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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 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 apărarea drepturilor 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 voters¹¹⁵. 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 judges¹¹⁶. 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 do¹¹⁷. Other studies have found that elected judges disproportionately rule in favor of their campaign contributors¹¹⁸. 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 dramatically¹¹⁹. Spending on judicial campaigns has doubled in the past decade, exceeding \$200 million in total

direct donations from 1999 to 2008¹²⁰. 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 contributor¹²¹. 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 Court¹²², 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. Uelman, *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 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 molesters¹²³. The challenger, Brent Benjamin, won the election and became the deciding vote to overturn the jury verdict¹²⁴. 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 imminent¹²⁵.” 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 judges¹²⁶.” 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 courts¹²⁷.” 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 rights¹²⁸.”

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, The Judiciary 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 officials¹³¹. 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 review¹³², 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 Reconstruction¹³³, 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 century¹³⁴, 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 century¹³⁵.

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 factors¹³⁶. 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 elections¹³⁷. 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 1850s¹³⁸. 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 date¹³⁹, 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 revolutions¹⁴⁰. 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 holding¹⁴¹, and in the 1810s and 1820s, states were switching over to elect virtually all state offices – except for judges¹⁴². 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 president¹⁴³. 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 elections¹⁴⁵. 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 1840s¹⁴⁶. 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 power¹⁴⁸. 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 courts¹⁴⁹, 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 attacked¹⁵⁰.” 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 appointments¹⁵¹. 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 legislature¹⁵². Indiana began electing lower court judges in 1816 as a reaction to the federal government’s overbearing territorial officials, including territorial judges¹⁵³. 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 courts¹⁵⁴.

In Andrew Jackson’s lifetime (from 1767 to 1845), only one state – Mississippi – adopted judicial elections for all of its courts¹⁵⁵. 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 Judiciary¹⁵⁶.” But as this history illustrates, judicial independence has multiple meanings, and Jackson later called for judicial elections and seven-year terms for federal judges¹⁵⁷. 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 law¹⁵⁹, “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 Englishmen¹⁶⁰.” 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 Salaries¹⁶¹.” 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 behavior¹⁶². Only four of those adopted the model of executive appointment and legislative consent¹⁶³. The other four chose legislative election, which was less centralized than a single governor's power to choose¹⁶⁴. 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 tenure¹⁶⁶. 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 independence¹⁶⁷. 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 states¹⁶⁸.

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 years¹⁶⁹. (In addition, Missouri and Kentucky had removed their entire supreme courts in the 1820s, a unique kind of ad hoc term limitation¹⁷⁰.) Then, in the 1830s, seven more states adopted term limits for judges, with the terms generally ranging between six and eight years¹⁷¹. 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 country¹⁷². 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: seven-year 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' terms¹⁷³. 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 payments¹⁷⁴. For a short period,

urban unemployment increased sharply, industry shut down, and credit collapsed, but the crisis was short-lived¹⁷⁵. 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 1843¹⁷⁶. Bank notes in circulation plummeted from \$149 million in 1837 to \$58 million in 1843, a drop of almost two-thirds¹⁷⁷, and European investors pulled out of the American economy almost entirely¹⁷⁸. Four states defaulted on their debts in 1841, and five more defaulted in 1842¹⁷⁹. 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 answered¹⁸⁰. 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.

