840s and 1850s, and if that underlying cause was driving the increase in judicial review. In fact, three relatively new types of legislation were appearing: one procedural and two substantive. The procedural innovation was the local or statewide referendum, and the new substantive innovations were married women's property statutes and liquor prohibitions. Nevertheless, only about ten percent of the 1850s judicial review boom is attributable to these new types of statutes. One notable substantive difference in the 1850s was the increase in decisions protecting the judiciary's power and jurisdiction against legislative encroachments. Another was the surge in cases protecting property rights, the obligations of contract, due process, and restrictions on taxing, debt, and legislative process[473]. These themes were consistent with the conventions' goals for the new elected judiciary.

Fourth, the timing and substance of these cases raise a question as to which cause was more responsible for the spread of judicial review: the economic crisis or judicial elections. If one is looking for a simple story that judicial elections caused judicial review, or if one is trying to determine which cause was the most significant, the pattern of judicial review in the 1840s and 1850s does present a problem. Some appointed judges in the 1840s started striking down statutes at an increased rate, before the wave of conventions and judicial elections. After the Panic of 1837, but before New York's 1846 convention, New York's appointed Supreme Court of Judicature and its mostly elected Court for the Correction of Errors both contributed to an early increase in judicial review. Still, New York's explosion of cases followed the 1846 convention. Pennsylvania's appointed judges expanded judicial review in the 1840s, before the state adopted judicial elections in 1850, and Maryland's appointed judges in the 1840s struck down more statutes than its elected judges in the 1850s. Maine and North Carolina stuck with appointing judges in the 1850s, and their appointed judges also started striking down more statutes.

Judicial elections were neither a necessary nor a sufficient cause of judicial review's spread. Historical causation is complex, and factors weave together. The economic crisis produced a deep skepticism of legislative power, which in turn produced (1) a modest increase in judicial review by some appointed judges in the 1840s; (2) new constitutional limits on legislatures in the late 1840s and early 1850s; (3) judicial elections to foster a more independent, more vigilant judiciary to enforce those new limits through judicial review; and (4) a sharp increase in judicial review by elected judges in the 1850s. All four results were closely related. The Panics probably caused the initial bump in judicial review in New York and Pennsylvania in the 1840s, just as the Panics also triggered the conventions, the push for increased separation of powers, and the turn to judicial elections. The subjects of these cases confirm this pattern. New York's appointed judges of the 1840s intervened against legislation principally related to the Panics and internal improvements. Three decisions limited takings and eminent domain[474]

[473] *See infra* Appendix D, p. 1150.

[474] *See* Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843); Trs. of Presbyterian Soc'y v. Auburn & Rochester R.R. Co., 3 Hill 567 (N.Y. Sup. Ct. 1842); Dikeman v. Dikeman, 11 Paige Ch. 484 (N.Y. Ch. 1845).

and other cases involved corporate charters, banking, and debts, which were also hot topics in the aftermath of the Panic of 1837[475].

In New York's surge, takings rulings were most prominent, with a focus on internal improvements, and even the Erie Canal[476]. One of the most important was *Newell v. People ex rel. Phelps*[477], a high profile decision in 1852 enforcing the 1846 constitution's stop-and-tax requirement. The state legislature had authorized $9 million in "canal certificates" to finance the enlarging of the Erie Canal, but the legislature declared that these certificates did not count as debt or liability. The Court of Appeals ruled that the legislature could not circumvent the new constitution's requirement of public approval for additional debt[478]. Issues related loosely to the financial crisis also were grounds for judicial review, such as equal taxation and taxing powers[479], corporate structure[480], and legislative constraints[481]. The cases limiting appointment procedures also continued[482], and were joined by cases protecting judicial independence against salary changes[483]. The Court of Appeals also struck down liquor prohibition laws, and in doing so, established one of the major precedents for substantive due process for property rights, one of the pillars of laissez-faire constitutionalism for almost a century thereafter[484]. Indiana's pattern was even more remarkable. In the 1840s, the Indiana Supreme Court struck down statutes twice. In the 1850s, it did so thirty-three times, and then from 1860 to 1865, another thirteen times. Generally, the substance of these cases was similar to New York's. Five of these cases (or groupings of cases) were rejections of liquor prohibition statutes, in whole or in part[485]. In one case, the court struck down a prohibition statute that had been passed

[475] *See* Commercial Bank of Buffalo v. Sparrow, 2 Denio 97 (N.Y. Sup. Ct. 1846) (banking and legislative procedure); De Bow v. People, 1 Denio 9 (N.Y. Sup. Ct. 1845) (banking law); Purdy v. People, 4 Hill 384 (N.Y. 1842) (city charter); Van Hook v. Whitlock, 26 Wend. 43 (N.Y. 1841) (corporate debt).

[476] Three cases from 1852 struck down laws related to the Erie Canal. Rodman v. Munson, 7 N.Y. 140 (1852) (Erie debts); Newell v. People *ex rel.* Phelps, 7 N.Y. 9 (1852) (Erie takings); People *ex rel.* Olmstead v. Bd. of Supervisors, 12 Barb. 446 (N.Y. Special Term 1852). Other takings or internal improvements cases were *Embury v. Connor*, 3 N.Y. 511 (1850); *Tonawanda Railroad. Co. v. Munger*, 5 Denio 255 (N.Y. Sup. Ct. 1848); *Town of Fishkill v. Fishkill & Beekman Plank Road Co.*, 22 Barb. 634 (N.Y. Special Term 1856); *Hartwell v. Armstrong*, 19 Barb. 166 (N.Y. Special Term 1854); *House v. City of Rochester*, 15 Barb. 517 (N.Y. Gen. Term 1853); and *People ex rel. Fountain v. Board of Supervisors*, 4 Barb. 64 (N.Y. Gen. Term 1848).

[477] 7 N.Y. 9.

[478] *Id.* at 51–52; *see also* Francis Bergan, *The History of the New York Court of Appeals*, 1847–1932, at 51–53 (1985) (discussing *Newell* in more depth and arguing that "the clear holding [of the case is] that the state's credit must not be pledged without popular approval," *id.* at 53); GALIE, *supra* note 82, at 117.

[479] *See, e.g.*, Barto v. Himrod, 8 N.Y. 483 (1853); Bradley v. Baxter, 15 Barb. 122 (N.Y. Gen. Term 1853); People *ex. rel.* Post v. Mayor of Brooklyn, 6 Barb. 209 (N.Y. Special Term 1849).

[480] *See, e.g.*, Conant v. Van Schaick, 24 Barb. 87 (N.Y. Gen. Term 1857); Corning v. Greene, 23 Barb. 33 (N.Y. Gen. Term 1856).

[481] *See, e.g.*, Kinney v. City of Syracuse, 30 Barb. 349 (N.Y. Gen. Term 1859); Thorne v. Cramer, 15 Barb. 112 (N.Y. Gen. Term 1851).

[482] *See, e.g.*, People v. Keeler, 17 N.Y. 370 (1858); People *ex rel.* McSpedon & Baker v. Stout, 23 Barb. 349 (N.Y. Special Term 1856); Griffin v. Griffith, 6 How. Pr. 428 (N.Y. Special Term 1851).

[483] *See, e.g.*, Halstead v. Mayor of N.Y., 3 N.Y. 430 (1850); People *ex rel.* Mitchell v. Haws, 32 Barb. 207 (N.Y. Special Term 1860).

[484] *See* Wynehamer v. People, 13 N.Y. 378 (1856); *see also* People v. Toynbee, 20 Barb. 168 (N.Y. Gen. Term 1855); Wood v. Brooklyn, 14 Barb. 425 (N.Y. Special Term 1852).

[485] State v. Monroe, 11 Ind. 483 (1858); O'Daily v. State, 10 Ind. 572 (1858); Crossinger v. State, 9 Ind. 557 (1857); Herman v. State, 8 Ind. 545 (1855); Aker v. State, 5 Ind. 193 (1854).

as a popular referendum. Referenda, according to these judges who had been recently elected by the people, violated the republican principle of indirect democracy[486] – apparently judicial elections also increased judicial chutzpah.

The Indiana Supreme Court also overturned a defendant's conviction for aiding fugitive slaves by voiding a state criminal statute, citing *Prigg v. Pennsylvania*[487] for the proposition that the federal Fugitive Slave Act preempted state law[488]. This decision was a twist on Robert Cover's hypothesis in *Justice Accused* that judicial elections were a reaction to appointed judges enforcing the Fugitive Slave Act. According to Cover's speculation, anti-slavery forces believed elected judges would reflect local opinion on slavery, and would refuse to enforce the Fugitive Slave Act[489]. As it turns out, there is not much evidence to support this intriguing theory. Still, this decision by the Indiana Supreme Court reflected some kind of conflict between pro-slavery public opinion as reflected in the statute and in the jury's verdict, and anti-slavery public opinion as reflected in the elected judges' striking down the statute and overturning the jury's verdict. Indiana was a divided state on this issue, and it is possible that each institution captured a different aspect of public opinion, just as it is possible that the statute was no longer popular, or that the judges were disregarding public opinion. In any case, the elected judges on the Indiana Supreme Court asserted more power on the issue of fugitive slaves than many of the northern appointed judges in Cover's study who personally opposed slavery but nevertheless enforced the statute as judges.

Ultimately, it is not possible to determine precisely which forces were more significant in causing the phenomenon of judicial review's rise, and it is also not as important as simply identifying judicial elections as one cause among many. If the conventional wisdom is that judicial elections deter judicial review, the 1850s challenge that assumption quite powerfully. But judicial elections did not merely coexist with judicial review. Convention delegates turned to judicial elections in order to accomplish the very thing that happened: more judicial review. Delegates said they wanted to adopt *X*

[486] *Aker*, 5 Ind. at 193–94 (citing Maize v. State, 4 Ind. 342 (1853)).

[487] 41 U.S. (16 Pet.) 539 (1842).

[488] Donnell v. State, 3 Ind. 480, 481 (1852).

[489] Robert M. Cover, *Justice Accused* 144–45 & 144 n.* (1975). Cover states that: A more sophisticated history of th[e] phenomenon [of judicial elections] must be written and must be grounded more closely in the specifics of particular states and times. The fact that in all the histories of this phenomenon mentioned above there is but a single sentence – a casual remark of Miller – that attests the ties between the movement for a more 'responsible' judiciary and antislavery, suggests that further explorations of particular issues and states will yield still more data on the complexity of the movement. ...A starting point for exploring my hunch as to the significance of unmined data for the movement against the independent judiciary would be a monograph on the roots of the New York constitution of 1846... *Id.* at 144 n.*. Cover also mentions in this footnote that his book treats "a couple of instances of interrelation of anti-slavery and judicial independence at some length." *Id.* On the question of the relationship between the anti-slavery movement and judicial elections specifically, Cover discusses one link: Massachusetts anti-slavery forces reacted to Chief Justice Lemuel Shaw's deference to the 1850 Fugitive Slave Act in *In re Sims*, 61 Mass. (7 Cush.) 285 (1851), by pushing for judicial elections, a reform that gathered steam but failed to win. COVER, *supra*, at 177–78. Cover lists a number of judges who deferred to the 1850 Fugitive Slave Act, and whose states adopted judicial elections around that time, including McLean in Ohio and Michigan, Kane in Pennsylvania, Miller in Wisconsin, and Conkling in New York. *Id.* at 178; *see also* BERGAN, *supra* note 365, at 5–6; Perry Miller, *The Life of the Mind in America* 234 (1965) ("[A]bolitionists . . . contended persuasively that judges elected in Northern states would not dare enforce the fugitive slave law.").

(elections) in order to produce *Y* (judicial review). They adopted *X*, and then *Y* happened. This pattern does not mean *X* is the only cause of *Y*, and one should be careful to avoid the fallacy of *post hoc, ergo propter hoc*, or hindsight bias. It is certainly possible that the adoption of elections might have played a different causal role: the expressive force of delegates saying, "We want *Y*" may have played a role in producing *Y*, without the institution of elections playing a mechanical role. Or the delegates saying, "We want *Y*" may have reflected a broader political commitment to *Y*, with that cultural shift in favor of judicial power being the true underlying cause of increased judicial review. Although these explanations are valid, the delegates embraced judicial elections *also* because elections would institutionalize and harness these forces in order to open the door for more judicial review. *X* was designed to produce *Y*. Moreover, as the section below demonstrates, some observers in the 1850s saw the causal link between elections and judicial review[490].

The economic crisis and the rise of judicial review in the 1840s and 1850s is one step in a much bigger story of American law: the transformation from the industrial-interventionist state of the early nineteenth century to the laissez-faire constitutionalism of the late nineteenth century. Professor Morton Horwitz observes that New York courts shifted from pro-growth doctrines to more formalism and laissez-faire in the wake of the Panic of 1837, with eminent domain (and increasing judicial review) being his prime example[491]. Horwitz suggests that the economic downturn led to a fear of legislative redistribution, and indeed, the fear of redistribution may have led some judges to set limits on legislatures. However, one might have expected the politics of recession and populism to cut the other way: the have-nots and the debtors would call for more redistribution and more legislative power. Other depressions in American history (for example, those of the 1820s and the 1930s) followed that course. By contrast, political leaders framed the depression of the 1840s not in class terms, but as a crisis in governance requiring new limits on governmental power[492].

The constitutions of the late 1840s and 1850s, as well as the elected judges of the 1850s, demonstrate that the Panics and the economic crisis of the 1840s had a broader impact on public opinion: building a broader foundation of laissez-faire for "the people." Other historians have interpreted the Jacksonian era as the democratization of free market capitalism[493]. This Article adds to this literature by suggesting that the American Revolutions of 1848 and the elected judges that those revolutions produced were both an effect and a cause of the emerging laissez-faire constitutionalism. In the 1850s, elected judges developed judicial review and substantive due process for property rights, the core weapon and doctrine of the *Lochner* era[494]. The next section discusses one

[490] *See infra* p. 1128.

[491] *See* HORWITZ, *supra* note 22, at 259–61.

[492] One reason for the shift from the pro-debtor, pro-legislation class fight in the 1820s to the middle-class, anti-legislation framing of the 1840s may have been the Bankruptcy Act of 1841, which was passed in the midst of the post-Panic depression. The Act's federalization of many creditor-debtor issues may have meant there was less reason to fight on these terms in the state legislatures, state courts, and state constitutional conventions. *See* BALLEISEN, *supra* note 104, at 101–18. But this theory is only a partial explanation.

[493] *See* HARTZ, *supra* note 16; RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (1948).

[494] *See, e.g.*, Wynehamer v. People, 13 N.Y. 378 (1856).

of the key doctrinal and theoretical shifts toward laissez-faire constitutionalism: from populist judicial review to individualist, countermajoritarian judicial review.

B. Democracy and Counterdemocracy: A Puzzle

According to the historical scholarship on popular constitutionalism, Americans in the Founding era and the early republic accepted judicial review as a majoritarian institution, a means of protecting the people from their government. Judges were supposed to intervene on behalf of the people and their constitutions to impede an overreaching legislature and to give the people a chance to confirm or reject the legislative program with further deliberation in the next election[495]. If the people voted in the same leaders to reinstate the same legislation, then the judges would step aside. In a gross oversimplification of this dynamic, judicial review was good (slowing down the political process and giving the people more chances to deliberate and decide), and judicial supremacy and finality were bad (stopping democracy, or at least slowing it down too much). The appointed judges from the Founding through the 1830s often relied on such majoritarian theories to support their exercise of judicial review[496].

Professor Larry Kramer, the leading historian of popular constitutionalism, cites the adoption of judicial elections as one example of this theory in practice, as a populist movement for judicial accountability[497]. One might expect popularly elected judges to emphasize these majoritarian and populist theories of judicial review more than appointed judges had. And if anything, one might imagine that such recent constitutional conventions, which were called and then ratified by a majority of voters, would strengthen the majoritarian theory that constitutional provisions reflected the people's will more than legislation did. The people voted on the constitutions directly but did not vote directly for statutes, and sometimes the legislation being challenged had been passed before the new constitutions had been ratified. This era should have been the height of majoritarian theory.

Instead, elected judges articulated anti-populist, countermajoritarian theories more often than ever before – a surprising reversal[498]. In the early nineteenth century, judges generally blamed government officials rather than the people as the threat to the people's higher law. Then, in the 1840s and 1850s, state judges began to identify the people and the flaws of majority rule as a threat to higher law. Almost all of these judges were part of the first generation of elected judiciaries, which made this a counter-intuitive turn to countermajoritarianism.

