



HARVARD LAW SCHOOL

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July 16, 2008

Dear Colleagues,

Jed Shugerman will present “The People’s Courts: The Rise of Judicial Elections and Judicial Power in America,” on Monday, July 21st. The paper is attached. The workshop begins at 12:00 and ends at 1:00, in Hauser 105. Lunch will be available beginning at 11:45.

Adrian Vermeule

Dear Faculty,

The attached paper is drawn mainly from the fourth and seventh chapters of my dissertation and book manuscript, *The People’s Courts: The Rise of Judicial Elections and Judicial Power in America*. I have provided a table of contents on the next page and an abstract on the following page. At the end of the paper, I have attached two charts showing the adoption of judicial elections and the numbers of cases striking down state statutes state-by-state, decade-by-decade.

I have cut several sections from this paper, but it is still long. The main argument is in the introduction (3-6), Part III (15-25), Sections IV.A and B (26-34), and the conclusion (45-47). Section IV.C (35-44) offers my tentative explanations for how the first decade of judicial elections contributed to the sharp increase in judicial review and the surprising turn to countermajoritarian justifications for judicial review. I invite your own ideas and suggestions about these interpretations.

Thanks for reading,

Jed

**The People's Courts:
The Rise of Judicial Elections and Judicial Power in America**

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The People's Courts:
The Rise of Judicial Elections and Judicial Power in America

Jed Handelsman Shugerman¹

July 10, 2008

Abstract

Almost 90% of state judges today face some kind of popular election. This peculiar institution emerged in a sudden burst from 1846 to 1853, when twenty states adopted judicial elections.

The modern perception is that judicial elections, then and now, weaken judges and the rule of law. Indeed, some critics of judicial power in the early republic supported judicial elections for those reasons, but they turned instead to more direct and effective attacks on the courts. Until 1846, only Mississippi elected all of its judges.

In the wave of judicial elections mid-century, the key was that the new supporters of judicial elections aimed to *increase* judicial power and *strengthen* judicial review. Over time, judicial appointments became more a tool of party patronage and cronyism. Then the turning points were overspending on internal improvements and then the Panics of 1837 and 1839, plunging the states into crippling debt. Then a wave of nineteen states called constitutional conventions from 1844 to 1853, chiefly to impose new limits on legislative power. In addition to a number of other constitutional provisions limiting the legislatures' tax and spending powers, incorporation powers and other special privileges, and procedures, these conventions adopted judicial elections, with many delegates stating 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 more than twice as many state laws than they had in any other decade. These elected judges offered familiar majoritarian explanations for judicial review (that the courts were enforcing the people's will in the state constitutions against the government's abuses), but surprisingly, they also turned to countermajoritarian justifications for defending individual and minority rights against the people and the "evils" of democracy. This article offers some explanations for why elected judges expanded judicial review and why some turned against democracy. The political crises of the 1840s and 1850s were very significant, but the process of judicial campaigns increased the impact of these crises and contributed to the rise of judicial review along with countermajoritarian theories.

¹ Assistant Professor, Harvard Law School. Thanks in particular to David Blight, Dick Fallon, Glenda Gilmore, Robert Gordon, Andy Kaufman, Daryl Levinson, Ken Mack, Bruce Mann, Bill Nelson, Bill Stuntz, John Witt, and the Harvard Juniors Lunch Workshop for reading drafts and providing great comments.

Introduction

Almost 90% of state judges face some kind of popular election.² Thirty-eight states put all of their judges up before the voters.³ One might think of judicial elections as modern America's peculiar institution, for even though many countries have copied American legal institutions, almost no one else in the world has ever experimented with the popular election of judges.⁴

Today, judicial elections weaken state courts and their willingness to defend the rule of law against public opposition or special interests. Recent studies demonstrate that elected judges, particularly ones chosen by partisan popular elections, face more political pressure and reach legal results more in following with local public opinion (particularly in sentencing, the death penalty, and torts), than appointed judges do.⁵ Other studies find that elected judges disproportionately rule in favor of their campaign contributors.⁶ It has been a long-established practice for parties and lawyers to donate to judges that will later hear their cases,

² Matthew Streb, *Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections* (New York: NYU Press, 2007), 7.

³ 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 its judges on its highest court, the Court of Appeals. South Carolina and Virginia use legislative appointment.

⁴ Even though Americans have exported constitutions and other legal institutions to much of the world, no one else has been importing judicial elections. The only other nations that elect even a tiny number of judges are Switzerland and Japan, and even those countries narrowly limit the scope of those elections. In Japan, the cabinet initially appoints high-court judges, and then run once for election unopposed. The emperor selects the chief judge. In Switzerland, some lay judges of canton courts are elected. Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," *University of Chicago Law Review* 62 (1995): 689, 691.

⁵ See, e.g., Sanford C. Gordon and Gregory A. Huber, "The Effect of Electoral Competitiveness on Incumbent Behavior," *Quarterly Journal of Political Science*, 2 (May 2007): 107-138; Alexander Tabarrok and Eric Helland "Court Politics: The Political Economy of Tort Awards," *Journal of Law and Economics* 42 (1999): 157. (finding damage awards higher in elected courts, particularly against out-of-state businesses, and highest in partisan-election states, and concluding that judges, not juries, were the cause); Gerald F. Uelman, "Elected Judiciary," *Encyclopedia of the American Constitution*, Supp. I. eds. Leonard W. Levy, Kenneth L. Karst & John G. West, Jr. (New York, NY: Macmillian Pub. Co., 1992), 170, 171 (showing meaningful differences between judges selected by executive appointment compared with judges selected by other methods, such as elections); Daniel R. Pinello. *The Impact of Judicial Selection Method on State-Supreme-Court Policy*. (Wesport, CT: Greenwood Press, 1996); Mark A. Cohen, "The Motives of Judges: Empirical Evidence from Antitrust Sentencing." *International Review of Law and Economics* 12 (1992): 13.; Victor Eugene Flango and Craig R. Ducat, "What Difference Does Method of Judicial Selection Make?" *Justice System Journal* 5 (1979): 1.; F. Andrew Hanssen. "The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges," *Journal of Legal Studies* 28 (1999): 205.; but see John Blume and Theodore Eisenberg, "Judicial Politics, Death Penalty Appeals, and Case Selection," *South Carolina Law Review* 72 (1999): 465 (showing no significant effect of selection methods).

⁶ Adam Liptak, "Looking Anew at Campaign Cash and Elected Judges," *New York Times*, Jan. 29, 2008, U.S. section, Sidebar; Adam Liptak and Janet Roberts, "Tilting the Scales? Campaign Cash Mirrors a High Court Rulings," *New York Times*, Oct. 1, 2006.

but the difference today is the size of those donations.⁷ Spending on judicial campaigns has doubled in the past decade -- with 44% of those donations came from business groups, and 21% from lawyers.⁸

The divergence of the state courts from the traditional method of appointment was sudden and sweeping. In 1832, Mississippi became the first state to elect its supreme court judges. No other state followed until New York's constitutional convention of 1846, and then New York -- with its prestigious stamp of approval -- was the turning point. Twenty states adopted judicial elections in just seven years (1846 to 1853). There was no organized movement or network promoting these changes. This transformation instead resulted from a complicated mix of political beliefs, economic crisis, partisan strategy, factional intrigue, backlash against particular decisions or events, momentum, and luck.

The conventional wisdom is that judicial elections have always been a means of weakening judges and that they were the direct result of Jacksonian democracy. This paper argues that for most of the Jacksonian era (roughly from the mid-1820s to 1850), Whigs and Democrats generally were happy to appoint judges. Near the end of this era and the demise of the Jacksonian two-party system, both Whigs and Democrats in every region embraced judicial elections only after a series of other events changed their views of the political order. In the late 1840s and early 1850s, many Whigs and Democrats turned to judicial elections explicitly to increase judicial power and increase judicial review, and in practice, the first generation of elected judges fulfilled those goals dramatically.

This article offers a more simplified overview of this story, focusing on some of the more general themes of democratization, economic crisis, corruption, and then constitutional revolution, the rise of judicial review with a new turn to anti-democratic theories of judicial review. The book delves into more state-by-state detail, with more focus on local politics, the role of parties and factions, religious minorities (including the Mormons), pro-slavery and anti-slavery, migrants and immigrants, and the role of luck and contingency.

This episode offers a number of puzzles. How did judicial elections grow from an aberration in Mississippi to a sweeping consensus of New Yorkers and then most of the country? How did judicial elections change from a below-the-radar experiment into a high-priority bipartisan agreement? 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 turning points 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 debt and financial disaster in the early 1840s. With legislatures disgraced, appointed judges in a few major states stepped up and began striking down statutes more regularly in the 1840s. At the same time, reformers organized their own American

⁷ Justice at Stake 2004 report, at 19. <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>; James Sample and Rachel Weiss, "The New Politics of Judicial Elections, 2006," Justice at Stake, at 15. <http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf>

⁸ James Sample and Rachel Weiss, "The New Politics of Judicial Elections, 2006," Justice at Stake, at 15. <http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf>

version of the Revolutions of 1848: nineteen state constitutional conventions from 1844 to 1853, with the chief goal of imposing new limits on legislative power.