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 1819¹⁸¹. 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 1830s¹⁸². 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 1825¹⁸³. Drunk with the success of the Erie Canal, New Yorkers went on a binge of internal improvements¹⁸⁴. In 1825, the New York legislature authorized seventeen new canals, and many were completed at great expense¹⁸⁵. 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 infrastructure¹⁸⁶. 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 regions¹⁸⁷. Before the Panic struck, Indiana's projects had shot so far over budget that the state teetered on the verge of bankruptcy¹⁸⁸. Early in 1837, Ohio, undaunted by Indiana's disastrous experience, enacted a free-spending loan law to subsidize many new canals, roads, and railroads¹⁸⁹. Again, designs failed and costs skyrocketed – sometimes to three times more than the budgeted cost¹⁹⁰. 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 programs¹⁹¹. Nine states defaulted on loans¹⁹². 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 1842¹⁹³. Many states, including Pennsylvania, Maryland, most Midwestern states, and the cotton-belt states, faced bankruptcy¹⁹⁴. New York literally tried to dig itself out of debt by building even more canals¹⁹⁵. 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 interest¹⁹⁷. The government offered "interest certificates" instead of cash to its investors, outraging the public¹⁹⁸. The governor forced the banks to loan the state money to pay off the debt¹⁹⁹, and the state ratcheted up taxes as well²⁰⁰. The government of Illinois acted with similar excess, and with similar results²⁰¹. During the state legislative session of 1836–1837, a host of projects, financed largely by loans, were passed together²⁰². 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 state²⁰³. 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 Bank²⁰⁴. By 1842, the debt had grown, and state leaders talked openly of repudiating it²⁰⁵ – 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 debacle²⁰⁷. 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.*

policies²¹¹.” In Maryland, the General Assembly had put the state in significant debt for public works projects, which triggered sharp tax increases in the 1830s²¹². The most significant public works projects were the Chesapeake & Ohio Canal and the Baltimore & Ohio Railroad²¹³, which carried products from the Western states that competed with the products of Maryland’s Eastern Shore²¹⁴. 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 demise²¹⁵. Similar fates befell other states throughout the country²¹⁶.

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 dimensions²¹⁷. 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 corruption²¹⁸. 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 Jacksonians²¹⁹. 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 practice²²⁰, the underlying hostility to debt and the “paper aristocracy” was deep and powerful, especially once rekindled by the Panics²²¹. 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 state²²², 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 power²²³, because they relied heavily on gubernatorial appointments to fuel their patronage machine²²⁴. The Whigs also had been conservative on judicial matters and opposed populist reforms²²⁵. 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 Whig²²⁸. 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 1840s²²⁹. The name "Hunkers" was derived from the fact that they "hunkered" for spoils or pursued a "hunk" of spoils from the appointment/

patronage system²³⁰, 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 War²³¹. The name "Barnburner" was an allusion to a legendary Dutch farmer who burned down the whole barn to kill off the rats²³². 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 them²³³. 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 do²³⁴." The Barnburners were partly descended from the radical Loco-Focos of the 1830s, who also were named for fire²³⁵. 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 corruption²³⁶. 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 power²³⁷. One scholar credits the Barnburners with the “birth of American liberalism²³⁸,” in this sense of the laissez-faire era. Relatedly, the Barnburners also strongly opposed the extension of slavery²³⁹. 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 1846²⁴⁰. 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 Party²⁴¹.

New York’s Whigs were competitive with the Democrats, but they were generally the minority party in the 1830s

and 1840s²⁴². 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 coalition²⁴³. 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 reason²⁴⁴. 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* 134–48 (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 appointments²⁴⁵. 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 quarrel²⁴⁶.” 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 state²⁴⁷.” 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 least²⁴⁸,” 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 convention²⁴⁹. 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-tax²⁵⁰,” 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 approach²⁵¹. 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 million²⁵². Even though some Barnburners had endorsed judicial elections, they did not propose an amendment for judicial elections²⁵³, 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 ratified²⁵⁴. 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 convention²⁵⁵. 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 mind²⁵⁷.

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 Constitution²⁵⁸." 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 stop-and-tax fiscal limits, which required popular referenda to approve new debts²⁵⁹. 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 officials²⁶⁰. 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 statutes²⁶¹. Legislation would be limited to a single subject²⁶², and numerous other measures limited taxing, spending, and other specific legislative powers²⁶³. 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 process²⁶⁴, and limited the traditional police powers that states had used to regulate daily life²⁶⁵.