Of course, these nineteenth-century judges did not use the modern terms "majoritarian" or "countermajoritarian," but these modern labels are a helpful shorthand for two formulations: the courts defending the people (and their constitutions) against their agents' abuse of power; and the courts defending individuals and minority communities

[495] *See* KRAMER, *supra* note 36, at 57–72.

[496] *See* Nelson, *supra* note 349, at 1179–80.

[497] KRAMER, *supra* note 36, at 164 ("[Jacksonians] tried instead to make the professional bench and bar more accountable – mainly through a movement to codify law and by the enactment in many states of provisions for an elective judiciary."); *id.* at 200. Kramer notes the "judiciary's general quiescence in constitutional matters for most of [this] period," though he does note a "slight upsurge" in the 1840s and 1850s. *Id.* at 209.

[498] *See* Nelson, *supra* note 349, at 1180–85.

against the majority's abuse of power. It is possible to reconcile these two lines of thought – one could argue, for example, that the "people themselves" had adopted constitutional rules to limit their own majoritarian power. However, the judges themselves did not make this argument explicitly.

The New York courts of the late 1840s and 1850s offered more antimajoritarian arguments than other courts, just as they were striking down more statutes than other courts. The 1846 convention helped lay the foundation for the laissez-faire constitutionalism that ascended after the Civil War. New York's courts dramatically increased their use of judicial review first in the 1840s and 1850s, and even more so thereafter, striking down statutes thirty-four times in the 1860s, fortyfour times in the 1870s, forty-two times in the 1880s, eighty-two times in the 1890s, and seventy times between 1900 and 1905[499]. The doctrine of vested property rights gained power in the wake of the 1846 convention, with the newly elected judges relying on substantive due process to limit the Married Women's Property Act of 1848 and the Anti-Liquor Act of 1855. This doctrine expanded to become the basis of the *Lochner* era.

At first, the elected judges added a minority-protection emphasis on top of their majority-protection theory of judicial review. In a takings case in 1848, a New York court defended judicial review because "excessive legislation is the great legal curse of the age... drawing every thing within its grasp[500]." The court justified judicial review as vindicating not only the will of the people, but also "individual right[s][501]" and "natural right and justice[502]." Over time, New York's elected judges became more critical of democracy itself.

A New York court in 1851 struck down an 1849 statute setting up a referendum on establishing free schools[503]. In doing so, the court rejected direct democracy, stating that it was wrong to think that "no harm can result from allowing the people to exercise, directly, the lawmaking power[504]." Skeptical of the voting public, the court observed that the people often followed "hasty and ill-advised zeal" and "unthinking clamor or partisan importunity[505]," and that the courts' responsibility was to enforce the constitution's protection of "minorities against the caprices, recklessness, or prejudices of majorities[506]." In a similar case two years later, a different judge wrote that judicial review was necessary to protect "that great idea" of the Founding[507] – "liberty regulated by law"[508] – against "the evils ... of a consolidated democracy[509]." One striking aspect of these decisions was the statute in question: it had created direct democracy through referenda for the creation of local schools. These elected judges – elected directly by voters – found that this other form of direct democracy went too far.

[499] Corwin, *supra* note 21, at 306–13.

[500] People *ex rel.* Fountain v. Bd. of Supervisors, 4 Barb. 64, 72 (N.Y. Gen. Term 1848) (emphasis omitted). The author of *Fountain* was Judge Seward Barculo. Barculo was appointed by Democratic Governor Silas Wright. *See* 2 R.H. GILLET, *The Life and Times of Silas Wright* 1820 (Albany, Argus Co. 1874).

[501] *Fountain*, 4 Barb. at 72.

[502] *Id.* at 73.

[503] *See* Thorne v. Cramer, 15 Barb. 112 (N.Y. Gen. Term 1851). Judge Barculo was also the author of *Thorne*.

[504] *Id.* at 117.

[505] *Id.* at 118.

[506] *Id.* at 119.

[507] Bradley v. Baxter, 15 Barb. 122, 126 (N.Y. Gen. Term 1853). The author of *Bradley* was Judge Daniel Pratt, a Democrat. *See New York State Government* – 1853, WKLY. HERALD, Jan. 1, 1853, at 3.

[508] *Bradley*, 15 Barb. at 126 (emphasis omitted).

[509] *Id.*

In *Wynehamer v. People*[510] in 1856, the New York Court of Appeals struck down a liquor prohibition act on the innovative grounds of substantive due process, a decision sometimes cited as a forerunner to the substantive due process right to property in *Dred Scott* and *Lochner*. The *Wynehamer* Court was divided five votes to three, with three concurring opinions and two dissents. Judge George Franklin Comstock, a conservative Whig (and later an anti-Lincoln Democrat) wrote the lead opinion, even though he was the most junior of all the full-time judges[511]. He justified judicial review in 1856 on the grounds that legislation is sometimes the result of mistaken "theories of public good or public necessity [that] command popular majorities[512]" and that the judiciary must protect the "vital principles" of "free republican governments" against popular abuses[513]. The concurring judges focused on the procedural right to a jury trial, and Comstock was the only judge to offer a substantive due process right to property.

New York was not alone. Many other states in the 1850s shifted to this argument. Most, like New York, had adopted judicial elections recently. Chief Justice John Bannister Gibson, who had been a prominent critic of judicial review on the Pennsylvania Supreme Court, backed away from this position in the mid-1840s[514]. Then in 1850, on the eve of the state's first judicial elections and his own election back to the Supreme Court, he expanded on judicial review[515]. In a civil case where the legislature had set aside a jury verdict and ordered a new trial, he ruled that this intervention overstepped the legislature's bounds[516]. Moreover, he offered a general critique of democratic elections: legislatures would sometimes pander to majorities, resulting in "the sacrifice of individual right[s]" because rights were "too remotely connected with the objects and contests of the masses to attract their attention." The courts thus could not rely on the people to protect individual rights because even if the people cared about those rights in a general sense, Chief Justice Gibson doubted whether they would notice the breach of those rights and do anything in response.

One year later, the first elected Pennsylvania Supreme Court (including former Chief Justice Gibson, now only Justice Gibson)[517] further developed this countermajoritarian theory of judicial review. The court invalidated the legislature's order to a private party to sell property because of the heirs' vested property rights[518]. It observed that if

[510] 13 N.Y. 378 (1856).

[511] Comstock was nominated by the Whigs for the Court of Appeals in 1855. Thomas M. Kernan, *George Franklin Comstock*, in *The Judges of the New York Court of Appeals* 57, 58 (Albert M. Rosenblatt ed., 2007). Later he became a Democrat. *Id.* at 59. He served only one term because when he ran for reelection in 1861, the Republicans swept the Democrats from office on the eve of the Civil War. *Id.*; s*ee also The Public Service of The State of New York*, 1880–1882, *available at* http://www.courts.state.ny.us/history/pdf/Library/Juidges/Chadbourne.pdf.

[512] *Wynehamer*, 13 N.Y. at 387.

[513] *Id.* at 390.

[514] Chief Justice Gibson appeared to acknowledge the validity of judicial review in *Norris v. Clymer*, 2 Pa. 277 (1845), in which he voted to uphold the constitutionality of a Pennsylvania statute. *Id.* at 284–85.

[515] *See* De Chastellux v. Fairfield, 15 Pa. 18 (1850).

[516] *Id.* at 20.

[517] *See* 2 Frank M. Eastman, *Courts and Lawyers of Pennsylvania* 444–45 (1922).

[518] *See* Ervine's Appeal, 16 Pa. 256 (1851). Justice Richard Coulter, a Whig, *see* 2 EASTMAN, *supra* note 405, at 460, wrote this opinion. Justice Coulter had earlier served four terms in the U.S. House of Representatives, from 1827 to 1835, as a "Jacksonian." Biographical Directory of The U.S. Congress 1774–1989, at 832 (1989). In 1851, he ran for the state supreme court as a Whig, but also won support in the Democratic convention – a unique case of bipartisan support for a judicial candidate. 1 John N. Boucher, *History of Westmoreland County Pennsylvania* 347 (1906).

statutes "are enacted, which bear... on the whole community... [and] are unjust and against the spirit of the constitution, [the community will] procure their repeal... And that is the great security for just and fair legislation[519]." The people can control the legislature, but the same is not true for individuals targeted by the majority:

But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the courts, the only secure place for determining conflicting rights by due course of law. But if the judiciary give way, and ... confesses itself "too weak to stand against the antagonism of the legislature and the bar," one independent coordinate branch of the government will become the subservient handmaid of another, and a quiet, insidious revolution effected in the administration of the government, whilst its form on paper remains the same[520].

The answer was for courts to set aside judicial review for "the people" in favor of judicial review for individual rights that will not mobilize the people in their defense. In 1848, the Pennsylvania Supreme Court had admitted it had been "too weak[521]," but in the 1850s, it was making up for lost time by asserting its strength. From elected judges with limited terms, such aggressive defenses of individuals against the people were risky – but judges apparently were feeling much stronger once they were elected. In 1855, two years after Justice Gibson's death, his friend and biographer attributed the sudden rise in judicial review to the rise of judicial elections:

The tendency of the legislative branch (I had almost said *rod*,) is to swallow up both the others. Against its aggressions, the judiciary is our main reliance. Before it became elective, a case occasionally occurred of its succumbing to those who were supposed to represent more nearly the wishes of the people, but that danger is now past, for the Courts are quite as near the people as the legislators themselves[522].

According to Justice Gibson's friend, then, appointed judges were cowed by the democratic legitimacy of legislators, but elections gave judges more courage to assert their power on behalf of "the people." One Ohio decision in 1855 demonstrated this shift in striking down a tax statute that gave special privileges and deductions to particular individuals and corporations[523]. The opinion started with the familiar principle that the three branches are each "servants of the people," but then emphasized that judicial review was more important in protecting individuals from the people:

I do not admit that, in this respect, a whole community should be more favored than the most helpless individual member... It is a trite saying, that eternal vigilance is the price of liberty; and so it is of a good government, and of freedom from oppression. A single individual, however vigilant, may sometimes suffer unjustly at the hands of a community. But communities rarely, if ever, suffer any injustice at the hands of those vested with authority, which cannot be traced to their own want of vigilance. Those who will not

[519] *Ervine's Appeal*, 16 Pa. at 268.

[520] *Id.* (quoting Greenough v. Greenough, 11 Pa. 489 (1849)).

[521] *Greenough*, 11 Pa. at 495.

[522] William A. Porter, *An Essay on the Life, Character and Writings of John B. Gibson* 102 (Phila., T. & J.W. Johnson 1855).

[523] *See* Cincinnati Gas Light & Coke Co. v. Bowman, 12 Ohio Dec. Reprint 147 (Super. Ct. Cincinnati 1855).

take that part in governing themselves, to which they are entitled under the constitution and laws, and will not exert, in this respect, that weight and influence which they may justly claim, must not be surprised if others take the trouble to govern them, and do not, at all times, do so in a satisfactory manner. But the remedy for any such oppression is not, and should not be, to ask a departure, on the part of a judge, from the strict line of duty, but rather a resort to that vigilance which has been neglected. A community thus suffering under oppression cannot apply to any Hercules for help, for it is with the people alone, under our system of government, that any such Herculean power resides. It is with them to make or unmake constitutions, laws, and officers[524].

The people have the power to fight against government abuse, and if they suffer such abuse, it is their own fault for being complacent. Their remedy is the next election, not litigation. By contrast, individuals are powerless against the tyranny of the majority, and have only litigation as a remedy. Thus, courts have a countermajoritarian duty – and perhaps *no majoritarian duty*. This change would have been remarkable in any era, but it was particularly so in the context of the recent democratization of these courts.

An Indiana judge, concurring in striking down a liquor prohibition statute in 1855, worried that popular "[i]nterest or passion, or perhaps other dubious influences, often mould legislation," and that some laws were the result simply of "the fluctuating fever of the hour[525]." This judge had recently served in the Indiana legislature, so he had firsthand experience with the interests, passions, and dubious influences there. If the people were "smarting under losses from depreciated bank paper, a feeling might be aroused... [to] return a majority to the

legislature which would declare all banks a nuisance, [and] confiscate their paper and the buildings from which it issued[526]." Based on the experience of the Panics of 1837 and 1839, this example was not farfetched. The concurring judge acknowledged that judicial review in these cases "looks like assuming to protect the people against themselves[527]." But apparently the courts' role was to do just that.

Slavery also entered into these cases. The Indiana Supreme Court, citing *Prigg v. Pennsylvania* and federal preemption, struck down a state statute that had imposed criminal sanctions on those who assisted fugitive slaves[528]. This decision was an opaque three or four sentences, offering no deeper insight into the issues, but perhaps these judges had a new perspective on other interests, passions, and dubious influences that might have led to such a statute, even if the statute reflected the voters' preferences. Sometimes slavery was the imagery in the court's decision. In dissent, a Michigan Supreme Court justice voted to strike down a liquor prohibition statute, warning against allowing individuals to become "abject slaves to the majority[529]."

A judge on the Ohio Supreme Court on the eve of judicial elections in his state condemned local referenda on "internal

[524] *Id.* at 157–58. The author, Judge William Yates Gholson, was a Republican. 1 *History of The Republican Party in Ohio* 97–98 (Joseph P. Smith ed., Chi., Lewis Publ'g Co. 1898). He had lived in Mississippi but inclined more and more towards abolitionism. As a result, he moved to Ohio and became an early member of the Republican Party. *See id.* at 97.

[525] Beebe v. State, 6 Ind. 501, 527 (1855) (Stuart, J., concurring).

[526] *Id.* at 521 (majority opinion).

[527] *Id.* at 527 (Stuart, J., concurring).

[528] Donnell v. State, 3 Ind. 480 (1852).

[529] People v. Gallagher, 4 Mich. 244, 267 (1856) (Pratt, P.J., dissenting).

improvement piracy[530]" and takings. He worried that, "if the rights of *minorities* are not observed, it will not be long before the *majorities* will be in bondage. I look upon this thing of taking private property, or subjecting it to unusual burdens without the consent of the owner, as a great stride toward despotic power[531]." The Ohio judge was anti-slavery, so it is not surprising that he would draw on slavery to critique democratic abuses in the 1850s[532]. However, the Michigan judge was a Democrat who hated abolitionism[533]. But party affiliation does not seem to track these new critics of democracy. The judges were a relatively even mix of Democrats, Whigs, and Republicans, and of pro-slavery and antislavery.

There are almost no examples of countermajoritarian justifications from states retaining appointive judiciaries, and few examples from before 1850[534]. One exception was a Delaware court in 1847 explaining the separation of powers in these terms: "These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority[535]." This court was confronting two legal issues that triggered some of the countermajoritarian arguments in the 1850s in elective states: (1) local referenda and (2) liquor prohibition.

Just as there were more judicial review cases from the mid-Atlantic and Midwestern states, there were also more countermajoritarian theories offered from those regions than from New England or the South. Some southern courts were more active in the 1840s and 1850s. The elected courts of Louisiana, Tennessee, and Missouri, in particular, struck down statutes thirteen, fourteen, and nine times, respectively, in the 1850s[536]. The appointed courts of North Carolina and Georgia also struck down statutes relatively often[537]. However, some southern courts asserted judicial review less often (for example, Maryland and Kentucky)[538]. When they did offer a theory for judicial review, they adhered to the traditional justification of defending the people and their constitution against legislative encroachment[539]. I have found

[530] Griffith v. Comm'rs of Crawford County, 20 Ohio 609, 623 (1851).

[531] *Id.*

[532] William B. Neff, *Bench and Bar of Northern Ohio* 60 (1921). The judge was Rufus Paine Spalding, who had been appointed to the court. Ohio judicial elections were held a few months later, and Judge Spalding was not elected. *Id.* (noting that the judge later became a Republican congressman).

[533] *11 Historical Collections Made by The Michigan Pioneer and Historical Society* 278–80 (Lansing, Mich., Thorp & Godfrey 1888).

[534] There are three cases from southern states in the 1830s. *See* Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 61 (1836); Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554, 557 (1831); Goddin v. Crump, 35 Va. (8 Leigh) 120, 151 (1837).

[535] Rice v. Foster, 4 Del. (4 Harr.) 479, 487 (1847). Delaware had been a slave state, but by the 1850s it was more of a border state.

[536] *See* Shugerman, *supra* note 348.