The main purposes of New York’s pivotal 1846 convention were to limit legislative power and to scale back on insider privilege and cronyism. As one of several new checks on the legislature, the delegates in New York’s 1846 convention turned to judicial elections to reduce cronyism by appointment, to separate the judges from the other branches, and to encourage more judicial review. In most of the conventions that followed New York, some delegates argued in favor of judicial elections as a means of bolstering judicial power with democratic legitimacy, so that judges would defend “the people” against corruption, faction, and folly.⁹

The reformers got results: elected judges in the 1850s struck down state laws with more frequency than ever before. This paper offers the most comprehensive study of the state courts’ practice of judicial review, with the following totals so far from the study of 22 states:¹⁰

State Supreme Court Cases Declaring State Laws Unconstitutional

	1790- 1799	1800- 1809	1810- 1819	1820- 1829	1830- 1839	1840- 1849	1850-1859	1860- 1865
Totals for 22 states	4	9	20	36	46	66	152	72
Totals from elected courts only	0	0	0	0	1	7	125	66

This quantitative research on its own merely suggests a correlation, but the historical record confirms that the explicit purpose of judicial elections was to bolster judicial power and to enable the courts to void more statutes. Counting decisions that void statutes is an imperfect proxy for judicial power, but at least it is a rough approximation of the courts’ power relative to the other branches. The 1840s and 1850s was a key turning point for judicial review becoming a widely accepted practice and for it to be justified by a more modern basis of limiting majorities, as opposed to protecting majorities.

Part I, “A Lull, a Panic, and a Spike” identifies some of the long-term and mid-term factors building up momentum for judicial elections. The long-term trend was the spread of democratic ideology, leading to an expansion of suffrage and the shift to the popular election of more offices in the Founding Era and the first few decades of the nineteenth century. Even though many populists attacked judicial independence, they used other means to do so, and judicial elections remained very rare. Another result was a new two-party system, with both Democrats and Whigs competing to be the party of the people, both in substance and in

⁹ See also Kermit Hall, “The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860,” *The Historian* 46 (1983):337-54; Caleb Nelson, “A Re-Evaluation of Scholarly Explanations for the Rise of the Elected Judiciary in Antebellum America,” *American Journal of Legal History* 37 (1993):190-224. Both articles are good, concise overviews of the whole era.

¹⁰ See the last page for a chart, as well as a chart in Part IV.

symbol. A mid-term trend was an economic crisis that created political upheaval and constitutional revision. The Panics of 1837 and 1839 left overspending states in a financial crisis, left legislatures disgraced, and sparked calls for new constitutions with stronger checks against legislative power; and some appointed judges on prominent courts (especially New York's courts) began expanding their power of judicial review in the 1840s. Part II, "Trigger: New York's Anti-Hunker Adoption in 1846" digs into the complicated details of New York factional politics and the larger political forces that prompted this pivotal turn to judicial elections. Judicial elections were not a priority for either party before the convention, but a number of surprise twists and turns led to a bipartisan consensus in favor of them. Legislative abuses of spending and governors' abuses of appointment powers for patronage propelled 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" turns to the sweeping adoptions throughout most of the country after 1846. Judicial elections rode a larger wave: a sweeping constitutional revolution limiting legislative power and increasing the separation of powers in the wake of financial crisis. One might call this series of conventions "the American Revolutions of 1848." Judicial elections were one method among many for achieving those goals, but the idea gained acceptance only after New York transformed it from a marginal frontier experiment into the wave of the future. Many delegates embraced the proposal explicitly in order to increase judicial review.

Part IV, "The Boom of Judicial Review," demonstrates that the reformers succeeded. In the most extensive study of state judicial review, this article shows that elected judges struck down statutes far more regularly than appointed judges had – and with a paradoxical twist of constitutional theory. This article develops some tentative answers to this puzzle. The remaining records of these judges are fragmentary at best, but those fragments offer some clues. The politics of the 1840s and 1850s contributed to the rise of judicial review and countermajoritarian justifications, as more and more Americans grew skeptical that their government, their Union and their democracy could survive. At the same time, the mechanics of the judicial campaigns magnified these forces. Judicial candidates competed actively for party nominations and for the support of factions, regions, and interests to support their nomination. There is little evidence that they campaigned at all in general elections. As the two parties were already fragmenting, the politics of party nominations pushed judges away from the center and towards smaller factions and special interests. Moreover, many of these judges ran in smaller districts, even for the state supreme courts, further pushing them away from state-wide public opinion towards localism. Among other factors, these dynamics further disintegrated a collapsing political order. Countermajoritarian theories expressed the fragmenting politics of judicial elections and the growing doubts about democracy.

The conclusion offers some links to the history of popular constitutionalism and some thoughts about the nature and history of "judicial independence" and judicial power in absolute versus relative terms. Today, judicial elections are perceived as making judges less independent, but originally, the supporters of judicial elections sought and achieved a certain kind of judicial independence: the independence of judges from the other branches of government. Their trade-off was more dependence on "the people" and the political parties, which is the way the debate over judicial independence and accountability is framed today.

I. A Lull, a Panic, and a Spike

A. *Weakening the Courts, 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 for judicial elections, but it was not a sufficient cause. Early American history is more or less an on-going evolution in popular sovereignty, marked periodically by revolutions of popular sovereignty.¹¹ States had been widely expanding suffrage in the early nineteenth century, so that by 1821, all but three of the twenty-four states had decoupled voting from property-holding, and in the 1810s and 1820s, states were already switching over to elect virtually all state offices – except for judges.¹² Andrew Jackson arguably was more a result of “Jacksonian” democracy than the creator of it, because he was more of a product of earlier expansions of suffrage and the growth of mass political parties than a builder of these movements. After the expansion of suffrage, it took a few years for popular participation to increase, but when it did, it was dramatic. In 1824, only 25% of adult white males voted for president. In the Jackson-Adams rematch of 1828, participation more than doubled, to 56.3%. This level of participation remained steady for the next two elections.¹³

The Whigs sought to steal the Democrats’ claim to being the party for the people. These slogans and symbols were not merely show. They shifted the Whig ideology into being a party for the people, and even if there was strong revulsion in many quarters of the party to electing judges, that opposition was eroding under the force of Whig convergence with democratic ideology in the 1840s. The Whig efforts to embrace populism and mobilize more voters had a sudden effect of voter participation. In 1840, for Tippecanoe and Tyler, too, the percentage shot up to 78.9%.¹⁴

In the first third of the nineteenth century, some populist leaders sometimes called for judicial elections in order to keep courts in check and reduce their power. However, these critics of judicial power in those years turned instead to more direct and effective attacks on the courts, such as impeachment and abolition of courts, 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. Judicial elections also remained rare in the early republic.

Alexis de Tocqueville predicted in 1835 (when only three states were electing any judges at all) that “sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates’ independence, not judicial power only but the democratic republic itself has been attacked.”¹⁵ Tocqueville was perceptive enough to

¹¹ Sean Wilentz interprets American history from the Revolution through the Civil War as a relatively unified march towards more inclusive democracy. Sean Wilentz, *The Rise of American Democracy*.

¹² Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln*. (New York: Norton, 2005), 189-98.

¹³ Harry Watson, *Liberty and Power: The Politics of Jacksonian America* 232 (2006).

¹⁴ Watson, *Liberty and Power*, 232.

¹⁵ Alexis de Tocqueville, *Democracy in America* (Doubleday, 1969) (George Lawrence, trans.) (originally published 1835)), 269.

recognize the very beginnings of a movement, and his prediction of politically-driven judges holds true for today's declining judicial independence – but it was not an accurate prediction in his own lifetime.

The territory of Vermont elected some lower court judges in reaction to bad experiences with New York judges, but as a state, Vermont also fell into line.¹⁶ In 1812, Georgia began electing its circuit judges to four year terms in the wake of the Yazoo Land Fraud scandal and the corruption of the state legislature.¹⁷ Indiana began electing lower court judges in 1816 as a reaction to the federal government's overbearing territorial government, and as a reaction against these territorial judges' power.¹⁸ In each case, the primary goal was increasing local control of judges against outsiders, but these experiments were outliers among more dominant methods of checking the courts in the early republic: limiting the tenure of judges from good behavior to a relatively short number of years; impeachment; "ripper bills" abolishing courts; and the creation of new courts.

Only one state – Mississippi in 1832 – adopted judicial elections for all of its courts during the presidencies of Jackson or Van Buren (and the writing of Tocqueville), while many other states rewrote their constitutions, expanded suffrage, democratized their governments, but declined to elect judges. Jackson in the 1820s stated that constitutional rights "are worth nothing, a mere bubble" without "an independent and virtuous Judiciary,"¹⁹ but Jackson later called for the election of federal judges to seven year terms.²⁰ He had been out of office for ten years until the next state heeded his call. Only in the late 1840s and 1850s -- after the height of the Jacksonian era and in the beginning of a dramatically new era of American politics -- did other states adopt judicial elections. From a blurry bird's eye view 150 years after the fact, 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 of specific events, and then a bandwagon effect of legal reform. There are no signs of an organized movement, but rather a trickle of chance that, state by state, gathered into a wave of reform around 1850. At the same time, the states transformed their prosecutors from low-level appointed officials to elected officials affiliated with the executive branch, but with much more independence and steadily increasing power.