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 whatever²⁶⁶.” 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 base²⁶⁷. 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 wanted²⁶⁸. 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 century²⁶⁹.

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 people²⁷⁰.” 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 solution²⁷¹. 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 power²⁷².” 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 purpose²⁷³. 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 suffrage²⁷⁴.

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 period²⁷⁵.” “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'Connor, also a lawyer on the judiciary committee, continued the same argument against the populist bias created by judicial elections, referring to their effects as "evils²⁷⁶." 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 majority²⁷⁷." 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 represented²⁷⁸." 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 populists²⁷⁹, more delegates wanted a constitution with stronger checks and

balances²⁸⁰. Governors had used appointments to promote their own interests and to keep judges in line with those interests²⁸¹. 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 men²⁸²." One delegate complained, "Who selects most of your judges now? The politicians of a party caucus²⁸³." 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 abolished²⁸⁴." If appointments were indeed abolished, judicial elections would liberate judges from partisan interests and "increase[] fidelity" to the people²⁸⁵. 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 wrath²⁸⁶.

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 1820s²⁸⁷. 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 1840s²⁸⁹.

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 Errors²⁹³, to "stringently limit[]" the legislature²⁹⁴, and to empower the courts to engage in "Judicial Legislation"²⁹⁵ in order to reverse "unjust" rules and laws²⁹⁶. 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 evil²⁹⁷. 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 it³⁰⁰.” 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 power³⁰¹. Hoffman conceded that judicial appointments produced judges of “talent and integrity” and “intellect³⁰²,” but he concluded that these judges had not used their power to protect the people’s rights³⁰³.

Churchill Cambreleng, another leader of the Radical Democrats in the convention, denounced the “unrestricted and unlimited ... legislative despotism³⁰⁴” 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 legislature³⁰⁵.

Even the populist Anti-Rent delegates, representing a farmers’ insurgency in upstate New York, echoed the same goals of *increasing* judicial independence and power³⁰⁶. 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 landlords³⁰⁷. 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 naught... . [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 responsibility³⁰⁸.

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 much³⁰⁹, 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 them³¹⁰. In Iowa's 1844 convention, one delegate opposed judicial elections by denouncing Mississippi as "an instance of badly-administered laws, connected with popularly elected Judges³¹¹." After New York's convention, many conventions studied and copied its new constitution. For example, Wisconsin, the first state to follow 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 provisions³¹². Delegates in Illinois in 1847³¹³ and Maryland in 1850³¹⁴, and commentators in Pennsylvania in 1847³¹⁵ sought support from New York's decision, and in 1849, California's delegates relied heavily on New York's new constitution³¹⁶. 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.

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 Party³¹⁷. 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 constitutions³¹⁹. Some Americans were inspired by these efforts, though some were horrified by the

sword³²⁰. 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 depression³²¹, twelve existing states adopted new constitutions with more widespread democratic power, and four states entered the Union with new constitutions³²². In 1848, the Democratic Party platform hailed the European revolutions for following the principle of "the sovereignty of the people³²³," 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 democracy³²⁴."

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 myth³²⁵." But the myth was powerful. In contrast with many of the

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 improvements³²⁶, 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 issues³²⁷. In the wave of conventions in the 1840s, the focus was on limiting legislatures and restraining government³²⁸. 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' label³²⁹." De Tocqueville had remarked in 1835 that "the legislature of each state is faced by no power capable of resisting it³³⁰." 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 legislation³³².

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 1850s³³³. The conventions first restricted state debt and eliminated "taxless finance³³⁴." Similar to the "stop-and-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 taxation³³⁵.

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 cronyism³³⁶ – and adopted general incorporation provisions³³⁷. Special privileges were a bipartisan affair, and the new constitutions limited corruption through more open access to incorporation³³⁸. 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 measures³³⁹. 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 transparency³⁴⁰.

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 elections³⁴¹, 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 barrier³⁴².