[537] *See id.*

[538] *See id.*

[539] *See* Sadler v. Langham, 34 Ala. 311, 321 (1859); State v. Moss, 47 N.C. (2 Jones) 66, 68 (1854); *see also* Wiley v. Parmer, 14 Ala. 627, 630–31 (1848). A more mixed case is *Hamilton v. St. Louis County Court*, 15 Mo. 3 (1851), which upheld a statute but offered a defense of judicial review. Judge Gamble generally focused on the legislature's failings, but also noted that a law can be "oppressive in its operation on one class of citizens." *Id.* at 23. Still, the focus of the opinion was on the abuses of the legislature; it did not express doubts about the judgment of the public. One possible exception to majoritarian reasoning is the Arkansas Supreme Court explaining in 1853 that, even though the state constitution had no clause requiring just compensation for lands taken for public use, such a requirement must be implied. The court explained that just compensation was necessary for protecting "the minority against the majority." *Ex parte* Martin, 13 Ark. 198, 207 (1853).

no explicit critiques of democracy in the southern states between 1850 and 1860.

One explanation for the rise of judicial review and countermajoritarian theory may be an extension of abolitionism. Legal historian William Nelson suggests that abolitionism led some jurists to turn to natural rights and fundamental principles, but this "style of judicial reasoning[540]" lost out to pro-slavery and instrumental reasoning in the 1840s and 1850s[541]. Nelson argues that anti-slavery ideology prevailed after the Civil War as formalism.430 My research suggests the possibility that anti-slavery ideology emerged in a few pre–Civil War cases of countermajoritarian critiques, and it is also possible that judicial elections may have increased the influence of abolitionist politics.

The notion that abolitionism was a factor in the rise of judicial review and countermajoritarian theory is bolstered by geography, but also undermined by geography. On the one hand, southern courts were mixed on judicial review, and they did not generate critiques of democracy. On the other hand, New England, the bastion of antislavery thought, accounted for little of the judicial review in the antebellum era. It is perhaps no coincidence that New England's judges were appointed and also struck down few statutes. One might expect New England abolitionists to have produced some countermajoritarian arguments, but I have found none. When their courts did strike down statutes, they offered the traditional majoritarian theory as a justification[542]. The absence of judicial review and countermajoritarian theory in New England is surprising, considering that the Whigs (and their forerunners, the Federalists) had been the proponents of judicial review, stronger courts, and property rights, as well as skeptics of democracy. Thus, anti-slavery ideology seems to be a weak explanation for the expansion of judicial review and countermajoritarianism.

Notably, state judges around the country generally used their new power not as much for the most important purpose of "the American revolutions of 1848" (fiscal restraint on legislative spending) as for a secondary purpose that lined up more with their own institutional selfinterest: the protection and expansion of judicial power against legislative encroachment. While this result is consistent with some of the original purposes of the state conventions, the judges emphasized judicial departmental power above and beyond the more central purposes of these conventions, such as fiscal restraint[543]. Popular constitutionalists may have created judicial elections, but elected judges developed anti-popular constitutionalism, along with judicial independence and

judicial finality.

C. Explanations for the Role of Judicial Elections in the Rise of Countermajoritarian Theory

Did the adoption of judicial elections contribute to the rise of countermajoritarian theories in the late 1840s and 1850s? Again, the patterns are suggestive, but they do not establish a direct link. But then why did many of these judges explain their practice of judicial

[540] William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 514 (1974).

[541] *See id.* at 528–29, 538–39.

[542] *See, e.g.*, Jones v. Robbins, 74 Mass. (8 Gray) 329, 338–41 (1857); *see also* Opinion of the Judges of the Supreme Court, 30 Conn. 591, 593–94 (1862).

[543] For more information on the subject matter of cases over these decades, see *infra* Appendix D, p. 1150.

review as defending individuals or smaller communities against the feckless people and the evils of democracy?

1. Judicial Elections and Faction. – "Things fall apart; the centre cannot hold[544]." One political factor helps explain both the increase in judicial review and the increase in countermajoritarianism: the practice of judicial campaigns in this era. Judicial candidates fought harder for party nominations, with more competition among factions within the party, and they did not compete directly for the general elections. This campaign dynamic exacerbated the political climate of the 1850s, pushing judges from the center out to the edges of the political spectrum. Judicial elections emphasized local districts and factions, rather than statewide public opinion and the "median voter." From the remaining records, it is even difficult to figure out many judges' party affiliations. Nevertheless, from some fragments we can reconstruct a grainy picture of party politics in judicial elections in the midnineteenth century.

The appointment process, for better and for worse, had been a centralizing force rewarding party cohesion. The party in power reinforced its strength and identity by building a machine through patronage. Of course, the elected officials also used appointments to reach out to smaller communities and constituencies, but convention delegates complained of cronyism in judicial appointments more than of special interests. Likewise, commentators argued that judicial appointments had been based on service to the party or other partisan interests[545]. But democratic reformers undermined patronage by making more and more offices popularly elected. Professor Michael Holt observes: "The power to select officials had often provided glue to majority parties in state legislatures, helping to neutralize any tendencies toward factionalism on substantive issues. With patronage powers gone, such restraints on internal fragmentation disappeared[546]." Holt quotes an unnamed observer blaming the disarray of the Ohio Democrats in 1852 on the recent constitutional reforms, which "ha[d] broken up their principle of cohesion to any central organization[547]."

This fragmentation of offices is emblematic of the larger political fragmentation in the 1850s. The founders of the second party system had sought to keep slavery out of American politics as long as possible, but by the early 1850s, it was no longer possible. Even though some had thought the Compromise of 1850 had saved the Union, this optimism was quickly squelched. Holt describes the 1850s as a decade-long collapse of the national political order and of most state political orders, leading to total "disintegration[548]" and "apathy, abstention, and alienation[549]." Most fundamentally, he finds that Americans of all regions and affiliations were disillusioned with their leaders, the party system, and their government. They felt betrayed and became pessimistic about the republic's survival.

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[544] W.B. YEATS, *The Second Coming*, *in* MICHAEL ROBARTES AND THE DANCER 146, 165 (Thomas Parkinson & Anne Branne eds., Cornell Univ. Press 1994) (1920).

[545] *See, e.g.*, *The Constitutional Convention*, *supra* note 251; *Constitutional Reform*, NEW CONST., Aug. 11, 1849, *reprinted in* MEDARY, *supra* note 245, at 225, 236, 238 (reprinting an article from the *Louisville Chronicle*); *Reasons Why the People Should Vote for a Convention To Amend the Constitution of Ohio*, NEW CONST., Sept. 15, 1849, *reprinted in* MEDARY, *supra* note 245, at 305, 316 (reprinting an article from the *Cadiz Sentinel*).

[546] *See id.* at 132–34.

[547] Michael F. Holt, *The Political Crisis of The 1850s*, at 107 (1978).

[548] *Id.* at 103 (internal quotation marks omitted).

[549] *Id.*

The practice of judicial campaigns magnified these forces by adding more centrifugal force and less cohesion. In an appointed system with competitive parties, judges had to consider, among other factors, whether they would be reappointed by a governor of the same party or possibly a governor of the other party, or perhaps a legislature of their party or the opposing party. On the one hand, the politics of reappointment in a climate of uncertainty pulled judges toward the center, even if those same forces sometimes pulled away from the center, too. On the other hand, judicial elections pulled more consistently away from the center. Even though the parties were less stable, they were still the vehicle for getting elected. The problem was that the factions and interests within the parties were increasingly powerful. The newspaper accounts of judicial elections in the 1850s and later in the nineteenth century reveal a consistent pattern of judicial candidates competing actively for party nominations, relying on the support of a faction, a region, a smaller constituency, or a special interest within the party. Judges then did little to compete for votes in the general election except for praying that their party machine was better at turning out its coalition of voters than was the other side's machine. This political dynamic helps explain the increase of judicial review and the rise of countermajoritarian theory to justify these politics.

In New York's first judicial elections in 1847, the Democrats split bitterly into separate factional county conventions: one conservative Hunker convention and one radical Barnburner convention. The Hunkers denounced the Barnburners' attempts to "produce alienation and division in the democratic ranks[550]." The factional infighting spread throughout the state, and their separate newspapers attacked each other daily[551]. After being out of power in the constitutional convention, the Hunkers returned to their strength as party insiders in the state Democratic nominating convention, converting their power over appointments into power over party nominations. To the consternation of the Barnburners, the Hunkers pushed through the nominations of four Hunkers for the four Court of Appeals positions, in part because the Hunker candidates had more judicial experience, and in part because Hunkers continued to control the party machinery. After the convention, the frustrated Barnburners divided the party by running their own candidates for the general election in many races[552]. Voter turnout for the judicial elections was relatively low[553], and the Hunkers swept the four statewide seats, taking advantage of the most consistent and reliable party machine[554].

The New York newspapers of the 1850s similarly offered stories about the factions' bargaining over judges in the state conventions, with judges who represented different interests and regions jockeying for the party's nomination[555]. In the general election, however, the newspapers would only print

[550] *To the Democracy of Albany County and the State*, DAILY ALB. ARGUS, May 1, 1847.

[551] *See, e.g.*, DAILY ALB. ARGUS, May 25, 1846.

[552] *See* SHUGERMAN, *supra* note 35 (manuscript at 259).

[553] *See id.* (manuscript at 260).

[554] *Judicial Election*, DAILY ALB. ARGUS, June 8, 1847.

[555] *See, e.g.*, ALB. EVENING J., June 8, 1847; *id.* June 5, 1847; *id.* June 3, 1847; *id.* June 2, 1847; *id.* May 20, 1847; *id* Apr. 29, 1847; DAILY ALB. ARGUS, June 8, 1847; *id.* June 7, 1847; *id.* June 5, 1847; *id.* May 25, 1847; *id.* May 22, 1847; *id.* May 12, 1847; *id.* May 4, 1847; *id.* May 1, 1847; N.Y. HERALD, May 23, 1847; *id.* May 22, 1847.

the party ticket, with no news about the judges campaigning publicly, no editorials, and no open letters to the public. The Pennsylvania newspapers in the 1850s and the late nineteenth century displayed the same pattern, including some intense factional fighting for party nominations, but no campaigning by judges in the general elections[556]. The veteran of the Pennsylvania Supreme Court, John Bannister Gibson, won his nomination in 1851 by only two votes in the party convention, despite being one of the most wellrespected judges in the nation. He had not been a party insider and had no political base in a faction of the party, and therefore he faced a difficult challenge in the new era of judicial elections. He reported afterwards that he did nothing to campaign for the general election. He simply rode the party machine to victory[557]. Judge Joseph R. Swan was not as lucky. He was a well-respected judge on the Ohio Supreme Court who expected an easy reelection in 1859. However, because he had enforced the Fugitive Slave Law, the Ohio Republican Party refused to renominate him[558]. The reelection campaigns of these two similarly established judges demonstrate the determinate nature of party support in the judicial elections of the mid-1800s.

Judges in the mid-Atlantic, the Midwest, and some border states drove the boom of judicial review in the 1850s. Many of these states had become more ethnically and religiously diverse, and their parties also became more diverse – the Democratic Party, in particular[559]. Some judges' renominations and reelections may have depended upon defending the rights of a powerful minority community or interest group. An example is Judge Albert Cardozo, Benjamin Cardozo's father. In 1866, Albert Cardozo sat on the Court of Common Pleas and ruled that a "blue law" limiting the sale of liquor was unconstitutional[560]. In a personal letter defending his decision, Albert Cardozo wrote:

I have announced the law, as I believe it to be and while I do not doubt that any other conclusion would have been my political death, I know my own firmness sufficiently to assert that if I had had different convictions of the law, I should have boldly declared them[561].

He added, "The liquor law and the judges who had upheld it, will assuredly ultimately meet the condemnation which they deserve at the hands of the people, to who[m] I shall also make an appeal in due time[562]." Albert Cardozo's constituency of German and Irish voters in his urban judicial district were strongly opposed to the statute[563]. In a later case, however, the General Term of the New York Supreme Court and then the Court of Appeals upheld the statute[564].

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[556] *See* Jed Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. (forthcoming 2010) (manuscript at 39, on file with the Harvard Law School Library).

[557] *See* Thomas P. Roberts, *Memoirs of John Bannister Gibson* 134–37 (Pittsburgh, Jos. Eichbaum & Co. 1890).

[558] David K. Watson & Moses M. Granger, *The Judiciary of Ohio*, in 5 *History of Ohio* 85, 135–36 (Emilius O. Randall & Daniel J. Ryan eds., 1912).

[559] BENSON, *supra* note 33, at 144, 165, 342–43.

[560] Andrew L. Kaufman, *The First Judge Cardozo: Albert, Father of Benjamin*, 11 J.L. & RELIGION 271, 283–84 (1994).

[561] *Id.* at 285 (emphasis omitted) (quoting Letter from Albert Cardozo to John R. Brady (July 26, 1866) (on file with the New York Public Library)) (internal quotation marks omitted).

[562] *Id.* (alteration in original) (footnote omitted) (quoting Letter from Albert Cardozo, *supra* note 451) (internal quotation mark omitted).

[563] *See id.* at 284.

[564] *See id.* at 286.

Nevertheless, the episode illustrates that when judges in lower courts run for election in smaller districts, a majority-minority population (such as the Irish and German constituents in Albert Cardozo's district) can influence a judge in consideration of his "convictions" and lead him to adopt the legal theory that a judge should defend a local community against a statewide majority.

The "countermajoritarian" judges of the 1850s also reflect some of this period's politics of fragmentation. George Comstock, one of the judges to warn against "popular majorities" in striking down a New York prohibition law, questioned the reliability of American democracy on several grounds[565]. He was a conservative Whig who was skeptical about another democratic institution, the jury[566], and he later embraced in earlier New York jurist who was a skeptic of democracy, Chancellor James Kent[567]. The factionalizing of American politics also contributed to Comstock's questioning of majoritarian democracy. By the time he ran for office in 1855, the Whigs were collapsing into factions, and the American Party (the anti-immigrant Know Nothings) had been rising to replace the Whigs. Comstock won the nominations of the "Silver Grays" (the faction of conservative Whigs) and the American Party, and he prevailed over a split multi-candidate field[568]. As parties were splitting into battling factions, some judges unsurprisingly saw that the center could not hold. They were losing faith in the mechanics of democracy and the claims of popular majorities.

Other factors seemed to shape Comstock's doubts about popular majorities. Once the Whig Party and American Party folded and the Republican Party emerged, Comstock embraced the Democrats[569]. He was still an ardent Unionist and opposed southern secession, but he also strongly condemned abolitionists, the Republican Party, and Abraham Lincoln. He lost his reelection campaign during a Republican sweep of the state in 1861. During the war, he wrote:

The Federal Government has no more right to invade one section of the Union for a purpose outside of the Constitution, no more right to propagate by force of arms in one State the theories, sentiments and opinions of other States, than it has to invade the Kingdom of Brazil to abolish slavery, or the Turkish Empire to abolish polygamy[570].

Comstock adhered to states' rights and limited federal power: "[U]nder the Constitution of the United States there is no shadow of right, in peace or war, by its laws or its military power, to spread or to propagate the opinions or sentiments of any class or section, upon social and moral questions[571]." Comstock had several reasons to voice his concerns about popular majorities in the 1850s, but among them was a growing commitment to states' rights in the political crisis of the 1850s.

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[565] For more on Comstock, see Kernan, *supra* note 398, at 57–61.

[566] *See id.* at 58–59.

[567] In 1865, Chancellor James Kent's heirs turned to Comstock to edit a new edition of Kent's Commentaries on American Law. Comstock praised Kent and his "accurate and consummate learning" in the preface. George F. Comstock, *Preface to the Eleventh Edition* of 1 James Kent, *Commentaries on American Law*, at iii, iii–iv (George F. Comstock ed., Boston, Little, Brown & Co. 1867).

[568] Kernan, *supra* note 398, at 58.

[569] *Id.* at 58–59.

[570] GEORGE FRANKLIN COMSTOCK, LET US REASON TOGETHER (1864), *reprinted in* 2 UNION PAMPHLETS OF THE CIVIL WAR 873, 876 (Frank Freidel ed., 1967). 4

[571] *Id.* at 879 (emphases omitted).