Shortening Tenure

As American colonists pursued independence from England, many demanded judicial independence, as well. They demanded that their judges receive "good behaviour"

¹⁶ Vermont Constitution of 1777, c. 2, section 27, cited in *Benjamin Perley Poore, United States Federal and State Constitutions* 1(1877), 1865.

¹⁷ Amendment of 1812 to the Georgia Constitution, cited in *Benjamin Perley Poore, United States Federal and State Constitutions* 1 (1877), 396.

¹⁸ Indiana Constitution of 1816, Article V, Section 7, cited in *Benjamin Perley Poore, United States Federal and State Constitutions* 1(1877), 506.

¹⁹ Richard Ellis, *The Union at Risk* (citing Andrew Jackson to Andrew Jackson Donelson, July 5, 1822) (NY: Oxford University Press, 1987); 3 *Correspondence of Andrew Jackson* (Bassett, ed.) 167.

²⁰ Wilentz, at 315.

commissions. In the 1750s, some colonial leaders declared that the common law mandated that judicial commissions were held during good behaviour, and could be removed only for misbehaviour in office.²¹ Those favoring judicial independence argued that “good behaviour” was the “ancient and indubitable” common law, “by the usage and custom of ages; . . . by the rules of reason; . . . by covenant with the first founder of your government; . . . by the united consent of Kings, Lords, and Commons; . . . by birthright and as Englishmen.”²² 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 behaviour.”²³ As Jefferson protested in the Declaration of Independence: “He [King George] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” Judicial independence, before all else, meant independence from a tyrannical central power, and not independence from public opinion. Such independence arguably was consistent both with life tenure by appointment or with periodic popular elections.

Once the colonies won their independence, eight states adopted constitutions that guaranteed judicial commissions during good behavior.²⁴ Only four of those adopted the model of executive appointment and legislative consent.²⁵ Seven states chose legislative election without the governor’s involvement.²⁶ Legislative appointment was less centralized than a single governor’s power to choose, and, at least in design, it was a more democratic or populist approach. Pennsylvania and New Jersey provided their judges with seven year terms, rather than life tenure, and judges in Georgia, Rhode Island, Connecticut’s lower courts, and Vermont served only at the pleasure of the assembly (i.e., no legal protection, but no specified limit).²⁷

²¹ Smith, “An Independent Judiciary,” 1121 (noting that Pennsylvania had such a schema).

²² Id., 1122 (citing *Pamphlets of the American Revolution, 1750-1776*, ed. Bernard Bailyn (Cambridge: Belknap Press of Harvard University Press, 1965), 256-72).

²³ In 1759, pro-judicial independence colonists in the New Jersey assembly battled the crown over a “good behaviour” judicial commission for Robert Hunter Morris. Id., 1125-28 A judge ruled that the commission was valid, and moreover, it was a freehold property—the critical distinction for the writ of assize of novel disseisin. Id., 1128 The pro-British governors continued to oppose Morris, and the confrontation escalated with the assembly. Id. New York, Pennsylvania, the Carolinas, and Massachusetts had similarly bitter confrontations, with assemblies passing acts establishing good behaviour commissions, and pro-royal governors rejecting them. Id., 1122. Benjamin Franklin took up the fight in the 1760s. In his “Causes of the American Discontents Before 1768,” Franklin called for good behaviour judicial commissions, with permanent and ample salaries. Id., 1125. The Crown won the battle after years of struggle, but the war for judicial independence and “good behaviour” commissions continued. Id.

²⁴ Massachusetts, New Hampshire, New York, Delaware, Maryland, Virginia, North Carolina, and South Carolina.

²⁵ Massachusetts, New Hampshire, New York, and Maryland.

²⁶ Connecticut, Rhode Island, Delaware, Virginia, North Carolina, South Carolina, and Georgia.

²⁷ Evan Haynes, *The Selection and Tenure of Judges* (Newark: National Conference of Judicial Councils, 1944).

Even in the Founding era, life tenure was not a dominant practice, and even in the states granting life tenure, the legislatures controlled salaries, fees, and removal (often by the address of a simple legislative majority) in order to weaken real judicial independence.²⁸ For example New Hampshire’s legislature, according to Edward Corwin, regularly “vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes. Nor do such practices seem to have been more aggravated in New Hampshire than in several other states.”²⁹

In the 1830s, the states continued to reduce judges’ terms, almost entirely without serious consideration of electing judges. Through 1830, twelve states had given their judges tenure during good behavior, and six states had given limited terms, ranging from no term (“at pleasure” tenure) to seven years.³⁰ In addition, Missouri and Kentucky had removed their entire supreme courts in the 1820s. In the 1830s, eight states limited judges’ terms, generally to between six and eight years.³¹ By the end of the decade, a majority of states limited judges’ terms (with a median of seven year terms), and these states were distributed fairly evenly through every region of the country. The overall effect was increasing the governors’ and legislatures’ control over reappointment, and thus a weakening of judges’ power against them. The trend of departing from good behavior in favor of short terms would continue in the late 1840s and 1850s (with roughly similar term lengths of between six and ten years), but then it would be mostly in the very different context of switching to popular election and highlighting the judges’ democratic pedigree.

B. Party Ideology, Strategy, and Democratic Convergence

(Cut from this draft)

C. The Distraction and Demise of Codification

(Cut from this draft)

D. Panic: Legislative Excess and Financial Disaster

²⁸ Wood, *Creation*, 161. See also Martha Andes Ziskind, “Judicial Tenure in the American Constitution: English and American Precedents,” *Supreme Court Review* 1969: 138-47.

²⁹ Corwin, “Progress of Constitutional Theory,” 155-56, 407-09.

³⁰ Rhode Island (“at pleasure” terms with no tenure protection); Vermont (one year terms); Georgia (three year terms); Indiana, New Jersey, and Ohio (seven year terms).

³¹ Alabama (six year terms in 1830); Mississippi (six year terms in 1832), Tennessee (12 and 8 year terms in 1835); Michigan (seven year terms in 1835); Arkansas (eight years and four years, in 1836); Pennsylvania (fifteen years in 1838); Florida (five year initial terms, 1838); Maine (seven years,

The 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 depression following the Panics of 1837 and 1839, which left many states in fiscal crisis through the 1840s. The Panic of 1837 forced almost half of the banks in the United States to close permanently (343 out of a total of 850, plus 62 partial failures). Unemployment rates soared, food riots erupted in many cities, and a depression lasted until 1843. President Martin Van Buren remained committed to the Democrats' ideology of negative government in the midst of calls for federal intervention and bailouts. "The less government interferes with private pursuits, the better for the general prosperity," Van Buren answered. State economic programs created "complaints of neglect, partiality, injustice, and oppression."³² 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. The Democrats' doctrine of limited government guided the party through the rest of the antebellum period, and it contributed to a judicial doctrine of limited government and judicial review, as well.

The crisis doomed Martin Van Buren's presidency, but many other political leaders 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 expensive internal improvements to excess. The push for internal improvements and state spending had, interestingly, been the opposite response to an earlier economic crisis, the Panic of 1819. In some ways, the reaction to the Panic of 1819 was similar to the Panic of 1837. The Panic of 1819 sparked a movement for increased political equality and increased democratic control. There was also a small move for constitutional revision which included the finishing touches on the expansion of suffrage. The second party system had its origins in the aftermath of the Panic of 1819. The Democrats found one of their organizing principles in the wave of anti-bank sentiment, and the Whigs found one of theirs in the Anti-Masons and the attacks on privilege. But generally, internal improvements were the craze and the fix-all for both Whigs (on the national and state level) and Democrats (on the state level), building from the 1820s into the 1830s. The solution in the 1820s became the problem in the late 1830s and 1840s. The Panics wiped out much of the expected proceeds of commerce and tolls, and the resulting debt was staggering. The political backlash reduced legislative power in several critical ways: increased judicial review by more powerful courts; constitutional revision in new conventions; and the adoption of judicial elections in those conventions (Part III).

New York's legislative energy began innocently and successfully enough in the 1820s with the Erie Canal, but the canal became something of a vortex, drawing too many copy-cats in the 1830s and '40s. 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 the Governor DeWitt Clinton. However, it was popular and profitable early on, and a "grand celebration" marked its completion in 1825.

New Yorkers were drunk with the success of the Erie Canal and went on a binge of internal improvements.³³ In 1825, the legislature authorized seventeen new canals, and many

³² Michael F. Holt, *The Political Crisis of the 1850s*, 32-33.

³³ Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics* (Chapel Hill: University of North Carolina Press, 2001), 57-60.

were completed at great expense.³⁴ 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 the tolls would pay off the massive debts. In 1835 and 1836, Indiana poured millions into internal improvements, but the choices of where to build which canals and roads sparked bitter fights between regions and between towns within those regions. Before the Panic struck, Indiana's projects had shot so far over budget that the state teetered on the verge of bankruptcy. Early in 1837, Ohio, undaunted by Indiana's disastrous experience, enacted a free-spending Loan Law to subsidize many new canals, roads and railroads. Again, designs failed and costs skyrocketed – sometimes three times more than the budgeted cost.³⁵ In state after state, modernizers' dreams for the transportation revolution became a nightmare of political squabbling.