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 did³⁴³. 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 self-dealing 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 people³⁴⁴.” 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 Governor³⁴⁵.” Davis also commented that if the federal judges were elected, the people “would have chosen judges, instead of broken down politicians” nominated by the President³⁴⁶. Soon after, an Illinois opponent of judicial elections mocked the supporters for “preach[ing] to us continually – distrust to the Legislature³⁴⁷.” 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 views³⁴⁹. 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 government³⁵⁰,” 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 Kentucky³⁵², Virginia³⁵³, Ohio³⁵⁴, 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, Lunenburg, Nottoway and Dinwiddie*, RICH. ENQUIRER, June 28, 1850, at 3–4).

³⁵⁴ See *infra* notes 271–73.

Maryland³⁵⁵, 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 law³⁵⁶." Earlier Virginia constitutions had not mentioned such a power³⁵⁷. 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 nationally³⁵⁸. *The New Constitution's* issues commented frequently on the European Revolutions, sometimes

reprinting other papers' socialist, pro-labor views³⁵⁹, but more often embracing a simpler pro-democracy, anti-despotism message that fit *The New Constitution's* anti-legislature and anti-regulation perspective³⁶⁰. 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 sword³⁶¹." 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 country³⁶³, 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 country³⁶⁴. 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 few³⁶⁵," 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 protected³⁷⁰

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 increased³⁷¹, and for judges to serve longer terms with the goal of attracting better candidates and strengthening their hands³⁷². 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 review³⁷⁴, but that letter triggered a more vocal and impassioned defense of judicial review by other writers³⁷⁵. 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 observed³⁷⁷. 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* trust³⁷⁸.” 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 play³⁸¹ ... 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 I]; 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 people³⁸⁴. 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 popularly 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

Constitution³⁸⁵. 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 hands³⁸⁶.

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 him³⁸⁷. Then, as soon as the Democratic governor died and was replaced by a Whig, Democratic newspapers adopted the same argument³⁸⁸. 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 people³⁹⁰. 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 rights³⁹¹.

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 1840s³⁹². 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 courts³⁹³, 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 legislature³⁹⁴, 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 strongholds³⁹⁵. 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 appointments³⁹⁷.

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 democracy³⁹⁸.

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 emerged⁴⁰⁰. Jacksonians (or more precisely, Van Burenites) feared

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 selfdealing⁴⁰¹. 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 juntas. The only way to fight monster banks and monster corporations was with monster democracy: the political party⁴⁰². By 1840, Illinois had a permanent two-party political system built on this ideology of parties as protectors of democracy and constitutional limits on power⁴⁰³. 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 politics⁴⁰⁸. 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 jury⁴⁰⁹. The third interpretation is Hall’s contention that moderate lawyer-delegates led the adoption of judicial elections in order to serve their own professional interests⁴¹⁰.

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 politics⁴¹². 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 politics⁴¹³. 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 qualifications⁴¹⁴. 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 innocence⁴¹⁵. 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 had⁴¹⁶. 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 fearless⁴¹⁷. 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 politics⁴²⁰. 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 century⁴²³. 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 independence⁴²⁴. In the era after the depression of the 1840s, only five state conventions shortened judicial tenure while they adopted judicial elections⁴²⁵. 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 limitation⁴²⁶. 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 fact⁴²⁷. 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 trial⁴²⁸. 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 evidence⁴²⁹.” 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 Procedure⁴³⁰. Judges also used interrogatories and special verdicts to guide and control juries⁴³¹. 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 power⁴³². 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 bar⁴³³. 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 lawyers⁴³⁴. 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 leader⁴³⁵. 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 uprising⁴³⁶. 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'Connor, 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 lawyers⁴³⁷, 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 fees⁴³⁸. 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 juries⁴³⁹. 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 jury⁴⁴⁴. 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'Connor, agreed that it should not be put in the power of the legislature to change the number of men on a jury⁴⁴⁷. Two Whigs argued that the jury was chiefly a check on judicial power – not on the legislature⁴⁴⁸. 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 institutions⁴⁴⁹.