Critics of democracy could be found in every party and faction in the 1850s. Democrats and Republicans joined Comstock and other Whigs in worrying about the dangers of popular majorities. William Yates Gholson, an Ohio judge, was born in Virginia and practiced law in Mississippi, and then left the South because of his anti-slavery views. After joining the Ohio Republican Party, he was elected to the superior court in 1854, and then to the state supreme court in 1859[572]. His son volunteered for the Union army and died in battle[573]. Judge Spalding, who had used images of slavery to criticize democratic excess, also joined the Republican Party early on[574]. From the opposite vantage point of Comstock's, Republicans in the mid-1850s had their own reasons to raise questions about popular majorities.

During these years, pro-slavery forces were pushing for popular sovereignty in Western states and territories. In 1854, the Kansas-Nebraska Act marked a major step toward popular voting on slavery's status in the west, followed by a period known as Bloody Kansas. Meanwhile, pro-slavery forces were winning elections[575]. It is possible that northern judges observed these developments, began to distance themselves from "popular sovereignty" rhetoric, and became less enamored with public opinion and voters. Of course, it was also becoming clear that a national popular majority would be the strongest weapon

for the Republicans against southern state majorities. Still, abolition would propel them to see a judge's role in protecting individual rights.

2. Judicial Elections and Districts. – Judicial elections also contributed to fragmentation by creating local judicial districts. Before judicial elections, judges were appointed on a statewide basis, so they were more likely to line up with the composition of the legislature, and they had more incentive to stay in the good graces of the governor and statewide politicians in order to win reappointment[576]. In the era of judicial elections, many judges ran for seats by district, shifting the base of support from statewide majoritarian opinion to local constituencies. In the wave of judicial elections, more than half of the states followed Mississippi and New York by basing all or some of their high court judges in geographic districts. Seven created judicial districts for their supreme courts: New York in 1846[577], Illinois in 1848[578], Kentucky in 1849[579], Michigan and[580] Virginia[581] in 1850, and Maryland[582] and Indiana[583] in 1851.

Districting alone cannot explain much of the increase in judicial review. The alignment of districts could not have been sufficiently different from statewide

[572] 1 HISTORY OF THE REPUBLICAN PARTY IN OHIO, *supra* note 412, at 89–90, 97.

[573] 2 HARVARD MEMORIAL BIOGRAPHIES 237 (Cambridge, Sever & Francis 1867) (biography of William Yates Gholson, Jr.).

[574] *See* NEFF, *supra* note 420, at 60.

[575] Pro-slavery Democrats won the presidential elections of 1852 and 1856, and, in Congress, they held the upper hand in the mid-1850s.

[576] *See supra* section I.A, pp. 1070–75.

[577] N.Y. CONST. of 1846, art. VI, § 4, *reprinted in* 2 POORE, *supra* note 38, at 1358–59; *see also* SHUGERMAN, *supra* note 35 (manuscript at 210–71).

[578] ILL. CONST. of 1848, art. V, § 3, *reprinted in* 1 POORE, *supra* note 38, at 449, 459.

[579] KY. CONST. of 1850, art. IV, § 4, *reprinted in* 1 POORE, *supra* note 38, at 668, 674–75.

[580] MICH. CONST. of 1850, art. VI, § 2, *reprinted in* 1 POORE, *supra* note 38, at 995, 1001.

[581] VA. CONST. of 1850, art. VI, § 10, *reprinted in* 2 POORE, *supra* note 38, at 1919, 1933.

[582] MD. CONST. of 1851, art. IV, §§ 4, 9, *reprinted in* 1 POORE, *supra* note 38, at 837, 848–50.

[583] IND. CONST. of 1851, art. VII, §§ 2, 3, *reprinted in* 1 POORE, *supra* note 38, at 512, 520–21.

elections to produce such a huge burst of conflict between the courts and the legislature. Furthermore, judges elected statewide (such as Pennsylvania's, Ohio's, Missouri's, and New York's four permanent seats) were just as much a part of this burst of judicial review as judges elected by district.

Nevertheless, districts could have shaped the opinions of individual judges if those judges considered their local constituencies more than they considered statewide public opinion. Most of the judges who struck down statutes with critiques of majority rule (and often with defenses of smaller communities) held districted seats, not statewide seats[584]. A judge from a particular district might be more sensitive to a statute's impact on that district or an interest group, and he might write an opinion rationalizing that sensitivity in the theoretical terms of protecting smaller communities against the whims of public opinion. It was simply local politics, translated into a more acceptable jurisprudence.

3. Other Influences of Judicial Elections. – Delegates framed the turn to judicial elections as "democratizing" the courts, and they intended that democratization to empower the judges. But democratizing the courts also constrained judges due to the power of factions, special interests, and localism. It is important to remember that the supporters of judicial elections emphasized judicial independence: elections would replace the appointments that gave legislators, governors, and cronyism power over the courts. Independent of these forces, the quality of judging would improve, and judges would be free to be judges. The opponents of judicial elections had the same goal; they simply disagreed about the means. For them, elections were a greater threat to judicial independence than appointments. The debates captured an ethos of the time that judges should be judges, just as lawyers were increasingly professionalizing and differentiating their role from mere politics. The question for many delegates was which selection method would allow judges to be more independent of politics and follow the rule of law. This development is often obscured when the debates are framed in simple "Jacksonian democracy" terms, as there is ample historical evidence that the legal profession was creating its own culture of expertise and aristocratic stewardship to save democracy from itself.

The convention debates may have influenced judges' approaches to judicial review and individual rights. One might assume that the new constitutions had added more individual rights clauses, which would[585] have offered a textual basis for more countermajoritarian theories. However, the changes in these constitutions were mainly structural and procedural, and their focus was not on establishing or reaffirming individual rights. Instead, it was the conventions' debates over popular elections that elicited individual rights arguments on both sides. Pro-democracy reformers used natural rights arguments, framed more as individual rights than as "the people's" rights, in favor of broader suffrage and more direct democracy. At the same time, some opponents of judicial elections feared that elected judges would

[584] Of the judges offering countermajoritarian justifications, more came from districted courts (New York, Indiana, and Michigan) than from statewide seats (Pennsylvania and Ohio). For cases, see *supra* section IV.B, pp. 1124–32.

[585] *See generally* Maxwell Bloomfield, *American Lawyers in a Changing Society*, 1776–1876, at 136–90 (1976); Paul D. Carrington, *Stewards of Democracy*, 47–67 (1999); DE TOCQUEVILLE, *supra* note 37, at 263–70.

not defend the rule of law and would not protect individual rights. Elected judges seem to have borrowed from both sides. They may have embraced the natural rights theory that justified self-determination, suffrage, and direct democracy[586], but they also remained skeptical of voters and public opinion, as were the critics of judicial elections. Because opponents had raised doubts about elected judges' capacity to protect individuals, this first generation of elected judges might have tried harder to settle those doubts in action and in theory.

Another possibility is that these judges accepted the brave new democratized courts, but also needed a way to distinguish themselves from legislators. If democracy is king, then why should a handful of infrequently elected judges have the final say over the work of the people's more frequently elected representatives? These judges offered the countermajoritarian arguments of liberty and rule of law to bolster their legitimacy: they could serve both the popular will and individual rights. The rule of law was also a credential that distinguished the judges as a professional elite. When judges were appointed, they had to highlight their democratic bona fides to be more like everyone else. But once they were elected, they had to differentiate themselves from the other branches.

In an era of democratizing the courts, lawyers and judges also reacted against too much democratization. Lawyers and judges were warding off efforts at broadening access to laymen, who had been seeking to represent clients in court and pursuing seats on the bench. The legal profession was building its own identity and power in this era, and part of its ethos was the lawyer's responsibility in defending individual rights[587]. Asserting professional expertise in the rule of law was a way of fending off these challenges. The professionalization of bench and bar may have contributed both to more judicial review and to countermajoritarian arguments, as ways of defending judicial expertise.

This first generation of elected judges also might have reacted against democracy once they experienced running in elections themselves. Some of these recently elected judges may have resented the new inconveniences and discomforts of election campaigns, or those campaigns might have opened their eyes to the questionable world of electioneering and party machines. As the lawyer-poet John Godfrey Saxe remarked a few years later, "Laws, like sausages, cease to inspire respect in proportion as we know how they are made[588]." Perhaps judges found out the same was true about democracy once they saw how it was made. The effect was an experiential basis for distrusting democracy.

4. Explanations Separate from Judicial Elections. – It is important to note how judicial elections magnified the political crisis of the 1850s, but, of course, there is no denying the independent influence of the crises. The economic crisis of the 1840s and the political crisis of the 1850s were powerful enough to push judges toward more judicial review and more skepticism of democracy, even without

[586] *See* Laura J. Scalia, America's *Jeffersonian Experiment: Remaking State Constitutions 1820–1850*, at 31–75 (1999).

[587] *See* KRAMER, *supra* note 36, at 161–64; Konefsky, *supra* note 299, at 68–105.

[588] Fred R. Shapiro, *Quote... Misquote*, N.Y. TIMES, July 27, 2008, Magazine at 16 (quoting DAILY CLEVELAND HERALD, Mar. 29, 1869) (attributing this quip to John Godfrey Saxe and noting its frequent misattribution to Otto Van Bismarck).

judicial elections. Many Americans were disillusioned not only with politicians and parties after the 1840s economic crisis and the 1850s slavery crisis, but also with democracy itself[589].

Going into the conventions that started in the mid-1840s, the leading interpretation of the crisis was that legislatures had been captured by special interests or their own interests. Delegates in state conventions argued that judicial elections would enlist the courts in restoring the will of the people against corrupt legislators[590]. With or without elections, judges would have ridden that same wave of anti-legislature sentiment. Judges also might have become skeptical of popular democracy in the wake of these events. An equally valid interpretation of the overspending and debt crises was that the public had helped generate the frenzy for new canals, turnpikes, and railroads, pushing the government into financial crisis. Neighboring towns and bordering regions had squabbled over the locations of the improvements, increasing pressure to pander and overbuild to keep the people happy. A reasonable reaction was skepticism of public opinion and the democratic process. However, if this interpretation of the crises had motivated judges to turn against democracy, then why did they not turn to antidemocratic arguments earlier, especially in the initial increase of judicial review in the 1840s? Instead, these arguments emerged mostly in the early and mid-1850s.

The new constitutions themselves offer another explanation. As suffrage and direct democracy expanded, and as voters controlled more and more of the government, courts might have become less concerned that legislators were out of touch with the popular will, and more concerned that they had become too responsive to the popular will. Or in the same vein, judges might have concluded that the reforms through the 1840s had made elected officials responsive enough to voters, and thus the judges shifted their attention from protecting "the people" (who no longer needed such help) to protecting individuals and minority communities. However, among the many reforms in the constitutions of the 1840s, the conventions had not made many changes to the mechanisms of popular control over the legislature or governor; those changes generally had come earlier in the century. In the 1840s and early 1850s, the constitutional changes focused on separation of powers and limits on legislative power. While some of the procedural changes for the passage of statutes were likely to slow down legislatures and keep them in line with public opinion, it is unlikely that the judges felt that these changes had dramatically increased popular sovereignty.

CONCLUSION: DEMOCRACY, ECONOMY, AND JUDICIAL INDEPENDENCE

The rise of judicial elections was one episode in America's ongoing conflict between law and democracy. Yet judicial elections only became widespread after their advocates had broadened beyond the populists who wanted to use democracy to fight judicial independence and the rule of law to include moderates, conservatives, and selfproclaimed "Radicals" who firmly believed judicial elections would increase judicial independence and judicial review. Most of the Radicals were a species of popular constitutionalists who advocated for judicial independence – in the sense of independence from the other branches – so that the courts could respond to public

[589] *See* HOLT, *supra* note 435, at 136–38.

[590] *See supra* Parts II & III, pp. 1080–1115.

opinion and protect the people's constitutional rights against the abuses of privilege and corruption. Many Radicals and conservatives agreed that judicial appointments had become the domain of partisan patronage that had corrupted the rule of law, and they believed judicial elections would help to separate the rule of law from politics and produce better judges. The turning point that galvanized this broad coalition was an economic crisis that many at the time perceived to be a crisis in governance. Reformers used this crisis as a basis for arguing that judicial elections were necessary to rescue the courts from political capture and to empower a more independent judiciary to prevent further abuses of power and economic crises.

"Judicial independence" now signifies the ability of judges to be free from political pressure and to rely upon their own legal interpretations or conscience. However, in the eighteenth and nineteenth centuries it had more diverse meanings: independence from the Crown, independence from elected branches of government, and independence from party patronage machines and special interests, as well as independence from public opinion. Some scholars have recently commented that there are many different understandings of judicial independence, and have noted that the phrase "judicial independence" is too vague to be helpful, and too easily manipulated to have "independent" substance[591]. These shortcomings are illustrated by one scholar's recent claim that throughout American history, reformers at each stage have changed judicial selection methods – from political appointment to partisan election to non-partisan election to merit selection – in order o increase judicial independence[592]. True, elections made judges less dependent upon the governor and the legislature, but many reformers in the antebellum period intended to make judges more accountable to the public. In practice, many elected judges became beholden to party machines and special interests. Undoubtedly, this turn of events was the hidden agenda of some reformers from the beginning, but the majority of them seemed sincere, especially from what we know of New York's true-believing Barnburners who led this fight for years.

Surprisingly, the adoption of judicial elections demonstrates the popularity of the idea of judicial independence, an idea that has been remarkably resilient throughout American history. Still, it is helpful to distinguish between "relative" judicial independence and "absolute" judicial independence. "Relative" judicial independence – independence from whom? – is the subject of this story, as is evident in the shift from appointment and the control of the other branches to direct election and the control of the public. As it turns out, the political parties were able to adapt to this shift and became the dominant force behind most judicial elections. The political theory at the time, however, was that strong political parties were a necessary evil in combating the growing power of "interests" and institutions, such as banks and corporations. By contrast, "absolute" judicial independence – how much independence from political pressure? – generally

[591] *See, e.g.*, Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *Judicial Independence at the Crossroads* 45 (Stephen B. Burbank & Barry Friedman eds., 2002).

[592] Hanssen, *supra* note 14, at 440–53. In Hanssen's defense, he emphasizes in parts that judicial elections increased independence from the state legislature, and provides quotations from contemporaries who discuss the significance of judicial accountability. *See id.* at 441, 443, 448. While Hanssen's argument is that the reformers generally sought more judicial independence, I think he would probably agree with a more precise (perhaps hair-splitting) distinction here.

results less from changes in selection methods and more from job security (such as longer tenure, salary protections, and protection against removal), campaign finance reform, institutional support, protections of jurisdiction, and the like. As it also turns out, the first generation of elected judges chiefly used judicial review to strike down legislative encroachments on jurisdiction, tenure, and judicial power, along with many other kinds of statutes. Counterintuitively, judicial elections were thus part of the developing notion that judges had a unique and separate role in government. On the one hand, judicial elections blur the differences between judges and other officials by selecting them the same way and putting them all in the midst of the same campaigns. On the other hand, elections addressed the problem that *judicial appointments* undermined judicial independence from the other branches, which made it more difficult for judges to fulfill their specialized commitment to defending the rule of law. As a matter of practice, elected judges' constitutionalism did not fit the "popular constitutionalism" mold so much as the countermajoritarian mold, at least to the extent that popular constitutionalism depends upon public deliberation over constitutional principles[593]. There is very little evidence that judges personally campaigned for office or debated judicial decisions publicly. Instead, they generally ran on party tickets, and were more likely to campaign behind the scenes for party nominations[594]. Rather, elections enabled judges to assert their countermajoritarian role, both in theory and in practice.

This Article also adds new layers to the interpretation of Jacksonian Democracy and the rise of laissez-faire constitutionalism and judicial review. A common impression of the Age of Jackson is that Andrew Jackson clashed with John Marshall on the federal level, and that a major platform of the Jacksonians was their opposition to judicial independence. During Andrew Jackson's lifetime, this impression was more true than not. But Jacksonians also believed in limited government and opposed the use of state power for the privileged, all the more so after the Panics of 1837 and 1839 that followed Jackson's death. The depression and the state fiscal crises of the 1840s underscored the problems of legislative folly and corruption and generated more support for laissez-faire constitutionalism in the American Revolutions of 1848. Reformers from both parties, from the north, south, and west, turned to judicial elections as part of a broader constitutional revolution against legislative power and in favor of limited government.