The Panic of 1837 and the crash of 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, raiding trust funds for schools and other programs. Eight states defaulted on loans. Many states, including Pennsylvania, Maryland, Midwestern states, and the cotton-belt states, faced bankruptcy. New York literally tried to dig itself out of debt by building even more canals. By 1842, the state debt had climbed to \$25 million, more than 50 times the size of the general state expenses, and it stayed at that level until the convention of 1846 (which this crisis had triggered). Pennsylvania had accumulated a staggering debt of \$40 million when a new round of panic struck the state in 1841.³⁶ The state offered “interest certificates” instead of cash to its investors, and the public was outraged.³⁷ By 1841, the state's spending on roads and canals had left it in \$40 million of debt, and the state could not pay the interest.³⁸ The governor forced the banks to loan the state money to pay off the debt, and the state ratcheted up taxes, as well – always a popular move.

The government of Illinois acted with similar excess, and with similar results. In the course of the 1830s, a number of internal improvement projects were proposed, including a canal connecting Lake Michigan with the Illinois River and local railroad projects.³⁹ The competition of local projects for support and financing soon led to an effort to combine these projects into a general internal improvement project.⁴⁰ During the state legislative session of 1836-1837, a host of these projects, financed largely by loans, were passed together.⁴¹ Construction began almost immediately, and the state quickly ran into financial difficulty, largely because the bill provided for many of the projects to begin simultaneously, and further

³⁴ John Lauritz Larson, *Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States* (Chapel Hill: University of North Carolina Press, 2001), 221.

³⁵ *Id.*, 221.

³⁶ *Id.*

³⁷ *Id.*, 221; A.K. McClure, *Old Time Notes of Pennsylvania* (Philadelphia: Winston Co., 1905), 58-65

³⁸ McClure, 58-65.

³⁹ Theodore Calvin Pease, *The Frontier State, 1818-1848* (Chicago: McClurg, 1922), 198, 205.

⁴⁰ *Id.*, 208.

⁴¹ *Id.*, 212-15.

required that all progress be proportionate among three districts of the state. After July 1841, the state could no longer meet its payment schedule and defaulted on its interest payments, not only halting the internal improvements but also multiplying the difficulties of the second Illinois State Bank.⁴² In 1842, the debt grew, and state leaders talked openly of repudiating it – with potentially devastating effects.⁴³ Outraged citizens demanded a new constitution “to prevent future financial disasters by curbing and restricting the legislature.”⁴⁴ A first effort for calling 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 constitutional convention delegates focused long discussions on the internal improvement debacle five years later.⁴⁵ The constitution’s main purpose was to limit power of the legislature because “excesses of the General Assembly had almost bankrupted the state through the creation of banks and internal improvements.”⁴⁶ (Part III will discuss the wave of state conventions).

In Ohio, the state’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.” However, by the 1840s, “the people began to see the legislature as the source of many, if not most of the problems of government.” The chief problem in the 1840s was the legislature’s “disastrous economic policies.”⁴⁷

In Maryland, the General Assembly had put the state in significant debt for public works projects, which triggered sharp tax increases in the 1840s. The most significant public works projects – by far – were the Chesapeake & Ohio Canal and the Baltimore & Ohio Railroad, which increased competition from other states against the Eastern Shore. The Eastern Shore had been declining in power since the eighteenth century and the increasing power of Baltimore, but it was wielded more political influence than it does today, and it was furious that its taxes were financing its own commercial demise.⁴⁸ Similar fates befell Indiana and Michigan, as well as other southern states, and many states looted their own banks

⁴² Efforts at internal improvement legislation were intimately tied to the development of the second Illinois State Bank. While the first Illinois State Bank ended in disaster, a bill for a second State Bank was passed in the 1834–35 session of the legislature. The panic of 1837, however, placed the banks on tenuous financial footing, with the banks suspending payments in late May, and such action eliciting opposition to the bank from the Democrats. The Whigs, meanwhile, attempted to fasten all responsibility for the bank’s financial difficulties on the Democrats. The Bank’s difficulties became disastrous because of its linkage with the internal improvement legislation, and in 1842 state offices refused to accept State Bank paper for taxes, and the Bank was eventually forced to liquidate. *Id.*, 303-14.

⁴³ Janet Cornelius, *Constitution Making in Illinois* 27.

⁴⁴ *Id.*, 27-28.

⁴⁵ See, for example, Onslow Peters, Speech (July 16, 1847), in Arthur Charles Cole, ed., *The Constitutional Debates of 1847* (Springfield, IL: Trustees of the Illinois Historical Library, 1919), 406-07.

⁴⁶ *Id.*, 33.

⁴⁷ Steinglass, *Ohio State Constitution: A Reference Guide*, 19

⁴⁸ James Warner Harry, *The Maryland Constitution of 1851*, Johns Hopkins University Studies, Series XX (Baltimore: Johns Hopkins Press, 1902), 16-19, 35; Maryland State Constitution of 1776.

through unconventional loans.⁴⁹ New York's debt crisis in the 1840s, which was the trigger for its pivotal convention in 1846, is discussed in Part II.

E. A Spike in Judicial Review

(Cut from this draft).

II. Trigger: The Anti-Hunker New York Convention of 1846

[This Part has been cut from this draft, but I provide a summary:]

These political and economic developments led to the trigger: New York's constitutional convention of 1846. In one prominent call for a convention in 1846, a New York commentator noted that there were few calls for constitutional reform "until after the state had been threatened with bankruptcy," due to "the improvidence of the Legislature in contracting debts on behalf of the state."⁵⁰ Nevertheless, a convention was not inevitable. The argument here is that New York stumbled into judicial elections almost by accident. Democrats controlled the state and did not want a convention. The smaller and populist faction of the party, the Radical Democrats or "Barnburners," sought a series of reforms by constitutional amendment. These reformist Democrats proposed amendments to address the problems of debt, legislative excess and judicial reorganization, but had not proposed an amendment for judicial elections.

Many Whigs supported these amendments, and they could have formed a coalition with the Barnburners to pass these amendments and extract some deals for their own benefit. Instead, the Whigs gambled and voted against these amendments in order to force a convention. As the minority party, the Whigs risked calling a convention that could have given Democrats even more power, but they wagered that they could play both factions against each other in a convention..

For years, the reformist Democrats (the "Radicals" or "Barnburners") had been shut out of appointments by the party machine of the conservative Democrats (the "Hunkers"), but the Radicals were able to dominate the elections to the 1846 convention (winning over 40% of the seats, compared to 13% for the Hunkers). The Whigs also resented the Hunker monopoly on appointments, and preferred elections by district as a better alternative to state-wide selection (which the Democrats would control under either system). Together, the Whigs and Radical Democrats had an overwhelming majority in the convention to adopt judicial elections with a mix of districts and state-wide 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 path of amendment was been small scale by

⁴⁹ McCurdy, *Anti-rent Era in New York Law and Politics* 58.

⁵⁰ "A History of Constitutional Reform in the United States (Continued)," *Democratic Review* 18 (1846): 403.

amendment. Without a convention, 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 blazed a trail for a surprisingly broad consensus. This Part also traces how New York served as the trigger for other states that followed. Delegates in Wisconsin, the next state to adopt judicial elections, focused closely on New York's convention, and the delegates in other states also emphasized New York's decision].

III. 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 Revolutions of 1848. In "The Rise of American Democracy," Sean Wilentz titles one chapter "The American 1848," focusing on the Mexican War's aftermath, the western expansion of slavery, and the resulting growth of the Free Soil movement, the forerunner of Lincoln's Republican Party.⁵¹ Daniel Walker Howe, in "What Hath God Wrought," similarly titles one chapter "The Revolutions of 1848," with a similar focus on slavery, the Mexican War, Manifest Destiny, and the "crumbling away of the second party system."⁵²

At the same time, America had its own overlooked revolutions of 1848, roughly speaking. They were non-violent and far more successful. While the poor and lower middle class arose with the sword in France, Italian and German states, the Habsburg Empire, and Poland, American reformers arose with the pen to re-write their state constitutions with more power to the people, and less power to their government. This period was not the first set of constitutional revisions in the states. Massachusetts, New York and Virginia revised their constitutions in the early 1820s, followed by Mississippi, North Carolina, Georgia, and Pennsylvania between 1832 and 1838. However, the burst of revisions between 1844 and 1853 was unprecedented. Fifteen existing states adopted new constitutions with more widespread democratic power, in addition to four states entering the Union with new constitutions. In 1848, the Democratic Party platform hailed the European revolutions for following the principle of "the sovereignty of the people,"⁵³ just as American states were increasing popular sovereignty in state constitutions. Yet the European revolutionaries were generally seeking socialism and more state economic redistribution, while the American reformers were generally seeking to limit legislative spending and increase private enterprise. This lost revolution was essentially economically libertarian and fiscally conservative. In the context of limiting the legislatures, these reformers adopted judicial elections in almost all of

⁵¹Sean Wilentz, Chapter 20, "Slavery and the American 1848," *The Rise of American Democracy* (2005).