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 bar⁴⁵⁰. Only two conventions, Kentucky's and Maryland's, limited the courts to practicing lawyers and prohibited lay judges⁴⁵¹.

Many of these conventions were filled with anti-lawyer rhetoric, even from lawyer-delegates themselves⁴⁵². 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 public⁴⁵³. 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 State⁴⁵⁴." 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 advocates⁴⁵⁵. 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 lawyers⁴⁵⁶.

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 rules⁴⁵⁷. 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 elections⁴⁵⁸. Only the *American Law Journal* supported them, reporting that "some of the members of the Legal Profession⁴⁵⁹" 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 government⁴⁶⁰.

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 California⁴⁶¹. This comprehensive list builds on a handful of intensive studies of judicial review in the 1780s⁴⁶² 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 York⁴⁶³ and Virginia⁴⁶⁴, 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 D⁴⁶⁵.

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 states⁴⁶⁶, but almost all of the states in this era were reporting hundreds of cases per decade⁴⁶⁷. 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 the 1850s, 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- 1840s⁴⁶⁸. 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 years⁴⁶⁹.

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 level⁴⁷¹. 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 year⁴⁷². 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 process⁴⁷³. 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 domain⁴⁷⁴

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 1837⁴⁷⁵.

In New York's surge, takings rulings were most prominent, with a focus on internal improvements, and even the Erie Canal⁴⁷⁶. 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 debt⁴⁷⁸. Issues related loosely to the financial crisis also were grounds for judicial review, such as equal taxation and taxing powers⁴⁷⁹, corporate

structure⁴⁸⁰, and legislative constraints⁴⁸¹. The cases limiting appointment procedures also continued⁴⁸², and were joined by cases protecting judicial independence against salary changes⁴⁸³. 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 thereafter⁴⁸⁴. 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 part⁴⁸⁵. 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 democracy⁴⁸⁶ – 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 law⁴⁸⁸. 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 Act⁴⁸⁹. 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 review⁴⁹⁰.

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 example⁴⁹¹. 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 power⁴⁹².

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 capitalism⁴⁹³. 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* era⁴⁹⁴. 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 election⁴⁹⁵. 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 review⁴⁹⁶.

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 accountability⁴⁹⁷. 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 reversal⁴⁹⁸. 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, forty-four times in the 1870s, forty-two times in the 1880s, eighty-two times in the 1890s, and seventy times between 1900 and 1905⁴⁹⁹. 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 grasp⁵⁰⁰.” The court justified judicial review as vindicating not only the will of the people, but also “individual right[s]⁵⁰¹” and “natural right and justice⁵⁰².” 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 schools⁵⁰³. 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 power⁵⁰⁴.” Skeptical of the voting public, the court observed that the people often followed “hasty and ill-advised zeal” and “unthinking clamor or partisan importunity⁵⁰⁵,” and that the courts' responsibility was to enforce the constitution's protection of “minorities against the caprices, recklessness, or prejudices of majorities⁵⁰⁶.” In a similar case two years later, a different judge wrote that judicial review was necessary to protect “that great idea” of the Founding⁵⁰⁷ – “liberty regulated by law⁵⁰⁸” – against “the evils ... of a consolidated democracy⁵⁰⁹.” 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 judges⁵¹¹. 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 majorities⁵¹²” and that the judiciary must protect the “vital principles” of “free republican governments” against popular abuses⁵¹³. 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-1840s⁵¹⁴. 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 review⁵¹⁵. 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 bounds⁵¹⁶. 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 rights⁵¹⁸. 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.*; see 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 legislation⁵¹⁹.” 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 same⁵²⁰.

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 weak⁵²¹,” 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 themselves⁵²².

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 corporations⁵²³. 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 officers⁵²⁴.