It might be too much to claim that this moment was "the birth of American liberalism," but it was an important step in the transition from the republican era of using state power to build a foundation for capitalism to the liberal era of removing the state from intervention in the capitalism that the state had helped to build. Instead of the metaphor of "birth," the turn to judicial elections was more like laissez-faire liberalism getting its driver's license: after the republican era literally built the roads of capitalism (through internal improvements and special corporate monopolies), the new constitutions of the late 1840s and early 1850s turned the keys over to the people, with judicial elections being the vehicle for enforcing constitutional limits on state intervention in the market and redistribution, and for protecting the courts from the other

[593] *See generally* KRAMER, *supra* note 36.
[594] *See* SHUGERMAN, *supra* note 35 (manuscript at 310–41); Shugerman, *supra* note 446 (manuscript at 3).

branches so that judges could protect the people's constitutional rights. In the years and then decades that followed, elected judges dramatically expanded judicial review, laissez-faire constitutional doctrine, and countermajoritarian legal theory – the pillars of the *Lochner* era. It is no accident that so many of the judicial review decisions by the first generation of elected judges defended judicial power, private property rights, and the obligations of contract, or that elected judges established substantive due process.

In the midst of modern controversies over judicial elections, skepticism of reform efforts to protect judicial independence is understandable. Judicial elections seem to have been inevitable and immovable. During the 1847 Illinois constitutional convention, an Illinois newspaper celebrated the adoption of judicial elections with the declaration: "Power once surrendered to a people is seldom returned[595]." Nevertheless, the story of the rise of judicial elections offers a different perspective. First, judicial elections were not inevitable, but rather arose from a contingent set of events and passionate leaders that reframed the role of the judiciary from a threat to democracy to the protector of democracy. Second, the concepts of judicial independence and the rule of law were popular and essential to the adoption of judicial elections. Today's reformers can borrow from the Barnburners' playbook by arguing that independent courts protect both democracy and law, rather than assuming that the two are inherently in conflict. Finally, institutional change can move surprisingly fast: Judicial elections swept the nation in five short years, more or less. Perhaps there is another wave on the horizon that will revive the American Revolutions of 1848: a stronger judiciary for the people, by the people, and more able to stand up to the people when necessary.

Appendix A: Judicial Elections Timeline*

	For Elections	**Against Elections**
1777 – 1812	Territory of Vermont for lower courts Georgia for "inferior" courts	
1816	Indiana for circuit courts (associate judges only)	
1832	**Mississippi** (C)	
1833		
1834		Missouri (A), Tennessee (C)
1835	Georgia for superior courts (A)	North Carolina (C)
1836	Michigan for circuit courts (C)	
1837	**PANIC**	
1838		Pennsylvania (C)
1839	**SECOND PANIC**	
1840	**DEPRESSION**	
1841	**DEPRESSION**	
1842	**DEPRESSION**	Rhode Island (C)

[595] *The New Constitution – The Tendency of Its Power*, *supra* note 236, at 2.

* The left column of the timeline shows states that adopted judicial elections, and the right column shows states that did not. All state conventions after 1812 are included and are indicated as (C). The timeline also indicates with (A) when a state adopted an amendment that changed its court system – in the left column when the amendment adopted some form of judicial elections, and in the right column when the amendment reformed the state's courts without adopting judicial elections. States listed in bold adopted judicial elections for all of their courts.

1843 **DEPRESSION ENDS**
1844 Iowa for lower courts (C) New Jersey (C)
1845 Louisiana (C), Missouri (C) Te x a s (C)
1846 **New York** (C), **Wisconsin** (C)
1847 **Illinois** (C)
1848–1850 **Pennsylvania** (A)
1848 Arkansas for circuit courts (A)
1849 **California** (C)
1850 **Kentucky** (C), **Michigan** (C), **Missouri** (A), **Ohio** (C), **Texas** (A), **Virginia** (C), Alabama (A), Connecticut (A), and Vermont (A) for circuit courts
1851 **Indiana** (C), **Maryland** (C) New Hampshire (C)
1852 **Louisiana** (C)
1853 **Florida** (A), **Te n n e s s e e** (A) Massachusetts (C)
–
1857 **Iowa** (C), **Minnesota** (C)
1858
1859 **Oregon** (C)
1860
1861 **Kansas** (C)

Appendix B.1: State Supreme Court Cases Declaring State Laws Unconstitutional*

	1780 to 1789	1790 to 1799	1800 to 1809	1810 to 1819	1820 to 1829	1830 to 1839	1840 to 1849	1850 to 1859	1860 to 1864
New Hampshire	1	–	–	1	1	1	1	2	0
Massachusetts	4	–	1	2	0	1	0	3	1
Rhode Island	1	–	–	–	–	–	–	2	0
Connecticut	0	0	0	0	3	2	1	0	1
New York**	0	0	0	5	6	4	6/13*	32*	14*
New Jersey	1	1	1	2	0	1	0	1	1
Pennsylvania	–	1	0	0	0	0	7/1*	7*	11*
Delaware	–	0	0	0	1	0	2	0	0
Maryland	–	0	0	0	2	4	4	1*	1*
Virginia	4	1	0	1	1	0	0	0*	0*
North Carolina	1	1	2	3	0	1	0	5	1
South Carolina	–	1	0	0	0	0	0	0	0
Georgia	–	–	–	–	–	–	3	3	0
Vermont 1791		–	0	2	6	3	0	2	1
Kentucky 1792		–	5	2	8	4	2	3*	2*
Tennessee 1796		–	0	2	1	12	6	2/11*	1*
Ohio 1803			1	–	0	0	2	11*	1*
Louisiana 1812				0	0	0	4	2/12*	1*
Indiana 1816				–	1	0	1	28*	13*
Mississippi 1817				–	1	1*	2*	1*	1*

* For a full list of cases and state-by-state graphs, see Shugerman, *supra* note 348. This chart aggregates only states that had entered the Union by 1821 to prevent skewing the results.

** For a description of New York's complicated mix of elected and appointed courts, see *id*.

Illinois 1818				–	0	1	1	5*	5*
Alabama 1819					1	2	1	4	1
Maine 1820					2	0	0	4	1
Missouri 1820					1	3	1	8*	4*
Appointed Total	12	5	10	20	35	39	42	30	7
Elected Total*	0	0	0	0	0	1	16	119	54
California** 1850								21*	14*

– = under 50 total reported cases for the decade
* = the court was elected for these decisions (for example, 6/13* means 6 decisions by the appointed supreme court and 13 by the elected supreme court in that decade)

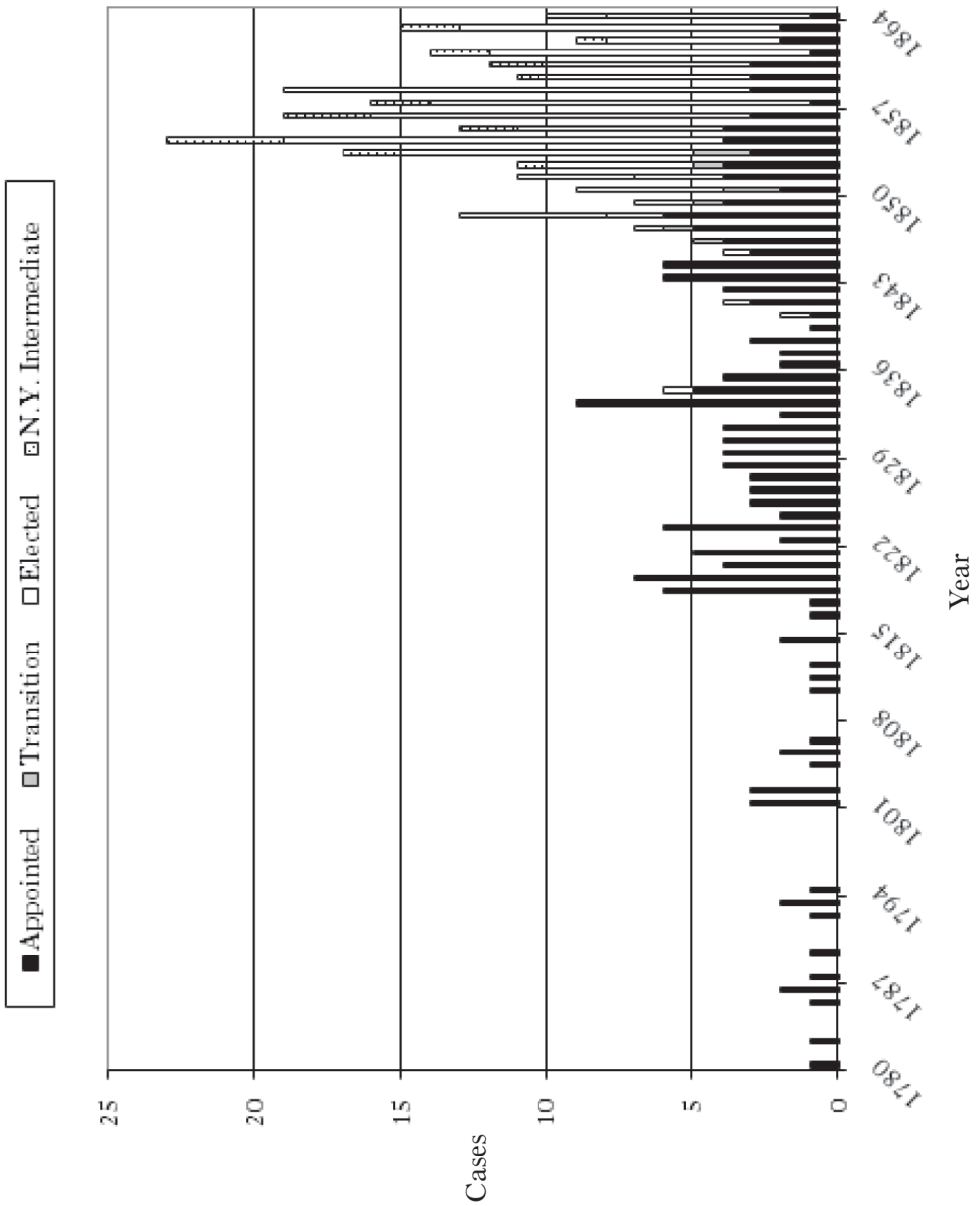
Appendix B.2: Total Reported Cases by Decade (on Westlaw and Lexis)

	1780 to 1789	1790 to 1799	1800 to 1809	1810 to 1819	1820 to 1829	1830 to 1839	1840 to 1849	1850 to 1859
New Hampshire	0	0	0	130	439	678	1014	1311
Massachusetts	6	4	481	976	770	1204	1464	2202
Rhode Island	0	0	0	0	1	10	26	301
Connecticut	171	338	176	298	376	374	399	595
New York	0	166	870	966	1183	1497	1408	993
New Jersey	1	139	144	207	366	605	561	706
Pennsylvania	0	283	394	748	1085	1447	2131	2534
Delaware	0	211	77	104	88	274	295	211
Maryland	25	134	142	156	292	343	390	708
Virginia	29	346	429	581	536	589	592	570
North Carolina	4	223	252	408	522	903	1625	1971
South Carolina	48	203	386	519	841	1041	1257	1019
Georgia	0	0	0	0	0	0	520	1982
Vermont 1791		19	132	103	328	777	966	1028
Kentucky 1792		24	471	835	1606	1283	997	891
Tennessee 1796		3	142	341	230	817	958	1231
Ohio 1803			0	0	250	452	729	969
Louisiana 1812				391	1107	1360	2584	2274
Indiana 1816				22	181	342	695	1373
Mississippi 1817				15	82	258	1095	1178
Illinois 1818				3	103	194	718	1317
Alabama 1819					341	907	2351	2024
Maine 1820					451	805	1339	1686
Missouri 1820					273	418	1013	1834

* The elected total includes six cases that were decided by appointed judges *after* the conven tions had adopted judicial elections, because they had become judges facing popular election. In Appendix C, these cases are designated "transition."

** California is not included in the totals to avoid skewing the 1850s total higher.

Appendix C: State Judicial Review, 1780–1864*



* Note that the rise begins gradually during the Depression of 1837–1844, grows more sharply around 1848, and then peaks in the mid-1850s, after the wave of adoptions was complete. California is not included.

Appendix D: Subject Matt er of State Supreme Court Cases of Judicial Review[4]*

	1780 to 1799	1800 to 1809	1810 to 1819	1820 to 1829	1830 to 1839	1840 to 1849	1850 to 1859	1860 to 1864
Judicial Power; Separation of Powers; Jurisdiction	1		6	6	5	17	39	14
Other Separation of Powers							2	
Takings/Eminent Domain			3	1	5	7	18	2
Internal Improvement/ Roads/ Public Works					1	5	4	3
Banks; Monopolies; Corps				2	3	5	9	3
Taxes/Public Debt			1	2	1	2	16	7
Legislative Procedure (Single Subject Rule; Title; Etc.)						3	22	6
Ex Post Facto/Retroactive Laws	1	2	6	4	2	9	13	6
Impairing Obligations of Contract/Private Debt		1	4	15	17	5	24	15
Vested Property Rights	2	1	4	4	1	8	16	3
"Law of the Land"/Due Process/Freedom of Contract		1			2		6	2
Special or Partial Laws					5	1	3	
Right to Jury Trial	5	5	1	4	2	2	10	4
Criminal Procedure			1			4	4	
Appointment and Removal		1		2	1	4	7	2
Liquor Prohibition			1			3	14	2
Referenda						2	5	
Marriage and Divorce				1	2	2	2	
Married Women's Property						5	4	1
Bastardy/Incest			1					1
Interstate Commerce/ Federal Commerce Clause			1	1		1		1
Slavery/Race			1	1	3	3	6	
Religious Freedom					1			
School Laws					1		4	2
Right To Bear Arms				1		1		
Voting/Election Law								2
Local Government/ Districting	1				1	2	7	2
Attorney Fees/Bar						2	2	1
Currency					2			
Anti-Dueling					1			
Native Americans					1			1

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* Not all cases fit cleanly into one category or another, and some cases cover more than one category, so this list is both over- and underinclusive. Again, California is not included to avoid skewing the totals. For short descriptions case-by-case, see Shugerman, *supra* note 348.

Judging Women

Stephen J. Choi,
New York University School of Law

Mitu Gulati,
Duke University School of Law

Mirya R. Holman,
Duke University School of Law
University of North Carolina at Chapel Hill
Claremont Colleges – School of Politics and Economics

Eric A. Posner,
University of Chicago Law School[596]




Abstract:

Judge Sonia Sotomayor's assertion that female judges might be "better" than male judges has generated accusations of sexism and potential bias. An equally controversial claim is that male judges are better than female judges because the latter have benefited from affirmative action. These claims are susceptible to empirical analysis. Primarily using a dataset of all the state high court judges in 1998-2000, we estimate three measures of judicial output: opinion production, outside state citations, and co-partisan disagreements. We find that the male and female judges perform at about the same level. Roughly similar findings show up in data from the U.S. Court of Appeals and the federal district courts.

Rezumat:

Aserțiunea d-nei judecător Sonia Sotomayor că femeile judecător pot fi mai bune decât bărbații judecători au generat acuzații de sexism și potențială părtinire. O afirmație

[596] The authors are affiliated with New York University (Choi), Duke University (Gulati & Holman) and the University of Chicago (Posner). Thanks to Rick Abel, Christina Boyd, Maxine Eichner, Laura Gomez, Sung Hui Kim, Jack Knight, Ann McGinely, Carrie Menkel-Meadow, Un Kyung Park, Gowri Ramachandran, Jon Tomlin and participants at workshops at Duke, UNM and Southwestern law schools for comments. Thanks to Charlie Clotfelter and Lee Epstein for their encouragement.

la fel de controversată este aceea că judecătorii bărbați sunt mai buni decât judecătorii femei pentru că acestea din urmă au beneficiat de măsuri pozitive. Aceste afirmații sunt susceptibile de analiză empirică. Folosind un set de date al tuturor Înaltelor Curți ale statelor din perioada 1998-2000, am identificat trei soluții judiciare: aviz de producție, în citațiile extrastatale și dezacordurile co-partizane. Am aflat că femeile și bărbații judecători au performanțe la același nivel. Constatări aproximativ similare se arată în datele de la Curtea de Apel SUA și instanțele federale districtuale.