⁵²Daniel Walker Howe, *What Hath God Wrought* (Oxford; New York : Oxford University Press, 2007), 827.

⁵³ Democratic Platform of 1848, cited in Howe, *What Hath God Wrought*, 793.

the new constitutions. They believed electing judges would not make them weaker, but rather, more empowered to check other elected officials who were abusing their power.

Howe writes that in 1848, the Democrats' "Young America" movement had taken over with an agenda of state spending on internal improvements,⁵⁴ but the history of these state conventions around 1848 demonstrate a bipartisan consensus to limit this spending power, which had been abused or misused in state after state in the 1830s and 1840s. The overspending on roads and canals combined with the Panics of 1837 and 1839 to leave most states in fiscal ruin in the early 1840s. The first part of this chapter illustrates how this crisis led directly to the wave of constitutional conventions starting in the mid-1840s, and their general goals of limiting legislative power, increasing separation of powers, and increasing the power of judicial review.

This chapter will then examine some of the more specific dynamics among the "early adopters" of judicial elections in this burst of constitutional creativity. While some have questioned whether New York influenced the next states all that much,⁵⁵ the evidence demonstrates that New York's adopting triggered the wave that followed in Wisconsin in 1846, Illinois in 1847, Pennsylvania in 1848, California in 1849, and elsewhere. Before New York added its credibility, other states were reluctant to follow Mississippi down this unorthodox path with unpredictable results. New York's adoption was pivotal in lending credibility to judicial elections and demonstrating that voters would choose established, experienced and qualified candidates. Wisconsin, the first state to follow New York in 1846, highlights the importance of frontier migration, as settlers retained their connections to the east and transmitted political ideas and legal institutions to the west. But the wave also transcended frontier and regional politics, as judicial elections became a new national symbol of democratic self-government.

The move to judicial elections also shifted power from the centralized officials and elites in the state capitals to the voters in local districts. The state delegates opted for local power even when they would have foreseen their own party (and their own interests) disadvantaged by districts, as opposed to state-wide elections or appointments. Their commitment to localism was apparently a principle more than a strategy, even when recent events, like the Mormon War of the 1840s, gave them practical reasons to question both localism and direct democracy. Finally, this chapter finds some evidence that slavery and antislavery shaped the judicial election debate, although in very limited ways. The last section turns to the delegates' plan for judicial elections to increase judicial power and judicial review, and then the evidence that elected judges fulfilled these hopes.

First, a timeline helps lay out the pattern of conventions and their adoption of judicial elections. All state conventions after 1812 are included, and are listed as "Conventions" or (C). The left side are states that adopted judicial elections, and the right side are states that did not. The chart also indicates when states adopted amendments that changed their court system – on the left side when the amendment adopted some form of judicial elections, but

⁵⁴ Id.

⁵⁵ See, e.g., Caleb Nelson, "A Re-Evaluation of Scholarly Explanations for the Rise of the Elected Judiciary in Antebellum America," *American Journal of Legal History* 37 (1993): 190, 193.

on the right side when the amendment reformed their courts without judicial elections. States listed in bold adopted judicial elections for all of their courts.

TIME LINE FOR JUDICIAL ELECTIONS

ELECTIONS	AGAINST ELECTIONS
1777: The territory of Vermont for lower courts	
1812: Georgia for “inferior” courts	
1816: Indiana for associate circuit court judges	

1832: Mississippi (Convention)	
1833:	
1834:	Missouri (A), Tennessee (C)
1835: Georgia for superior court judges (A)	North Carolina (C)
1836: Michigan for circuit judges (Convention)	
1837:	
1838:	
1839:	
1840:	
1841:	
1842:	
1843:	
1844: Iowa for lower courts (Convention)	New Jersey (C)
1845:	TX (C), LA (C), MO (C)
1846: New York (Convention)	
Wisconsin (Convention)	
1847: Illinois (Convention)	
1848-50: Pennsylvania (amendment):	
1848: Arkansas for circuit court judges (amendment)	
1849: California (Convention):	
1850: Missouri (amendment)	
Ohio (Convention)	
Kentucky (Convention)	
Michigan (Convention)	
Texas (amendment)	
AL, CT, and VT for circuit court judges (amendments)	
Virginia (Convention)	
1851: Maryland (Convention), Indiana (Convention)	New Hampshire (C)
1852: Louisiana (Convention)	
1853: Tennessee (Convention), Florida (Amendment)	Massachusetts (C)
1854:	
1855:	
1856:	
1857: Minnesota (Convention), Iowa (Convention)	
1858:	
1859: Oregon (Convention)	
1860:	
1861: Kansas (Convention)	

The left side are states that adopted judicial elections, and the right side are states that did not. States in bold adopted judicial elections for all of their courts.

From 1846 to 1851, 12 states adopt judicial elections for their entire court system, plus five partial adoptions. By 1860, out of 31 states in the Union, 18 states elect all of their judges, plus five electing some. This chart certainly suggests that New York’s adoption was a major turning point.

While New York was an indispensable trigger for judicial elections, the financial panics of the late 1830s and early 1840s were an equally indispensable trigger for the wave of conventions. Part I surveyed the state legislatures' overspending on internal improvements, followed by the Panics of 1837, a severe depression, and enormous state debts. Nine states defaulted on their debts, and many more were on the verge of default. This economic and political crisis was the "main impetus" for the convention wave.⁵⁶

One historian described the wave of conventions as "horizontal federalism," as states borrowed from each other and learned from each other's advances and mistakes.⁵⁷ In the handful of state constitutional revisions between 1800 and the 1820s, the most important issues were expanding suffrage and legislative reapportionment, but legislatures retained their preeminence in state government.⁵⁸ In the wave of conventions in the 1840s, the focus was on limiting legislatures. Tocqueville had remarked in 1835 that "the legislature of each state is faced by no power capable of resisting it."⁵⁹ Tocqueville had not seen the power of state conventions a decade later that were determined to curtail the legislatures. One historian identified an "anti-government bias" in these conventions,⁶⁰ but another more accurately describes "an opposition to a particular way of conducting government rather than to government per se."⁶¹ That "way" of government was special privilege to the powerful, wealthy, and connected. Still, the answer in many of these conventions was to limit legislatures and state power, an anti-government means to an anti-corruption ends. One Ohio delegate decried in 1850, "I wish to see the State Government brought back to its simple and appropriate functions, [leaving] railroad, canal, turnpike and corporate associations, to get along on their own credit, without any connection or partnership with the State whatever."⁶²

These conventions first restricted state debt and eliminated "taxless finance."⁶³ The debt crisis was the primary cause for New York's convention in 1846, and it was the first item on the convention's agenda. The delegates' solutions included public approval by referendum for any debt exceeding \$1 million. This requirement was part of a "stop-and-tax" restriction, requiring taxes to balance out debt, similar to today's "pay-as-you-go" proposals. The

⁵⁶ G. Alan Tarr, *Understanding State Constitutions* (Princeton University Press, 1998) p. 111-12. John Wallis, Richard Sylla, and Arthur Grinath, "Sovereign Default and Repudiation, The Emerging Market Debt Crisis in U.S. States, 1839-1843," September 2004). NBER Working Paper No. W10753. Available at SSRN: <http://ssrn.com/abstract=590763>. John Wallis, "Constitutions, Corporations and Corruption: American States and Constitutional Change, 1842-1852," *Journal of Economic History*, 65:214-216 (2005).

⁵⁷ G. Alan Tarr, *Understanding State Constitutions* (Princeton University Press, 1998) p. 98.

⁵⁸ Merrill Peterson, *Democracy, Liberty, Property: The State Constitutional Conventions of the 1820s* (Indianapolis: Bobbs Merrill, 1966).

⁵⁹ Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer (Doubleday, 1969), 89.

⁶⁰ Kermit Hall, "Mostly Anchor and Little Sail: The Evolution of American State Constitutions," in Paul Finkelman and Stephen Gottlieb, eds., *Toward a Usable Past: Liberty Under State Constitutions* (1991), 405.

⁶¹ Tarr, *Understanding State Constitutions*, 133.

⁶² Id. at 112.

⁶³ John Wallis, "Constitutions, Corporations and Corruption," 65:216-218.

convention required canal revenue to pay off the state debts, and future revenue would first pay off general expenses before it could be spent on new projects.

Similar to the “stop-and-tax” measure in New York’s 1846 convention, the new state constitutions required states and localities to tax to cover all spending, and hold referenda to authorize tax increases. The modern versions of these rules are called “pay-as-you-go.” The conventions also mandated uniform taxation, requiring tax burdens to be spread evenly throughout the state or locality. Of the fifteen conventions held between 1844 and 1851, all fifteen restricted state debt, and thirteen equalized taxation.⁶⁴ Even the states that did not experience their own financial crisis learned from the others and adopted these provisions. All fifteen also prohibited special incorporation – which was often identified with special privileges and cronyism – and adopted general incorporation provisions.⁶⁵ Martin Van Buren and the Albany Regency had granted bank charters to Democratic insiders, which was the state level version of the Whigs’ Henry Clay-Nicholas Biddle self-dealing with the federal Bank of the United States. Special privileges were a bipartisan affair, and the new constitutions limited corruption with more open access to incorporation.⁶⁶ The conventions also adopted broader procedural restraints on legislatures, including supermajority voting rules on particular issues, shorter legislative sessions, and fewer meetings (moving from annual sessions to biannual sessions). Constitutional provisions required open deliberation, committee procedures, multiple readings, single-subject-per-bill rules, accurate titles for bills, and other obstacles to legislation.⁶⁷ In the 1850s, it became much harder to pass legislation and to spend state money.