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 hour⁵²⁵.” 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 issued⁵²⁶.” 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 themselves⁵²⁷.” 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 slaves⁵²⁸. 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 majority⁵²⁹.”

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 piracy⁵³⁰ 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 power⁵³¹.” The Ohio judge was anti-slavery, so it is not surprising that he would draw on slavery to critique democratic abuses in the 1850s⁵³². However, the Michigan judge was a Democrat who hated abolitionism⁵³³. 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 1850⁵³⁴. 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 majority⁵³⁵.” 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 1850s⁵³⁶. The appointed courts of North Carolina and Georgia also struck down statutes relatively often⁵³⁷. 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 encroachment⁵³⁹. 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 reasoning⁵⁴⁰” lost out to pro-slavery and instrumental reasoning in the 1840s and 1850s⁵⁴¹. 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 justification⁵⁴². 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 restraint⁵⁴³. 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 hold⁵⁴⁴.” 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 interests⁵⁴⁵. 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 disappeared⁵⁴⁶.” 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 organization⁵⁴⁷.”

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 “disintegration⁵⁴⁸” and “apathy, abstention, and alienation⁵⁴⁹.” 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.

⁵⁴⁴ W.B. YEATS, *The Second Coming*, in MICHAEL ROBERTS 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 daily⁵⁵¹. 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 races⁵⁵². Voter turnout for the judicial elections was relatively low⁵⁵³, and the Hunkers swept the four statewide seats, taking advantage of the most consistent and reliable party machine⁵⁵⁴.

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 nomination⁵⁵⁵. 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 elections⁵⁵⁶. 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 victory⁵⁵⁷. 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 him⁵⁵⁸. 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 particular⁵⁵⁹. 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 unconstitutional⁵⁶⁰. 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 them⁵⁶¹.

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 time⁵⁶²." Albert Cardozo's constituency of German and Irish voters in his urban judicial district were strongly opposed to the statute⁵⁶³. In a later case, however, the General Term of the New York Supreme Court and then the Court of Appeals upheld the statute⁵⁶⁴.

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 grounds⁵⁶⁵. He was a conservative Whig who was skeptical about another democratic institution, the jury⁵⁶⁶, and he later embraced in earlier New York jurist who was a skeptic of democracy, Chancellor James Kent⁵⁶⁷. 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 field⁵⁶⁸. 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 Democrats⁵⁶⁹. 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 polygamy⁵⁷⁰.

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 questions⁵⁷¹." 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.

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 1859⁵⁷². His son volunteered for the Union army and died in battle⁵⁷³. Judge Spalding, who had used images of slavery to criticize democratic excess, also joined the Republican Party early on⁵⁷⁴. 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 elections⁵⁷⁵. 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 reappointment⁵⁷⁶. 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 1846⁵⁷⁷, Illinois in 1848⁵⁷⁸, Kentucky in 1849⁵⁷⁹, Michigan and⁵⁸⁰ Virginia⁵⁸¹ in 1850, and Maryland⁵⁸² and Indiana⁵⁸³ 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 seats⁵⁸⁴. 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 would⁵⁸⁵ 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 democracy⁵⁸⁶, 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 rights⁵⁸⁷. 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 itself⁵⁸⁹.

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 legislators⁵⁹⁰. 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" substance⁵⁹¹. 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 to increase judicial independence⁵⁹². 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 principles⁵⁹³. 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 nominations⁵⁹⁴. 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	Territory of Vermont for lower courts	
—		
1812	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), Tennessee (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)