Keywords: judicial system, magistracy, work conditions, women judges, professional training, professional associations of the magistracy, judicial elections, reform, gender equality, professional career

1. Introduction

Justice Sonia Sotomayor's controversial suggestion, prior to her elevation, that women are better judges than men ignited an inferno of criticism in the months leading up to her confirmation hearings, and she backed away from it[597]. But she may well have believed it, and certainly she said it on numerous occasions to what we suspect were receptive audiences. The claim contradicts a more familiar notion that presidents and other elected officials must engage in affirmative action favoring women in order to ensure that the judiciary has a sufficient mix of women and men. The pool of people from whom judges are normally taken–middle-aged lawyers–contains many more men than women, because twenty years ago more men than women attended law school, and because in the intervening years more women than men have abandoned prestigious legal positions in order to take care of children or pursue other opportunities. If the federal judiciary is to contain a respectable proportion of women, politicians will have to appoint women who are less qualified than men. Then-Judge Sotomayor's claim that, because of their backgrounds, women are better judges than similarly qualified men, implies that presidents do not appoint less competent women but merely engage in a kind of statistical reverse discrimination by treating femaleness as a proxy for judicial quality.

The idea that women might be better judges than men, or at least as good as men, represents a radical break from taken-for-granted assumptions of the recent past. Female judges were rare before the 1970s (Schafran 2005). In 1977, Rose Bird was the first woman appointed to the California Supreme Court (Purdum 1999). In 1980, fourteen women sat on state high courts among several hundred men (Curriden 1995). Sometime after that the political establishment decided that women should have greater representation on the courts. By 1995, over fifty female judges had joined the state high courts (Curriden 1995; Songer & Crews-Meyer 2000). In the period from 1998 to 2000, over 100 women sat on the state high courts, roughly a quarter of the total[598]. The federal courts similarly

[597] The statement that received the most attention was one made by Judge Sotomayor in 2001 at a conference at Berkeley, where she said that ""I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." (Lithwick 2009). A prior statement, in 1994, was broader and said that "women" judges might reac h"better" conclusions. (Dickerson 2009).

[598] From our dataset.

witnessed a dramatic increase in the fraction of female judges the past two decades (Hurwitz & Lanier 2008).

Much of this change no doubt resulted simply from the increasing numbers of women who have entered the legal profession since the 1970s. But there is little doubt that politicians engaged in affirmative action, in the sense of giving preference to female candidates who are less qualified than men on the basis of standard measures, such as length of time in the profession. In general, women serving on state high courts starting in the late 1990s went to law school in the mid 1970s, where they were the distinct minority in law schools and in the legal profession. In addition, the women who were eligible for the judgeships we study may have been subject to gender discrimination during their careers, thus narrowing the pool of available female judge candidates further. If there is a smaller pool of women from which to select judges (compared with the pool of potential male judges), then forcing the selection of a substantial number of women may result in more qualified men getting passed over (compared with female candidates), thereby reducing overall court performance[599]. We will discuss the evidence in detail below; for now, the clearest evidence is that, in the dataset of state high court judges we use in this paper, women practice for 21 years on average before becoming judges, whereas men practice 26 years on average before becoming judges.

A number of rationales can be given for affirmative action for women. One such rationale is political. If women voters believe that female judges understand and represent their perspectives better than do male judges (the "differential perspectives" view), they will demand more female judges and, as a result, politicians will cater to those interests (Solowiej, Martinek & Brunell 2005). Another rationale is that the addition of women to the decision-making mix improves the quality of group decisions. Greater diversity of perspectives can protect against groupthink and can add new information to the decisional calculus (Martin 1990; Farhang & Wawro 2004; Massie et al. 2002). Some suggest, for example, that the presence of a woman judge on a court can alter (and maybe improve) the decision making of her male colleagues (Songer & Crews-Meyer 2000; Peresie 2005). Yet another perspective suggests that female judges bring value as role models (Tacha 2007; see Mansbridge 1999 for a more general argument).

The bulk of the literature on gender and judging examines what we call the "differential viewpoints" question[600]. This literature focuses on the subject areas where female judges are likely to bring a

[599] For complaints about Judge Sotomayor's nomination along these lines, see Buchanan 2009; Shapiro 2009.

[600] See Beiner 1999; Davis 1993; Sherry 1986. Empirical research in this area has asked whether there are systematic variations in the outcomes of cases in certain areas due to the different perspectives women bring to the bench arising from their gender and likely different life experiences (Davis 1993; Allen & Wall 1993). Scholarship has examined whether female judges rule differently in subject areas perceived to involve women's issues or areas where women's supposed liberal leanings will make a difference, such as criminal law matters (Songer et al., 1994; Jackson 1997; Martin & Pyle 2000; Stribopoulos & Yahya 2007). Some early research that looked at differences in criminal dispositions, among other things, found few differences (Kritzer & Uhlman 1977; Gruhl at al. 1981; Walker & Barrow 1985) but recent work has found some gender differences in sexual harassment and discrimination cases (Davis et al. 1993; Peresie 2005; Boyd, Epstein & Martin 2007). Although the overall picture is unclear (Palmer 2001), the general story appears to be that female judges support the rights of women more strongly than do their male colleagues (Martin & Pyle 2005; McCall & McCall 2007; McCall 2008).

distinctive perspective to bear. The most prominent finding is that female judges are more likely to favor plaintiffs in sex discrimination cases (Peresie 2005; Boyd, Epstein & Martin 2007). This result does not, however, cast light on whether female judges are better or worse than men. The empirical research has not established that the female judges are legally correct in these cases; it is possible that those plaintiffs should have lost.

Our focus is on the relationship between the gender of judges and judicial quality–the question raised by the affirmative action issue. Drawing on our prior work on judicial quality, we focus on opinion publication, citations, and disagreements with co-partisans (reflecting judicial independence) as metrics of judicial performance. Using three datasets–justices sitting on the highest courts of the fifty states from 1998 to 2000, federal district judges from 2001 to 2002, and federal appellate judges from 1998 to 2000 - we test the hypothesis that female judges are worse (or, as Justice Sotomayor claimed, better) than men. We find no evidence for this hypothesis.

2. Predicting Gender Differences

One of the distinctive characteristics of U.S. courts, as compared to their

European and Asian counterparts, is that judges come to the bench later in life, roughly around age fifty, after significant experience outside the judiciary. The aggregation of these prior experiences constitutes a judge's human capital–in effect, her training to become a judge. A lawyer with more legal experience should be a better judge than a lawyer with less legal experience. In addition, attending a better law school should, theoretically, provide better training for the tasks associated with judging. Further, because judicial candidates coming to the bench have a major portion of their professional career behind them, they have likely passed through numerous selection screens already.

Research on gender and legal education suggests that women have a lower quality experience in law school than do their male colleagues. They participate less in classroom discussion, feel more alienated, and underperform in terms of the traditional indicators of success in law school.

These factors suggest two opposite sets of predictions. Under what we call the Preference Story, women who are less qualified than men are selected to be judges, with the result that female judges perform less competently than do male judges. Our empirical tests focus on the Preference Story, which has support in the literatures on lawyers and women. Under the Screening Story, pre-judicial barriers to entry–including sex discrimination and employment conditions that are hostile to the needs and interests of women–screen out less competent women. If the pool of women is smaller than the pool of men, the women who remain in that pool after the informal screening are higher quality than the men. The Screening Story implies that female judges should be as competent as, or more competent than, male judges.

2.1. The Preference Story

2.1.1. Women Law Students and Lawyers

Research on gender and legal education suggests that women have a lower quality experience in law school than do their male colleagues. They participate less in classroom discussion, feel more alienated, and underperform in terms of the traditional indicators of success in law school such as grades, law review membership, and publications (Banks 1990; Guinier, Fine & Balin 1997; Mertz, Njogu & Gooding 1998; Yale Law

Women 2001-02; London, Downey & Anderson 2007; Mertz 2007; Leong 2009). In addition to formal legal training, law schools also provide students with entry into a network of contacts. If female students are disproportionately excluded from social networks among students, faculty, and alumni, then female students receive less value from their educations (Iskander & Bashi 2003).

This pattern of limited access continues at the next stage, early legal employment. The jobs that students take in their early years are disproportionately likely to be in the private sector, both because there are more of these jobs than in the public sector and because many public sector jobs require legal experience[601]. These initial jobs in the private sector, according to what recruiters tell students, are supposed to provide both on-the-job training and a network of contacts (Garth & Sterling 2009). Research on the operation of private law firms, particularly the large ones, however, suggests that these firms do not provide equal amounts of training and networking opportunities (Garth & Sterling 2009). Much of the work is routine and done in relative isolation. Work that provides training and client contact is scarce and given out to those deemed most likely to succeed in the law firm tournament (Wilkins & Gulati 1996; 1998). It is likely that those who succeed in making partner at these firms are the ones who receive the better training and networking opportunities. Scholars have found that women succeed at private firms at lower rates than men (Epstein 1993; Kagan 2006; O'Brien 2006; Leber 2009). One explanation for this lack of success is that firms assign women to more of the routine work and offer them fewer of the scarce training and networking opportunities[602].

2.1.2. Female judges

Our statistical analysis focuses on judges in the late 1990s, who for the most part went to law school in the 1970s or before. As of the early 1970s, the fraction of women in law schools was in the 10-20% range (Epstein 1997; Savage 2009). Because women in this cohort likely dropped out of law at a greater rate than men to care for family members or pursue other opportunities, the effective pool of women qualified for judgeships was probably even smaller by the 1990s. Despite the relatively small pool of potential female judges, the fraction of female judges in our dataset of state high court judges from 1998 to 2000 was 24.1%. Under the preference story, the disproportionate selection of women judges–given the lower training among women attorneys both at law school and in their early employment–leads to lower qualified judges.

Finally, there is the matter of discrimination women might face after they become judges. A series of reports produced by gender bias task forces around the country starting approximately two decades ago suggested the presence of bias against women participating in the judicial system at multiple levels (Resnik 1996; Kearney & Sellers 1996, provided overviews). Some of that bias has been

[601] In addition to private practice job disparities, men and women have uneven rates of clerkships. Judicial clerkships are among the most elite jobs out of law school, supposedly providing the best training. Extant research has found that women are less likely than their male counterparts to obtain an elite clerkship (Kaye & Gastwirth 2008).

[602] A key element of the dynamic here is thought to be the difficulty that women have in finding mentors who can transfer tacit knowledge (Garth & Sterling 2009). The causal mechanism here does not have to involve explicit discrimination. Rather, if women are perceived as having a lower likelihood of success at these firms–perhaps because of stereotypes–then the firms' partners may not invest as much in training women associates.

toward female judges where some female judges report getting less respect from colleagues, court staff and lawyers. If that is the case, female judges probably have to expend greater effort than their male colleagues to get their views heard and requests fulfilled (Barteau 1997, Mississippi Task Force Report 2004; Pennsylvania Task Force Report 2008). Justice Ginsburg recently observed:

It was a routine thing [in the past] that I would say something and it would just pass, and then somebody else [who was male] would say almost the same thing and people noticed. I think the idea in the 1950s and '60s was that if it was a woman's voice, you could tune out, because she wasn't going to say anything significant. There's much less of that. But it still exists, and it's not a special experience that I've had. I've talked to other women in high places, and they've had the same experience (Bazelon 2009).

Research from other professional settings suggests that women sometimes get stuck with disproportionate shares of administrative burdens; this might occur on the courts as well (Worrell 2001). The prospect of bad working conditions might deter more qualified women (with a resulting higher opportunity cost) from pursuing or accepting judgeships–further diminishing the quality of women judges. The possibility of discrimination also suggests caution in interpreting statistical results: highly qualified female judges could perform worse than men because their working conditions are harsher.

2.1.3. Women, Risk Aversion and Conflict Avoidance

The third body of literature relevant to our predictions concerns women generally, as opposed to women lawyers or judges. Multiple studies find that women display a greater degree of risk aversion than do men (Levin, Snyder, & Chapman 1988; Powell & Ansic 1997; Jianakoplos emove some of the gender differences mentioned above (Croson & Gneezy 2008).

2.2. The Screening Story

The Screening Story predicts that female judges will either outperform or do no worse compared with their male colleagues. The argument rests on selection effects. Women lawyers, at every stage, starting in law school, have had higher barriers to cross than their male counterparts. The fact of the higher hurdles that face women means that many more women will fail to cross the hurdles than men. However, the women who do succeed in crossing the higher hurdles and make it to judicial selection will likely be more capable than their male counterparts who had to cross lower hurdles to get to the same stage. In a discussion of Judge Sotomayor's comments, Dahlia Lithwick, drawing from research in anthropology, speculates as to whether female judges, have had to learn to understand both male and female perspectives during their careers. By contrast, male judges have probably not had to learn the female perspective (Lithwick 2009).

In contrast to the Preference Story, one might not expect the women in the

Screening Story to be risk averse or conflict averse. Given the hurdles they have had to clear, those women that remain probably have a greater inclination toward taking risks and enduring conflicts in order to succeed. Further, having had to succeed in male environments probably might mean that these women are not primarily interested in certain "women's" topics such as family law. Instead, they are probably interested in, and adept at, tackling a wide range of issues.

2.3. Data and Measures

Our dataset has information on several objective metrics of judicial performance

for all the sitting state high court judges in the U.S. for the years 1998-2000. There are 409 judges, of whom 103, or 25.18% are female. For each of these judges, we collected data on three separate measures, including the number of published opinions, the numbers of citations from outside the state (that is, non-precedent driven citations), and open disagreements (dissents) with those from the same political party background (our measure of judicial independence). Others have questioned the value of the objective measures and some have suggested alternate measures (Cross & Lindquist 2009; Baker, Marshall & Feibelman 2009; Stith 2009). For purposes of this article, we tie our predictions of gender differences to the objective measures as opposed to general notions of quality. While the measures are rough, we have found in other work that they are correlated with other factors in a theoretically sound way (Choi, Gulati & Posner 2009a, 2009b, 2009c)[603] and so provide at least a starting point in assessing gender differences in judicial quality. We also assume that the inadequacies of our objectives measures are not a function of gender, allowing us to assess how men and women perform differentially on our measures[604]. In analyzing the results, we control for variations among the states.

2.3. Predictions

The predictions below are simplified hypotheses based on the Preference Story.

2.3.1. Opinion Publication Rates

Publishing an opinion, as opposed to issuing an unpublished disposition, we assume, takes greater effort (Choi, Gulati & Posner 2009a). Further, the designation of the opinion as published brings greater external scrutiny and, therefore, greater risk of criticism. We predict under the Preference Story that female judges will publish fewer pinions than their male colleagues because they are likely to have received lower amounts of legal training and are more likely to be risk averse. The Selection Story provides the opposite prediction–women judges should publish either more or at least no fewer opinions compared with male judges.

The publication of an opinion gives it greater precedential weight. If women are more interested in advancing the law in certain areas, they will focus their publication efforts in those areas. We predict that women will publish more opinions in areas such as family law and civil rights (which includes sex discrimination and sex harassment) and fewer opinions in business law.

2.3.2. Citations

Citations by outside authorities are a commonly used measure of influence

(Landes, Lessig & Solimine 1998). We have data on citations by a variety of outside actors including other state courts, the federal courts outside the relevant circuit and law reviews. Citations to judicial opinions have been described as measuring multiple characteristics of the

[603] For example, elected judges and appointed judges differ in a systematic way. In addition, judges close to retirement are less productive and judges with more court experience are more productive. (Choi, Gulati & Posner 2009a).

[604] At more than one faculty workshop, we have been asked whether one of our measures, citation counts, was subject to gender bias. The point being that female judges might receive fewer cites because men will be more likely to cite each other. This is likely to be the case if the men hold negative stereotypes of the women or have networks of reciprocal citations from which women are excluded. In a different article, using a dataset of federal appeals court judges, two of us examined this question and found no indication of gender bias (Choi & Gulati 2008). But, should such a bias exist here, it would strengthen our conclusions.

underlying opinions including quality of analysis (Choi, Gulati & Posner 2009a, 2009b, 2009c), nimbleness in writing (Vladeck 2005), and creativity (Posner 2005).

If women lawyers ascend to the bench with fewer legal skills and are also more risk averse than their male colleagues, as predicted under the Preference Story, female judges should write less frequently cited opinions. If women are less likely than are their male colleagues to have built up networks among lawyers and other judges then that should also result in fewer citations. And if the techniques of reasoning and the perspectives of female judges are markedly different from those of male judges, then the majority of judges (who are men) will likely prefer to cite opinions by male judges. In contrast, we predict under the Selection Story that the opinions of female judges will receive the same if not greater number of citations compared with male judges.

Beyond the Preference and Selection Stories, other predictions are possible. Some may predict that women judges may receive a differential number of citations in certain subject matter areas, also driven by stereotypes. If there is a perception that women understand better and pay more attention to issues in certain areas that fall into what is considered a "women's" domain such as family law or sex discrimination cases, we would expect to see more citations to women there. Conversely, we would expect fewer citations to female judges in areas such as business law.