Historians focusing the history of state constitutions have given little attention to the adoption of judicial elections,⁶⁸ but this change was closely related to the other restrictions on legislatures. Section I.E showed that, once the state legislatures were appeared to be fiscal frauds, appointed judges in New York led the way in expanding judicial power and judicial review in the early 1840s. They demonstrated that judicial review could be a check against irresponsible government, but there was still a question as to which interests judicial review would serve and whether the other branches could use appointments to punish these judges and replace them with their own cronies again. Just as the financial crisis turned some appointed judges against some legislatures in the 1840s, the crisis also triggered a wave of constitutional revision – the largest number of conventions in any decade, including the Founding.

C. The Purpose of More Judicial Review

In addition to these substantive and procedural limits that directly related to legislatures, these conventions found a less direct way of limiting legislatures: judicial elections.

⁶⁴ Id. at 219, Table 2.

⁶⁵ New York had adopted a general banking provision in 1838, and expanded the same principle in 1846.

⁶⁶ Id. at 214-15.

⁶⁷ Tarr at 118-19.

⁶⁸ John J. Dinan, *The American State Constitutional Tradition* (2006).

Judicial elections were not among the primary goals of these conventions, but they were adopted in every convention that met after New York's (except in New Hampshire's and Massachusetts's conventions, two New England holdouts). Delegates voted for clauses establishing popular elections with relatively little opposition, and many supporters argued that judicial elections would strengthen the courts' checks on the other branches.

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 particular periods."⁶⁹ Conservative Democrat Charles O'Connor, also a lawyer on the judiciary committee, continued the same argument against the populist bias created by judicial elections, even referring to their effects as "evils."⁷⁰ Horatio Stow, a young Whig lawyer, focused on the "wide and decided distinction" between a judge's role and a governor's or a legislator's: "A majority elect the legislature and executive; and the reasons for this are very obvious. But a very different mode of selecting the judges should be adopted. They are as the shield of the minority; to protect from the oppression (if tried) of the majority."⁷¹ Later, Stow added that an elective judiciary assumed "the right of the majority to be represented on the bench--whereas it was the law only that should be represented."⁷² Stow believed judges had countermajoritarian duties to the rule of law and individuals rights, and judicial elections would allow public passions to undermine those principles.

Some advocates of judicial elections embraced this criticism of judicial elections, celebrating it 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. However, more delegates explicitly defended judicial elections as a means of re-establishing judicial independence. Governors had used appointments to promote their own interests and keep judges in line with those interests.⁷³ Judicial elections would liberate judges from those interests and "increase[] fidelity" to the people.⁷⁴ The Whigs had been skeptical of direct democracy in other times and contexts, but in this convention they were among the most vocal in their support for judicial elections, partly on the grounds of judicial independence. Even though conservative Democrats (Hunkers) had controlled the appointment process and the legislature, one of the

⁶⁹ *Debates and Proceedings in the New York State Convention, for the Revision of the Constitution [1846]*, S. Croswell and R. Sutton, reporters for the *Argus* (Albany: Office of the Albany Argus, 1846), 456.

⁷⁰ *Debates and Proceedings in the New York State Convention, for the Revision of the Constitution [1846]*, S. Croswell and R. Sutton, reporters for the *Argus* (Albany: Office of the Albany Argus, 1846), 503.

⁷¹ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York, 1846*, reported by William G. Bishop and William H. Attree (Albany: Office of the Evening Atlas, 1846) [Hereafter *Debates and Proceedings* (New York 1846), 141.

⁷² *Id.* at 770

⁷³ *Id.* at 141-42 (Patterson, Whig), 575 (Harris, Whig); 550 (Tilden, Democrat).

⁷⁴ *Id.* at 575.

most influential Hunkers in the convention called for more judicial resistance to legislation and for an end to the presumption that statutes were valid.⁷⁵

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 judicial elections were necessary to strengthen a judiciary that had been too permissive of legislative abuse in the past. 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.⁷⁶ Hoffman, seeking more limited government, wanted a stronger activist court exercising more judicial review on behalf of the people against special interests. Whigs embraced the same message that judicial elections would lead to aggressive judicial review for the protection individual rights against the legislature.⁷⁷ Even the populist Anti-rent delegates, representing a farmers’ insurgency in upstate New York, echoed the same goals of *increasing* judicial independence and power.⁷⁸ 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 judicial elections. The support for judicial elections was so widespread that the New York convention never needed a roll call vote on the general question of judicial elections versus appointments. The reason was that the Barnburner Democrats, as critics of legislative abuses by Hunker Democrats, and the Whigs, as critics of executive abuse of power by Hunker Governors, had so much control over the convention and had a mandate to increase the separation of powers and build a judiciary upon a stronger democratic foundation so that it could block the other branches.

In the Illinois convention of 1847, future Supreme Court justice David Davis complained that appointed judges had “none of the confidence of the people,” while elected judges “would always receive the support and protection of the people.” He acknowledged that elected judges might abuse their power, but he “would rather see judges the weathercocks of public sentiment, in preference to seeing them the instruments of power, to see them registering the mandates of the Legislature, and the edicts of the Governor.” Davis also commented that if the federal judges were elected, the people “would have chosen judges, instead of broken down politicians” nominated by the president.⁷⁹

Soon after, an Illinois opponent of judicial elections mocked the supporters for “preach[ing] to us continually – distrust to the Legislature.”⁸⁰ But “distrust to the Legislature” was the prevailing mood of this period. Another delegate heralded judicial elections as the key to the separation of powers:

[T]he people have desired 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

⁷⁵ *Id.* at 371 (Ruggles, Hunker).

⁷⁶ *Id.* at 492-93

⁷⁷ *Id.* at 411-12 (Worden); 540 (Tallmadge); 619 (Richmond).

⁷⁸ *Id.* at 575 (Wright); 645 (Ira Harris).

⁷⁹ *Illinois Constitutional Debates of 1847* at 462 (David Davis).

⁸⁰ *Id.* at 463 (William Archer).

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 plain and simple. 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.⁸¹

In order for judicial review to function, judicial selection had to be taken away from the other branches and given to the people. Illinois newspapers echoed these same views.⁸² Delegates throughout these conventions argued for judicial elections to increase their independence and their check on legislation— not just in New York and Illinois, but also in Kentucky,⁸³ Virginia,⁸⁴ Ohio,⁸⁵ Indiana,⁸⁶ and Maryland.⁸⁷

By 1850, Ohioans viewed the legislature as corrupted by special interests.⁸⁸ The convention delegates revealed a general distrust of the legislature, and its answer was to make more state offices elected. The new constitution limited legislative appointment powers, and restricted economic and special legislation.

One delegate proposed:

Whereas, There is a deep and just dissatisfaction amongst the people in regards to appointment to office – especially by the legislative department of government; converting that body, as they do to some extent into a more political arena, embittering the feelings of part spirit , and corrupting the pure fountain of legislation: therefore –

Resolved, That the new Constitution provide for the election of all State, Country, and Township officers immediately by the people.”⁸⁹

⁸¹ *Illinois Constitutional Debates of 1847*, 466 (Archibald Williams).

⁸² *Galena Weekly*, Sept. 17, 1847.

⁸³ *The New Constitution*, 38, 57-59, 116, 123, 164.

⁸⁴ *Richmond Enquirer*, June 28, 1850 (cited in Hall 350).

⁸⁵ See *infra*.

⁸⁶ *Indiana Debates and Proceedings* 2:1808-09 (1851) (Borden) (Unless judges were removed “from the control of the other branches of government,” the constitution’s promise “to protect the people, and to preserve a proper equilibrium between the different departments” would be no more than “parchment barriers.”)

⁸⁷ *Maryland Debates*, 2:424-36, 501.

⁸⁸ *Id.* at 25

⁸⁹ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, J. V. Smith, Official Reporter to the Convention (Columbus: S. Medary, 1851), I: 86

These sentiments were echoed by other delegates, linking the problem of legislative power to solution of increasing of 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, preceding from the people, and responsible to them, which can revert to those great fundamental principles of the State government, and preserve the landmarks of the Constitution.”⁹⁰ 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 for the people to delegate a part of the powers left with them, in order more effectually to guard and protect them in that which they retained in their own hands.”⁹¹ This delegation to the judges led to stronger judicial review not only to protect the majority, but also to protect rights and liberties *from the majority*. Thus, Ohio delegates expressed both majoritarian and countermajoritarian theories, both republican and liberal theories, for stronger judicial review. These same sentiments were expressed in Indiana, where a judge argued that as long as the other branches appointed judges, constitutional provisions “to protect the rights of the people, and to preserve a proper equilibrium between different departments of the government” merely would be “parchment barriers” against abuses of power.⁹² In the Massachusetts convention that ultimately failed to adopt judicial elections in 1853, one delegate observed, “The judiciary are so weak [because] they must depend on the legislative branch for their appointments and to make laws... Elect your judges, and you will energize them, and make them independent, and put them on par with the other branches of government.”⁹³

Pennsylvania adopted judicial elections by amendment, and not in a recorded constitutional convention. Without a forum for delegates to debate judicial elections, the newspapers raised the same arguments to the public. When a Democrat was governor, Whig newspapers called for judicial elections so that judges would have more power and independence against him.⁹⁴ Then, as soon as the Democratic governor died and was replaced by a Whig, Democratic newspapers adopted the same argument.⁹⁵ As the amendment was proceeding through its successive stages, an appointed judge on the Pennsylvania Supreme Court wrote:

⁹⁰ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, J. V. Smith, Official Reporter to the Convention (Columbus: S. Medary, 1851), II:217 (Taylor).