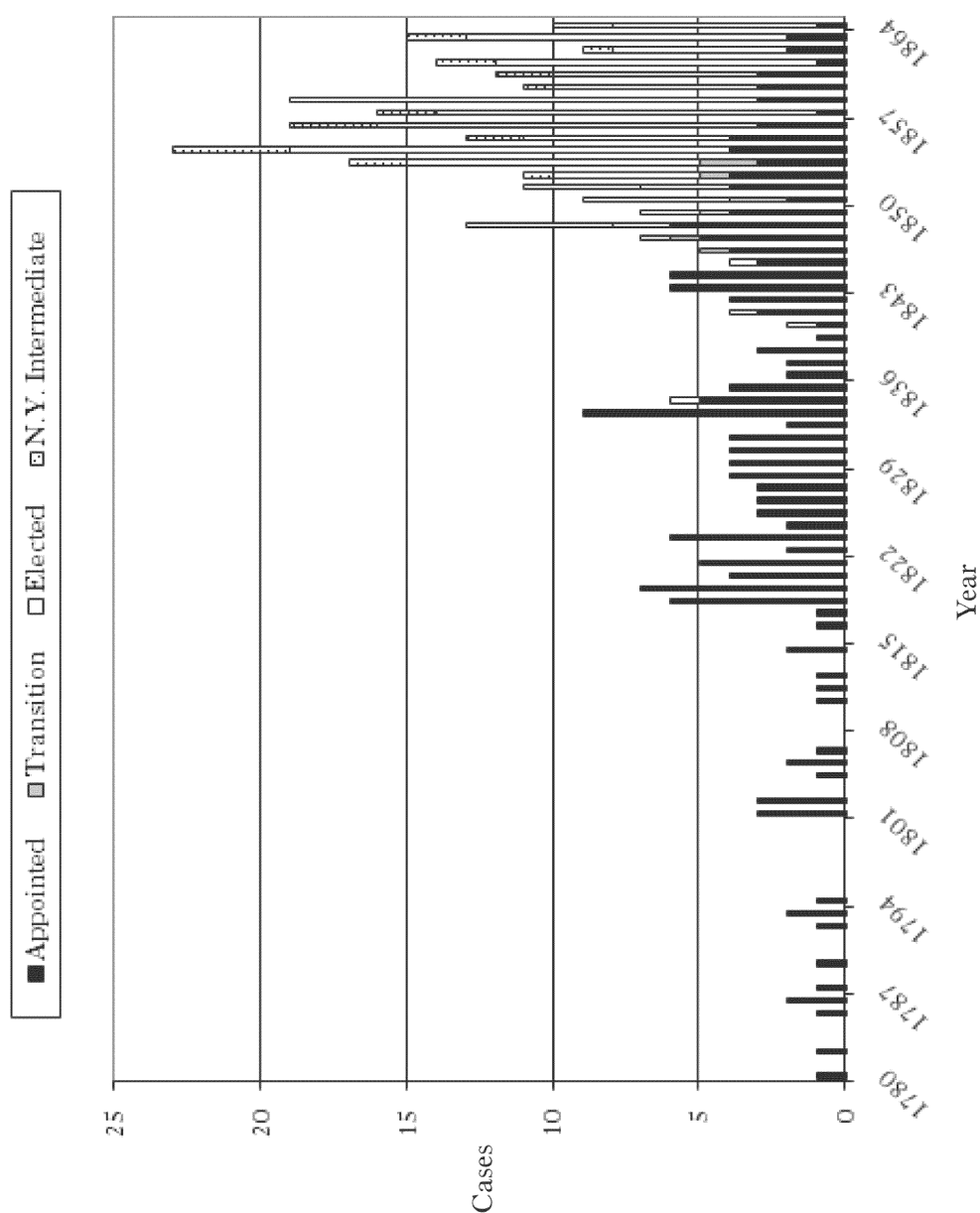
	1780 to 1789	1790 to 1799	1800 to 1809	1810 to 1819	1820 to 1829	1830 to 1839	1840 to 1849	1850 to 1859
New Hampshire	0	0	0	130	439	678	1014	1311
Massachusetts	6	4	481	976	770	1204	1464	2202
Rhode Island	0	0	0	0	1	10	26	301
Connecticut	171	338	176	298	376	374	399	595
New York	0	166	870	966	1183	1497	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 conventions 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 Matter 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.