Disagreement

Our third measure looks at the willingness of a judge to disagree with co partisans, either by dissenting against their opinions or writing majority opinions that induce dissents–our measure of judicial independence. In calculating this measure, we look at dissents–which are open and public statements of disagreements. We look first at (1) the number of disagreements by a judge against co-partisans divided by the total number of disagreements by the judge. This gives us a "raw" sense of how often a particular judge is in open disagreement with co-partisans. A highly partisan judge, for example, may never come in disagreement with a co-partisan (preferring to save her dissents primarily for judges from the opposite political party). How often a judge opposes a co-partisan, of course, will depend on the number of co-partisans on the same bench. If a judge is the lone Democrat on a specific court, the judge will necessarily oppose opposite party judges (due to the lack of any co-partisans). To control for court composition, we look second at (2) the total number of majority opinions by co partisans (opportunities to dissent) over the total number of majority opinions by all judges on the court[605].

We then define independence as the difference between (1) the number of

disagreements by a judge against co-partisans divided by the total number of disagreements by the judge and (2) the total number of majority opinions by co partisans (opportunities to dissent) over the total number of majority opinions by all judges on the court. A more negative score corresponds to a judge who writes opposing opinions against opposite-party judges more frequently than the background pool of majority opinions authored by opposite-party judges. Conversely, a more positive score

[605] There are problems with this measure that we document at length in Choi, Gulati & Posner (2009a; 2009b; 2009c). Among those is that our measure does not work for the handful of states where all the judges are of the same party. Accordingly, we drop those states from our independence calculations. Further, as a function of the number of judges of each party on a court, the potential scores for a judge are bounded. To adjust for this, we calculated a simpler alternate 0-1 measure of independence.

corresponds to an authoring judge who writes opposing opinions less frequently against opposite-party judges compared with the background pool of opinions (and thus more frequently against co-partisans).

We treat a more positive score as indicative of a more independent judge. Others might view disagreement among judges as a negative–a sign of disagreeability or cantankerousness. Regardless of perspective, the prediction under the Preference Story is that women will disagree less. Female judges, because they are less likely to be willing to engage in open conflict, particularly with co-partisans, should–if the Preference Story is correct–receive lower scores on our independence (or disagreeability) measure. Further, their relatively lack of training (from discrimination in school and in the workplace) in legal reasoning should also make them less willing to engage in conflict since their opponents (mostly men) will have greater skill and experience. In contrast, the Selection Story predicts that women judges will receive a higher independence score.

To summarize, we have five predictions regarding gender differences to show up in our measures if the Preference Story is correct. Female judges will publish fewer opinions overall (Hypothesis 1), but more opinions on topics of specific interest to women such as family law (Hypothesis 2). Female judges will be cited less overall (Hypothesis 3), but more on topics of specific interest to women such as family law (Hypothesis 4). Women will score lower on their willingness to disagree with co partisans (Hypothesis 5). Three of these predictions (Hypotheses 1, 3 and 5) address the question of whether female judges underperform their male counterparts. The other two (Hypotheses 2 and 4) test whether (any) differential performance on the part of female judges is explainable due to a specific subject matter focus on the part of female judges.

3. Different Pathways

3.1. Education and Training

The Preference Story assumes that female judges have less experience and lower quality training than male judges. We test whether this assumption is true. In our data set, female judges have significantly worse educational credentials than do male judges. Panel A of Table 1 reports summary statistics. The average U.S. News rank[606] of the law school attended by a male judge is approximately 52 and that for a woman judge is 62[607].

The rankings difference is larger for undergraduate education, where the average college ranking for a woman judge is 154 and that for male judge is 125[608]. Men were also more likely to attend graduate programs that offer LLMs for judges[609].

[606] In order to have consistent and reliable information about the rankings of the schools that these judges attended, we used data from 2002. US News and World Report data on college rankings is only available back to 1983. In other words, we do not have information on the rankings at the time these judges attended college and law school. Nonetheless, these rankings tend to be fairly stable over long periods of time.

[607] The ten-point difference in JD rankings is statistically significant to the 0.0321 level.

[608] The difference between male and female judge's undergraduate college rankings has a p-value of 0.0023.

[609] Two other variables that we also examined were judicial clerkships and membership of professional law reform associations such as the American Law Institute. We find that men are more likely to have done judicial clerkships, but the data is only available on a small group of judges. Obtaining a clerkship is not only a sign of high performance in law school, but a source of legal training. On law association membership, the numbers for women are significantly higher. To the extent these associations are sources of training, they could add to a member's human capital. We were unable to find any credible indications in the literature, however, that membership of these organizations enhances human capital.

Table 1
Panel A: Background Characteristics

	Men		Women		
	Mean	**Std. Dev.**	**Mean**	**Std. Dev**	**p-value**
Chief Judge	0.1809	0.0221	0.1667	0.0371	0.7451
Court Experience	7.9342	0.4188	4.8039	0.5441	0.0001
Post-Law School Experience	32.8942	0.4835	25.7660	0.8556	0.0000
Close To Retirement	0.3750	0.0278	0.1863	0.0387	0.0004
Age	58.5809	0.4851	52.9314	0.7933	0.0000
Private Practice	0.8355	0.0213	0.7647	0.0422	0.9975
PAJID	36.9277	1.2898	38.8382	2.2411	0.4579
US News BA Ranking	124.6352	4.9459	154.2937	10.3061	0.0023
US News JD Ranking	52.4013	2.3747	62.8700	4.5186	0.0321
In-State School	0.6213	0.0280	0.6000	0.0492	0.7057
Married	0.6494	0.0164	0.5778	0.0301	0.0167
Children	1.9141	0.0659	1.0556	0.0822	0.0000
Divorced	0.0459	0.0072	0.0556	0.0140	0.2592
LLM	0.1255	0.3319	0.0753	0.2653	0.9063
Prestigious Membership	0.4869	0.5006	0.5340	0.5013	0.2050
Selection Method					
Appointed	0.1993	0.4001	0.2524	0.4365	0.1280
Merit Selection	0.3300	0.4710	0.2233	0.4185	0.9792
Non-Partisan Elections	0.2614	0.4401	0.3689	0.4849	0.0187
Partisan Elections	0.2092	0.4073	0.1553	0.3639	0.8826

Panel B: Gender and Production, Citations, and Independence

		Men	Women		
	Mean	**Std. Dev.**	**Mean**	**Std. Dev**	**p-value**
Number of Total Published Opinions per Year	26.145	0.598	24.086	0.938	0.0792
Number of Published Majority Opinions per Year	18.846	11.909	16.783	10.209	0.0112
Number of Outside State Citations per Majority Opinion	0.7084	0.0148	0.8138	0.0295	0.0009
Independence Score	-0.0516	0.0118	0.0093	0.0190	0.0087

3.2. Prior Professions

Panel A of Table 1 reports the primary prior professions of these judges. One might expect that women judges would come more often from public sector jobs, consistent with the patterns for women lawyers more generally (Dau-Schmidt et al. 2007; After the JD Study 2004). There are several possible explanations for why women are likely to move to the public sector: first, women have more difficulty in tackling the work-life conflict presented by modern law firm jobs (Garth & Sterling 2009). Second, women – because of discrimination or less mentorship – are less likely to receive either training or promotion in the law firm context (Garth & Sterling 2009). There is also research

on entering women law students suggesting that they are initially more interested in public interest work than their male colleagues are (Dau-Schmidt et al. 2007). By the end of law school, however, the expectations of men and women students appear to converge in favor of private sector jobs (Dau-Schmidt et al. 2007; Ku 2008). Panel A of Table 1 reports that while 83.6% of male judges were in private practice, only 76.5% of female judges were. This difference however is not statistically significant.

3.2. Marriage, Children and Age

Background variables such as marriage and number of children, although not necessarily part of the Preference Story, are potentially relevant control factors because gender differences in these variables can have an impact on performance. Age is also a potentially revealing variable in that younger judges are likely to have less experience and training.

The women in our data are less likely to be married as the men and more likely to be divorced[610]. This is consistent with the reports on women professionals, including lawyers, where these women have both lower marriage rates and higher divorce rates than their male counterparts (Wilson 2008)[611]. We find also that male judges have more children than female judges. Reported in Panel A of Table 1, the average is one child for the women versus just under two children for the men (t-test of difference significant with a p-value of 0.000). Women also are less likely to have children than men (43% of the women have children versus 57% of the men)[612]. These numbers are perhaps more indicative of the Screening Story than the Preference Story: women who succeed at becoming judges at a high level are those who have chosen to take fewer family responsibilities over their careers.

In terms of age, the women in our sample attended and graduated from law school later than their male colleagues. The average JD date for women is 1972 versus 1965 for the men. Given the years of graduation, it is safe to assume that many of these women likely faced significant barriers when they were law students; in 1972, women made up only 10% of the JDs (Catalyst 2009). Law school environments were not welcoming of women during the early 1970s, when their numbers were small (Epstein 1997). By contrast, women currently make up close to 50% of law students (Catalyst 2009). The women in our sample are also on average younger than their male counterparts are (average age for the women is 64 and that for the men is 70). Comparing the judge's age at graduation from law school to their age when they become judges, we see that women rise more quickly to judgeships; it takes female judges, on average, twenty-one years from JD to judgeship, while takes male judges over twenty-six years[613]. As a result, women are younger (48 years old) than their male counterparts (51.5 years old) are when they become state high court judges[614]. We also find that

[610] 65% of men are married, compared to 58% of women, a difference that is statistically significant to the 0.0167 level. 4.6% of men are divorced, compared to 5.6% of women, a difference that is not statistically significant.

[611] Lower marriage rates for women lawyers are also reported in the "After the JD" study for a cohort of women significantly younger (roughly ages 27-32) than those in our judge sample (roughly ages 50-65) (After the JD Study 2004).

[612] For senior lawyers, in 2008, one estimate is that 80% of male lawyers had children as compared to 66.67% of women. The same article also reports that women with U.S. law degrees are significantly more likely to be divorced than their male counterparts (roughly 10% of women with JDs versus 5% of men). (Wilson 2008).

[613] The difference between the genders in time from JD to judgeship is statistically significant to the 0.00 level.

[614] The difference in age in becoming a judge is statistically significant to the 0.01 level.

women are older when they graduate from law school, regardless of the year of graduation. The foregoing is consistent both with the Preference Story and with the Screening Story. Looking at the Preference Story, the smaller pool of available women lawyers to choose from probably meant that those selecting judges had to go deeper into the pool– hence, selecting female judges who were younger and less experienced than are their male counterparts. On the other hand, women who are overachievers might take less time to accomplish professional goals, which fits the Screening Story[615].

3.4. Type of Judicial Selection System

Finally, we examine the type of judicial selection systems most likely to yield female judges. The bottom portion of Panel A of Table 1 reports that female judges are most numerous in non-partisan election systems (and to a lesser extent, appointment systems)[616]. It is hard to make much out of this, except perhaps that officials are more likely to engage in affirmative action than is the public.

4. Testing the Hypotheses

4.1. Predictions of Gender Underperformance

Panel B of Table 1 reports the raw differences in publication rates, outside citations and independence[617]. Generally, men publish more, writing and publishing an average of 26.15 opinions per year, while women write and publish 24.09 opinions per year (difference significant at the 10% level)[618]. The difference is even greater when we focus solely on published majority opinions. Male judges published 18.85 majority opinions per year; female judges published only 16.78 majority opinions per year (difference significant at the 5% level). However, women are cited[619] more than their male counterparts (0.81 outside state citations per opinion for women and 0.71 for men)[620] and are more independent (both differences significant at the 1% level)[621]. At the first cut, then,

[615] Women who graduated from law school prior to 1970 take 25 years to become a state high court judge, compared to the 27 year for men with a JD from pre-1970, a difference which is significant to the 0.02 level. Women who graduated after 1970 take 18 years to become a judge, compared to the 19.7 for men, a difference that is significant to the 0.01 level.

[616] We do not dwell on these differences because, as an initial matter, we see no reason to expect gender differences in performance to be exacerbated because of the type of judicial selection system. As explained later, using state controls allows us to incorporate the effect of a variety of factors, including the selection system.

[617] We use slightly different levels of analysis for each of these measures: citations are measured at them individual citation level; production is measure for each judge for each year; and independence is for each judge with all years combined.

[618] This difference is statistically significant to the 0.10 level.

[619] We use citations from courts outside the state throughout the paper. We also test a variety of citation types, including law reviews and dividing the citing court into types; women are cited at the same level or more than their male counterparts are regardless of the type of court.

[620] The difference between men and women's citation rates is statistically significant to the 0.001 level.

[621] The difference in independence levels (0.0093 for women, -0.0516 for men) is statistically significant to the 0.001 level. A question that has been asked at workshops is whether the productivity numbers for women are inflated by their writing many short concurrences and dissents (the unstated claim being that the shorter opinions take less effort). To examine that question, we looked at page numbers of opinions published as an alternate measure of productivity and found no significant gender differences. We also examined the number of "yellow flags" and "red flags" on opinions for male and female judges and found that women had more yellow flags (significant at the 10% level). Yellow flags in Westlaw signify the presence of negative history for a case, suggesting that the reasoning in a case generated disagreement from other judges). On red flags, however, there were no significant gender differences. Red flags indicate that the case is no longer good for at least one point of law.

women outperform men on two of three measures. However, the various states differ in terms of the characteristics of their legal systems and the types of disputes they receive. To say anything meaningful about gender differences, therefore, one has to correct for state differences.

Table 2
Gender and Production, Outside Citations, and Independence

	Independence	**Production: ln(Majority Opinions Per Year)**	**Citations: ln(1+Number of Outside State Citations to Majority Opinions)**
Female	0.0641**	-0.0507	-0.000159
	(3.29)	(-1.21)	(-0.02)
Constant	-0.0252	2.979**	0.293**
	(-0.62)	(34.08)	(7.65)
Subject Matter Controls	No	No	Yes
State-Fixed Effects	Yes	Yes	Yes
Year Fixed Effects	No	Yes	Yes
N	350	1067	19473
R^2	0.299	0.481	0.085

t statistics in parentheses; + $p < 0.10$, * $p < 0.05$, ** $p < 0.01$. Subject matter controls include indicator variables for the following case subject matter areas: administrative, Attorney and Client, Capital Punishment, Church and State, Commercial, Criminal, Family, First Amendment, Labor, Property, Rights, and Torts (with Other as the base category). The subject matter areas are defined in the Appendix. Opinion level controls include the number of dissents against the majority opinion, the number of West key pages, and the length of the opinion in pages.

Independence is defined as the Opposite_Pool – Opposite_Party. Opposite_Party is the number of opposing opinions written against a judge of the opposite party divided by the number of opposing opinions written against a judge of either the opposite or same party from 1998 to 2000. Opposite Pool is the total number of majority opinions authored by an opposite party judge divided by the total number of majority opinions authored by either an opposite or same party judge from 1998 to 2000. Independence_Indicator is defined as 1 if Independence is greater or equal to zero and 0 otherwise. Only judges for whom we could identify a political party were included in the analysis. We exclude judges from states where all judges in our sample were of the same political party from the analysis (Georgia, Maryland, New Mexico, South Carolina, South Dakota).

The quality measure is the average number of Outside State Citations per majority opinion. Outside Federal Court includes all citations from a federal district or circuit court located in a circuit that does not contain the state in question. Other State Court includes all citations from state courts outside of the state in question. US Supreme Court includes all citations from the U.S. Supreme Court. Outside State Citations is the sum of Outside Federal Court + Other State Court + US Supreme Court. All citations are from the LEXIS Shepard's database and are tracked up until January 1, 2007. Law Review Citations are for law reviews as tracked by the LEXIS Shepard's database (until January 1, 2007).

To correct for the different characteristics of the states, which could include differences in population, crime rates, court structures, judicial salaries, numbers of law clerks and so on. Instead, to control for all differences we use a state-fixed-effects estimation[622]. We estimate the following equations using ordinary least squares regressions on pooled judge-level data (Independence), judge-year level data (Production), and opinion-level data (Citations):

Independence Model:

Independencei = α + ß1iFemale + State Fixed Effects + Year Fixed Effects + εi

Production Model:

ln(1+Majority_Opinions)i = α + ß1iFemale + State Fixed Effects + Year Fixed Effects + εi

Citation Model:

ln(1+Outside State Citationsi) = α + ß1iFemale + State Fixed Effects + Year Fixed Effects + εi

As Table 2 shows, once we correct for state fixed effects, the gender differences for both publications and outside citations disappear, demonstrating that men and women are performing at roughly the same levels. Significant differences remain in the independence regressions after inserting state controls, with female judges scoring higher on independence. Thus far, our predictions (Hypotheses 1, 3 and 5) regarding female judges underperforming find little support in the data. If anything, female judges have greater independence compared with their male counterparts.