⁹¹ *Id.*, I: 562

⁹² 2 *Indiana Debates*, Vol. 2, p. 1808-09.

⁹³ *Official Report of the Debates and Proceedings in the State Convention to Revise and Amend the Constitution of the Commonwealth of Massachusetts Debates* (1853), 2:770 (Keyes)

⁹⁴ *Philadelphia North American*, Oct. 12, 1847.

⁹⁵ *Philadelphia Pennsylvanian*, Oct. 5, 1850.

“[Unconstitutional] retroactive legislation began and has been continued, because the judiciary has thought itself too weak to withstand; too weak, because it has neither the patronage nor the *prestige* necessary to sustain it against the antagonism of the legislature and the bar. Yet, had it taken its stand on the rampart of the constitution at the onset, there is some little reason to think it might have held its ground. Instead of that, it pursued a temporizing course till the mischief had become intolerable, and till it was compelled ... to invalidate certain acts of legislation, or rather to reverse certain legislative decrees.

“Yet the legislature attempted to divest it, by a general law it is true, but one impinging on particular rights.”⁹⁶

According to this judge, 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, rising above the people. But in mid-nineteenth-century America, the “people” bestowed prestige with their ballots. The next Part will show the results of these more democratically “prestigious” judges taking on the legislatures’ “intolerable mischief.”

IV. A Boom in Judicial Review

A. Elected Judges, From Design to Practice

In the conventions, supporters of judicial elections hoped for a more aggressive 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 the establishing the widespread practice of judicial review in America, and as important, the most widespread acceptance of judicial review. However, they were not reliably “populist.” Whereas appointed judges in the early republic relied mainly on majoritarian theory (i.e., the defense of the people and their constitution against the excesses of legislators), elected judges in the late 1840s and early 1850s increasingly turned to countermajoritarian theories (i.e., defense of individual rights against the excesses of majority rule).

A search of the electronic databases (building on a handful of studies of particular states such as New York and Virginia) shows a surge of judicial review starting in the late 1830s and 1840s, and then exploding in the 1850s. Again, here is the table showing the numbers of state decisions striking down state statutes in the antebellum era, with elected supreme courts marked by an asterisk.

⁹⁶ *Greenough v. Greenough*, 11 Pa. 489, 1849 WL 5732, 51 Am.Dec. 567, 1 Jones (PA) 489, Pa., 1849.

State Supreme Court Cases Declaring State Laws Unconstitutional

	1790- 1799	1800- 1809	1810- 1819	1820- 1829	1830- 1839	1840- 1849	1850-1859	1860- 1865
New Hampshire	0	0	1	1	0	1	2	0
Vermont 1791	0	0	2	6	2	0	2	1
Massachusetts	0	1	2	0	1	1	4	1
Rhode Island	0	0	0	0	0	0	2	0
Connecticut	0	0	0	3	2	1	0	1
New York	0	0	5	7	4	21(*)	33*	16*
New Jersey	0	0	2	0	1	0	1	1
Pennsylvania	2	0	0	1	1	9	10*	17*
Delaware	0	0	0	1	0	2	0	0
Maryland	0	0	0	2	5	4	1*	2*
Virginia	1	0	1	1	0	0	0*	0*
North Carolina	1	2	3	1	1	0	6	1
South Carolina	0	0	0	0	0	0	0	0
Georgia	0	0	0	0	0	3	3	0
Kentucky 1792	0	5	2	6	4	2	3*	2*
Tennessee 1796	0	0	2	1	14	7	14*	1*
Ohio 1803	-	1	0	0	2	5	16*	3*
Indiana 1816	-	-	0	2	2	2	33*	14*
Mississippi 1817	-	-	0	1	1*	2*	3*	1*
Illinois 1818	-	-	0	0	0	2	5*	6*
Alabama 1819	-	-	-	1	2	3	5	1
Missouri 1821	-	-	-	2	4	1	9*	4*
Totals	4	9	20	36	46	66	152	72
Totals from elected courts only	0	0	0	0	1	7	125	66

U.S. Supreme Court Cases Declaring Statutes Unconstitutional

	1790- 1799	1800- 1809	1810- 1819	1820- 1829	1830- 1839	1840- 1849	1850- 1859	1860- 1870
Federal laws	0	1	0	0	0	0	1	4
State laws	0	1	7	7	3	9	7	23

(The numbers marked by asterisks are decisions by supreme courts that were popularly elected for most of that decade. See Appendix B for a full list of cases, along with state-by-state graphs by year.) Without Tennessee’s outlier burst of judicial review from 1830-36, largely the

result of the state legislature's recurring interference in the details of on-going litigation, the 1830s represent a decrease in judicial review from the 1820s (from 37 to 33), and the 1840s more than double that number.

New York judges were the leaders in this growth of judicial power, as appointed judges before 1846 and even more so as elected judges after 1846. They struck down statutes seven times in the 1820s, four more in the 1830s, and ten more between 1840 and 1846. These appointed judges increasingly inserted themselves into the areas with political significance. Four of the cases from the "spike" (after the panics but before the elected judges took over) restricted appointment powers (reflecting the increasing scrutiny on the appointment process),⁹⁷ and three decisions limited takings and eminent domain (possibly reflecting concerns about internal improvements).⁹⁸ Other cases involved corporate charters, banking, and debts, linking to other hot topics in the aftermath of the Panic of 1837.⁹⁹

Even if some observers at the convention failed to see this growing judicial power, it certainly had raised the courts' profile for those seeking an answer for the problem of corruption in the 1840s. The courts had been flexing their muscles, and reformers understood that they could harness this emerging power on behalf of the people against the legislature and the governor. These New Yorkers were visionaries: from 1848 to 1851, the first elected judges in New York struck down fifteen more laws (four per year), and from 1851-1860, the Court of Appeals struck down a staggering thirty-three statutes. A recently elected New York judge in 1848 wrote:

It cannot be denied that *excessive legislation* is the great legal curse of the age. It is the mighty vortex which is drawing every thing within its grasp. So long as it keeps within the constitutional bounds and legitimate scope of its authority, it is our duty to enforce the laws: but when it transcends these, it is equally our duty to declare them null and void.¹⁰⁰

Just as New York had witnessed a boom in judicial review just before adopting judicial elections, Pennsylvania had, too. The state Supreme Court had struck down statutes nine times in the 1840s, which seems to have raised the profile of the court, leading to a political battle over appointments. These decisions were also mixed in terms of their political leanings, and judicial elections created another opportunity to harness the emerging power of the court for the interests of the people. And just as in New York, the Pennsylvania judges embraced this power, striking down ten more statutes in the 1850s, and remarkably, seventeen during the Civil War. Ohio courts had begun striking down statutes in the years before adopting judicial elections, after decades of doing so very rarely, and then increasing to in the 1850s. The numbers are smaller (the Ohio Supreme Court struck down just one statute between 1800 and 1840, then five in the 1840s, and then sixteen in the 1850s). As a common

⁹⁷ Kane 1840, Clark 1841, Conner 1845, Warner 1846.

⁹⁸ Trustees of Presbyterian Church 1842, Taylor v. Porter 1843, Dikeman v. Dikeman, 1845.

⁹⁹ Van Hook (corporate debt), 1841; Purdy (city charter), 1842; DeBow (banking law) 1845; Commercial Bank of Buffalo (banking and legislative procedure), 1846.

¹⁰⁰ People ex rel. Fountain v. Board of Supervisors, 4 Barb. 64, 72 (N.Y. Sup. Ct. 1848) (emphasis in original).

pattern, these courts raised their profile and power before the adoption of judicial elections, and then increased that power afterwards.