To examine the question of who these men and women are further, we estimate separate models for each of our measures with a variety of control variables.

4.2. Controlling for Backgrounds

The judges in our sample vary on a number of individual characteristics, all of which might affect judicial outcomes. Some of these variables are proxies for human capital such as education, years of experience or one's primary prior profession being in the private sector. An important element of the Preference Story is that the female lawyers who become judges accumulate lower amounts of human capital during their careers (from law school, private practice and so on) and, therefore, will not perform as well as male judges. We find, as reported in Table 1, that women do indeed graduate from lower ranked law schools and undergraduate institutions, have less experience on the court or post-law school, and are generally younger. This suggests that the assumptions underlying the Preference Story have support. However, our state fixed effects models reported above provide a contrary outcome from the Preference Story. These findings lead us to ask alternate questions about why we might see either insignificant or positive effects for gender on our measures judicial quality. The first question is whether the traditional measures of human capital, such as eliteness of legal education and private practice experience, have purchase in the gender and judging narrative?

If the answer is yes, that the Preference Story holds up, then we should expect to find significance for background variables in our production, quality, and independence models. If the answer is no, and focusing on traditional measures of human capital is the wrong approach, we should see no significant effects of any background variable in the model. Table 3 displays how we tested which of the stories is correct.

We should note that the results reported already suggest that the

[622] Because there is no reason to expect big variations in these state-specific variables in the three years in your sample (1998-2000), the fixed effects model should capture state differences.

Preference Story, with its emphasis on traditional human capital measures, does not hold up. If it had, we would have seen scores for women being significantly lower than those for men in our state fixed effects models, but those differences would have disappeared when we controlled for differences in levels of human capital acquisition (where, as reported, women had less). Instead, we found that while women did have lower levels of human capital (on the traditional measures), they still scored just as well as the men, even without controlling for background differences. The results reported below, which control for background variables, confirm the initial indications that reject the Preference Story.

Table 3
Gender and Production, Outside Citations, and Independence with Judge Controls

	Independence	Production: ln(Majority Opinions Per Year)	Citations: ln(1+Number of Outside State Citations to Majority Opinions)
Female	0.0809**	-0.0672	0.00120
	(3.62)	(-1.31)	(0.10)
Chief Judge	-0.0071	-0.133**	-0.0176
	(-0.28)	(-2.59)	(-1.51)
Court Experience	0.0021	0.0110*	-0.000177
	(1.04)	(2.50)	(-0.20)
Post-Law School Experience	0.0001	0.000382	-0.00186+
	(0.08)	(0.06)	(-1.72)
Retirement Close	0.0271	-0.147**	0.00669
	(1.11)	(-3.56)	(0.59)
Age	0.0001	0.000479	0.000464
	(0.05)	(0.07)	(0.46)
Married	0.0286	-0.0378	-0.00106
	(1.05)	(-0.70)	(-0.08)
Number of Children	-0.00338	0.00364	0.00263
	(-0.37)	(0.23)	(0.70)
Divorced	0.0638	-0.0154	-0.00360
	(1.58)	(-0.20)	(-0.18)
Private Practice	-0.0344	0.0498	0.00885
	(-1.04)	(0.82)	(0.64)
PAJID	0.00004	0.000275	0.000300
	(0.07)	(0.27)	(1.26)
US News JD Ranking	-0.0006	0.000344	-0.000158
	(-1.64)	(1.48)	(-1.08)
In-State Law School	0.0286	-0.0309	0.0213+
	(1.18)	(-0.64)	(1.82)
Constant	-0.00460	2.802**	0.292**
	(-0.04)	(10.92)	(4.99)
Subject Matter Controls	No	No	Yes
State Fixed Effects	Yes	Yes	Yes
Year Fixed Effects	No	Yes	Yes
N	327	943	18433
R^2	0.339	0.534	0.087

t statistics in parentheses; + $p < 0.10$, * $p < 0.05$, ** $p < 0.01$. Subject matter controls include indicator variables for the following case subject matter areas: administrative, Attorney and Client, Capital Punishment, Church and State, Commercial, Criminal, Family, First Amendment, Labor, Property, Rights, and Torts (with Other as the base category). The subject matter areas are defined in the Appendix.

To each of our production, quality, and independence models, we add independent variables for a variety of judge-level background factors, collectively referred to as "judge controls." Our "judge controls" include the following: whether the judge was the chief judge of the high court (Chief Judge). A judge who is chief judge may have less time to author opinions. The chief judge may also command greater respect and receive greater numbers of citations as a result for her opinions.

Alternatively, the chief may be able to assign herself the more important opinions and garner more citations that way (Langer, 2003). We include the number of years between 1998 and the year in which the judge received her law degree (Post Law-School Experience) and the number of years the judge has been on the high court (Court Experience). More experienced judges may decide opinions with greater skill, leading to more citations. We include variables for whether a judge retired from the bench in 2001 or earlier and 0 otherwise (Retirement Close).

We also include a number of variables specific to the background of the individual judge measured as of 2000. These include the age of the judge (Age), whether the judge was married (Married), the judge's number of children (Number of Children), whether the judge was divorced (Divorced), and whether the judge's primary experience before becoming a judge was in private practice (Private Practice). We include the PAJID score for each judge as developed by Brace, Hall, and Langer (2000). These scores locate judges on a political continuum from highly conservative (0) to highly liberal (100). We lastly include variables relating to the judge's education including the U.S. News ranking of the Judge's law school measured in 2002 (US News JD Ranking), and whether the judge went to an in-state law school (In-State Law School.)

4.2.1. Publications

In the model for production with judge controls (reported in Column 1 of Table 3), with the log of the number of majority opinions as the dependent variable, Female remains insignificant. For all judges, whether the judge was the chief judge and whether the judge was close to retirement turn out to be relevant; both have a negative effect on publication rates. This is not surprising, as chief judges have additional responsibilities, while a judge who is close to retirement may be slowing down. The years-on-the-court variable has a positive effect, suggesting that publishing is a learned skill. None of the traditional human capital measures, such as prior employment, law or undergraduate school rankings are significant.

4.2.3. Citations

We next turn to an examination of outside state citations to majority opinions with the addition of judge control variables to the model[623]. Results are reported in Column 2 of Table 3. Looking at all the judges, we see that Female remains insignificant. Moreover, except for chief judge none of the judge "control" variables are significant. The coefficient on Chief Judge is negative and significant at the 10% level. Judges who serve as chief judge receive significantly fewer outside state citations per opinion. Again, as with the production model, the human capital measures are insignificant.

[623] The level of analysis here is the individual citation, so the number of observations is much higher. We have also included state, subject matter, and year controls.

4.2.4. Independence

We see in Column 3 of Table 2 that the coefficient on Female in the regression with the judge-controls while positive is now not significantly different from zero[624]. To summarize, the above three sets of findings are inconsistent with Hypotheses 1, 3 and 5. Indeed, we find little support for the Preference Story, as almost none of the background variables are significant.

Overall, all these findings suggest that women serving on state supreme courts are either able to overcome their lack of training, or that the job of being a state high court judge simply does not require skills learned in elite law schools and private practice. These results call into question the focus on traditional measures of human capital in predicting the performance of female (and male) judges.

4.2.5. Predictions of Differential Interests

Our next two Hypotheses (2 and 4) draw upon the idea that women might have different subject area interests than men and, therefore, might invest effort in law making in different areas than men. One possible criticism of our results is that women are on par with men only because they excel in certain traditionally female-focused areas of law (such as family law). Outside of these areas, the Preference Story may still prevail. To examine this question, we examined publication and citation numbers as a function of specific subject areas.

Table 4
Gender and Subject Matter Differences in Production

	Number of Majority Opinions Per Year - Men	Number of Majority Opinions Per Year - Women	p-value	Female Significant In Full Model?*
Administrative	1.354	1.139	0.0389	No
Attorney	0.578	0.566	0.8574	No
Capital	0.738	0.629	0.2643	No
Church	0.006	0.000	0.1993	Yes, Negative
Commercial	2.809	2.386	0.0311	No
Criminal	6.162	5.562	0.1386	Yes, Negative
Family	1.417	1.457	0.7938	No
First Amendment	0.062	0.037	0.1506	Yes, Negative
Labor	1.565	1.270	0.0157	Yes, Negative
Property	1.156	1.015	0.2047	No
Rights	0.298	0.330	0.5363	No
Torts	2.296	2.097	0.2206	No
Other	0.405	0.296	0.0668	No
Total	18.846	16.783	0.0112	No

[624] We also included a control for the ideology of the judge, the PAJID measure borrowed from our political science colleagues (Brace, Langer & Hall 2000). Theoretically, women could simply be more liberal than their male partisan counterparts, which could drive the difference in independence.

* Each model used the number of citations for cases in each subject area as the dependent variable, with Female, judge controls, and state and year fixed effects as independent variables. This column indicates whether the Female gender variable is a significant predictor of the level of citations from outside the state a case receives, and whether the variable has a positive or negative effect.

Table 4 reports summary statistics on the number of majority opinions published per year categorized by gender and by subject matter (see Appendix for definition of subject matter categories). We find a wide variety of significant differences with simple difference of means tests. Generally, female judges publish fewer majority opinions in Administrative, Commercial, Labor, and the Other categories of cases. Some of these differences may be driven by underlying differences in case loads across the different states and other factors. To control for this, we estimate a regression model using the log of the number of published majority opinions within a subject matter category as the dependent variable and include Female, judge controls, and state and year fixed effects as independent variables. Table 4 reports that in the multivariate model, Female judges publish fewer majority opinions in the Church, Criminal, First Amendment, and Labor categories. Based on these models, women do seem to publish less than men in several areas. But none of these were as predicted (as "traditional" female-focused subject matter areas under Hypothesis 2), suggesting the possibility that these findings are no more than noise. Moreover, there is no indication that women are publishing more cases in the Family law area. Hypothesis 2, in sum, seems to have little support.

Turning to Hypothesis 4, we examine whether women are cited less or more in specific subject areas. As women may been seen as experts in areas relating to family law or gender based rights, we expect that women will be cited more in these areas, but less in areas such as business law that are outside of women's stereotypical domain. Looking first at the average number of outside state citations per majority case published in each subject area, we see that women are cited more often than men in cases relating to the Capital and Family law cases[625].

Table 5
Gender and Subject Matter Differences in Citation Rates

	Number of outside state citations per opinion - Men	Number of outside state citations per opinion - Women	p-value	Female Significant In Full Model?[35]
Administrative	0.452	0.488	0.6787	No
Attorney	0.707	0.736	0.8430	No
Capital	0.786	1.170	0.0067	No
Church	–	–	–	–
Commercial	0.983	1.133	0.1983	No
Criminal	0.662	0.716	0.2759	No
Family	0.625	0.939	0.0064	No
First Amendment	1.191	1.182	0.9874	No
Labor	0.436	0.478	0.6529	No
Property	0.455	0.536	0.2908	No
Rights	1.203	0.976	0.4931	No
Torts	0.954	1.056	0.2855	No
Other	0.471	0.662	0.2471	No
Total	0.708	0.814	0.0009	No

There were no majority opinions authored by a Female judge in the Church category.

[625] Men are cited more in areas that fall outside the basic subject areas (the "other" category).

* Each model used the number of outside state citations for majority cases in each subject area as the dependent variable, with Female, judge controls, and state and year fixed effects as independent variables. As with the publication table, this column indicates whether the Female gender variable is a significant predictor of the level of citations from outside the state a case receives, and whether the variable has a positive or negative effect.

We estimate ordinary least square models with the log of 1 plus the number of outside state citations to majority opinions for each subject matter separate with gender, judge controls, and state and year fixed effects as independent variables. We find that Female gender is not significant in any of these models in explaining the number of outside state citations. The initial summary statistics suggest mild support for Hypothesis 4, in that women are cited more than men in family law. But that mild support disappears once the regressions are estimated. Further, female judges are not cited significantly less than are their male counterparts in any subject area, suggesting that other judges view female judge's opinions as holding the same weight as their male counterparts' opinions. Not only do female judges do just as well as male judges in the aggregate, they do so even at the level of specific subject matter areas.

5. Gender in the Federal Courts

To evaluate whether our results are unique to the state high courts, where there is tremendous variation in terms of court systems and state effects, we report data on the federal courts of appeals and district courts for roughly the same time periods (1998-00 for the courts of appeal and 2001-02 for the district courts). Owing to constraints in the datasets, we are able to estimate gender comparisons only on a subset of the hypotheses. Further, because of the relatively small size of the appeals court dataset, we were unable to use as many controls as we did with the state court data. To bring matters full circle, we report preliminary data on Judge Sotomayor while she was on the Second Circuit Court of Appeals (for the years 2004-06).

5.1 Appeals Courts

The data for the Courts of Appeals, collected for a prior project (Choi & Gulati 2004) has information for all the active circuit court judges during the period 1998 to 2000 who had been on the bench at least two years and were under the age of 65 at the time. Data was collected for the same three measures: majority opinion publication, outside federal circuit citations to majority opinions, and co-partisan disagreements[626]. We estimate regressions with controls for circuit effects since the circuits likely differ in both behavioural norms and caseloads.

Table 6
Appeals Data

	Independence	Production (Majority Opinions)	Outside Federal Circuit Citations
Gender	-0.00988	-0.0654	-0.168+
	(-0.22)	(-1.13)	(-1.76)
Constant	-0.0515	4.554**	8.056**
	(-0.42)	(44.00)	(51.26)
Circuit-Level Controls	Yes	Yes	Yes
N	98	98	98
R^2	0.141	0.639	0.649

t statistics in parentheses
+ $p < 0.10$, * $p < 0.05$, ** $p < 0.01$

[626] We did not have data on subject areas, so as to be able to test whether there were gender differences in the types of cases the judges wrote opinions or received citations in. Also because of the small number of female judges, we were unable to meaningfully test critical mass effects.

Generally, we find that female appeals judges are slightly less likely to be cited by judges from outside their circuit, but have roughly the same rates of publication and independence as male judges. We also see similar patterns, in terms of background, to what we found in the state high courts. Compared to the men, women at the federal appellate level attended less prestigious colleges and law schools, were less likely to have their primary prior background be in private practice, and were younger when appointed to the bench[627].

5.2 District Court

For the district courts, we used data for the approximately 575 federal district judges who were active in the 2001-02 period[628]. Because these judges sit individually, we are unable to calculate independence scores in a fashion similar to the state high courts. As with the federal appeals courts, we used circuit controls to adjust for possible differences in norms[629].

Table 7
District Court Data

	Production (Majority Opinions)	Outside Federal Circuit Citations
Gender	0.2792*	0.0552**
	(2.09)	(3.01)
Constant	2.0839**	0.535**
	(6.26)	(14.10)
Circuit-Level Controls	Yes	Yes
N	**[575]**	8781
R^2	0.639	0.03

t statistics in parentheses
+ $p < 0.10$, * $p < 0.05$, ** $p < 0.01$

We find significant gender differences in both publication rates and outside federal circuit citation rates, with women outperforming men. Unlike with the state high courts and the federal appeals courts, we do not find significant gender differences in terms of the judge background as measured by our judge controls (prestige of college, law school, experience in private practice, and age) in the district courts.

5.3. Judge Sotomayor Versus the Others

As Judge Sotomayor's statements and the reactions they generated were the starting point for our project, we examined data on her as well. Initially, to take advantage of our dataset from 1998-00, we examined her performance in roughly comparable years (1999-01). Roughly speaking, her scores would have put her in the bottom half of the judges on citation

[627] As might be expected, given relative prestige levels of the court systems, the federal appeals court judges tended to have attended more prestigious colleges and law schools as compared to the state high court judges.

[628] There were approximately 650 district court judges who were active during the 2001-02 period. Owing to incomplete data on approximately 75 of these judges, however, we estimated our results only for the 575 for whom we have complete data. We are in the process of filling in the data on the remaining 75.

[629] We also estimated these regressions with district level controls, given possible variations in caseloads across districts. The basic gender results remain the same.