The content of the 1850s cases was not so different from earlier decades. State courts continued striking down statutes that impaired the “obligations of contract,” but those cases were a smaller share of the total in the 1850s. A greater share shifted to separation of powers cases and takings cases, and new cases emerged from the new constitutions’ limits on legislative procedures and from the validity of local referenda.¹⁰¹ In New York’s surge, takings rulings were most prominent, with a focus on internal improvements, and even the Erie Canal.¹⁰² One of the most important was *Newell v. People ex rel. Phelps*, a high profile decision in 1852 enforcing the 1846 constitution’s stop-and-tax requirement.¹⁰³ The state legislature had authorized \$9 million in “canal certificates” to finance the enlarging of the Erie Canal, but the legislature declared that these certificates did not count as debt or liability. The Court of Appeals ruled that the legislature could not circumvent the new constitution’s requirement of public approval for additional debt.¹⁰⁴

Issues related loosely to the financial crisis also were grounds for judicial review, such as equal taxation and taxing powers,¹⁰⁵ corporate structure,¹⁰⁶ and legislative process.¹⁰⁷ The cases limiting appointment procedures also continued,¹⁰⁸ and were joined by cases protecting judicial independence against salary changes.¹⁰⁹ The Court of Appeals also struck down liquor prohibition laws three times.¹¹⁰

Indiana’s pattern is even more remarkable. In the 1840s, the Indiana Supreme Court struck down statutes twice. In the 1850s, it did so 33 times, and then from 1860 to 1865, another 14 times. Many of these cases were rejections of liquor prohibition statutes (or provisions of them).¹¹¹ In one case, the court struck down a prohibition statute that had been passed as a popular referendum. These referenda, according to these judges who were recently elected by the people, violated the republican principle of indirect democracy!¹¹²

¹⁰¹ Cite lists

¹⁰² Three cases from 1852 struck down laws related to the Erie canal: *Rodman v. Munson*, 1852 (Erie debts); *Olmstead* 1852 (Erie expansion), *Newell* 1852 (Erie takings). Other takings/internal improvements cases are: *People ex rel. Fountain v. Westchester County Sup'rs*, 4 Barb. 64 (N.Y.Sup.Ct. 1848); *Tonawanda R.R. Co. v. Munger*, 5 Denio 255; 1848 N.Y. LEXIS 106 (1848); *Embury v. Connor*, 3 N.Y. 511 (1850); *House v. Rochester* (1853); *Hartwell* (1854); *Fishkill* (1855).

¹⁰³ 7 N.Y. 9 (1852).

¹⁰⁴ Galie, *Ordered Liberty* 52-53

¹⁰⁵ *Post v. Brooklyn* (1849); *Bradley v. Baxter* (1853); *Barto v. Himrod* (1853).

¹⁰⁶ *Corning* (1855); *Conant* (1857).

¹⁰⁷ *Thorne* (1851); *Kinney* (1859).

¹⁰⁸ *Griffin* 1851; *People ex rel. McSpedon & Baker v. Stout*, 13 How. Pr. 314, 4 Abb.Pr. 22, 23 Barb. 349, N.Y.Sup., 1856; *Keeler* (1858)

¹⁰⁹ *Halstead v. Mayor of New York*, 3 N.Y. 430, 1850 N.Y. LEXIS 39 (1850); *Mitchell v. Haws*, 1860

¹¹⁰ *Wood v. Brooklyn*, (1853); *Toynbee* (1855) *Wynehamer* (1856).

¹¹¹ *Aker v. State*, 5 Ind. 193 (1854); *Crossinger v. State*, 9 Ind. 557 (1857); *Leppert v. State*, 12 Ind. 618 (1859).

¹¹² *Aker v. State*, 5 Ind. 193 (1854).

Otherwise, Indiana courts turned back attempts to circumvent the state constitution's appointment procedures, to interfere with appellate procedure, and takings, all similar to New York's cases. The Indiana court also overturned a defendant's conviction for aiding fugitive slaves, because the conviction was under a state criminal statute, and *Prigg v. Pennsylvania* had established that the federal Fugitive Slave Act preempted state law.¹¹³ This result is a twist on Robert Cover's speculation that judicial elections were designed to reflect local opinion on fugitive slaves, against appointed judges' tendency to defer to federal compromises.¹¹⁴ It turns out that there is not much evidence to support this intriguing theory. Still, this decision by the Indiana supreme court reflects some kind of conflict between state-wide public opinion as reflected in the statute and state-wide public opinion as reflected among the elected judges. It is possible that each 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 showed more resolution on the issue of fugitive slaves than many of the northern appointed judges who opposed slavery in Cover's study.

B. *Democracy and Counterdemocracy: A Puzzle*

However, the judges' theory of judicial power, with its majoritarian origins, was changing just as their method of appointment was changing. In the early republic, when judges all were appointed, they defended judicial review with democratic theory, but once the state judges were elected, they shifted to an antidemocratic, rights-based theory.¹¹⁵ In the late 1840s and 1850s, state courts shifted away from majoritarian arguments (i.e., the constitution is the will of the people) to countermajoritarian arguments (constitutions protect fundamental values of individual rights and minority groups against the encroachments of popular majorities). Judges from 1790 to the 1840s stated that they were protecting "higher law" from legislative encroachment, but the source of that higher law was majoritarian: they were

¹¹³ *Donnell v. State*, 3 Ind. 479 (1852).

¹¹⁴ Robert Cover, *Justice Accused* (New Haven, CT: Yale University Press, 1975), 144 n.*

A more sophisticated history of this phenomenon [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 this 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 . . .

Cover also mentions in this footnote that his book treats "a couple of instances of interrelation of antislavery and judicial independence at some length." *Id.* However, on the question of judicial elections specifically, Cover discusses one link between anti-slavery and pro-judicial elections: Massachusetts antislavery forces reacted to Judge Lemuel Shaw's deference to the 1850 Fugitive Slave Act in *Sims* by pushing for judicial elections, a reform that gathered steam but failed to win. *Id.*, 177-78. Cover lists a number of judges who deferred to the 1850 Fugitive Slave Act, and their states adopted judicial elections around that time: McLean in Ohio and Michigan, Kane in Pennsylvania, Miller in Wisconsin, Conkling in New York. *Id.*, 178. Perry Miller, *The Life of the Mind in America* (New York, NY: Harcourt, Brace & World, 1965), 234; Francis Bergan, *The History of the New York Court of Appeals, 1847-1932* (New York, NY: Columbia University Press, 1985).

¹¹⁵ William Nelson, "Changing Conceptions of Judicial Review," 1180-85.

protecting the people and their rights. Just as significantly, these judges identified legislatures and their abuses of power as the threat to the people's higher law, rather than the people themselves. Then, in the 1850s, state judges identified the people and the flaws of majority rule as a threat to higher law, much more than ever before. Almost all of these judges were part of the first generation of elected judiciaries, a counterintuitive turn to countermajoritarianism.

To be sure, these nineteenth-century judges did not use the terms "majoritarian" or "countermajoritarian," but these modern labels are a helpful shorthand for two formulations: the courts defending the people (and their constitution) against their agents' abuse of power; and the courts defending individuals and minority communities against the majority's abuse of power. It is possible to reconcile these two lines of thought (i.e., the people had adopted constitutional rules to limit their own majoritarian power), but many of these judges did not attempt to balance their anti-majoritarian arguments in those terms.

The New York courts of the late 1840s and 1850s offered more anti-majoritarian arguments than other courts, just as they were striking down more statutes than other courts. At first, the elected judges added a minority-protection emphasis on top of their majority-protecting theory of judicial review. In a takings case in 1848, a New York court defended judicial review because "excessive legislation [is] the great curse of the age . . . drawing every thing within its grasp."¹¹⁶ It justified judicial review not just for the will of the people, but also for "individual rights" and "fundamental right and justice."¹¹⁷ Over time, New York's elected judges became more critical of democracy in itself.

A New York court in 1851 struck down an 1849 statute setting up a referendum on establishing free schools. The court rejected direct democracy, stating that it was wrong to think that "no harm [could] result from allowing people to exercise . . . the law-making power."¹¹⁸ Skeptical of the voting public, the court observed that the people often followed "hasty and ill-advised zeal," and "unthinking clamor or partisan importunity," and the courts' responsibility was to protect "minorities against the caprices, recklessness, or prejudices of majorities."¹¹⁹ In a similar case two years later, a different judge wrote that judicial review was necessary to protect "that great idea" of the Founding, "liberty regulated by law," against "the evil of consolidated democracy."¹²⁰ 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.

¹¹⁶ *People ex rel. Fountain v. Board of Supervisors*, 4 Barb. 64, 72 (N.Y. Sup. Ct. 1848). The author of *Thorne* was Seward Barculo, a Democrat. *Life and Times of Silas Wright*, p. 1820.

¹¹⁷ *Id.*

¹¹⁸ *Thorne v. Cramer*, 15 Barb. 112, 117 (N.Y. Sup. Ct. 1851). The author of *Thorne* was Seward Barculo, a Democrat. *Life and Times of Silas Wright*, p. 1820.

¹¹⁹ *Id.*

¹²⁰ *Bradley v. Baxter*, 15 Barb. 122, 126 (N.Y. Sup. Ct. 1853). The author of *Bradley* was Daniel Pratt, a Democrat. *New York Weekly Herald*, Jan. 1, 1853.

In *Wynehamer v. People* 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*. The Court of Appeals was divided five votes to three, with three concurring opinions and two dissents). Judge George Franklin Comstock, a conservative Whig (and later an anti-Lincoln Democrat) wrote the lead opinion, even though he was the most junior of all the full-time judges.¹²¹ He justified judicial review in 1856 because legislation is sometimes the result of mistaken “theories of public good or public necessity [that] command popular majorities,” and the judiciary must protect the “vital principles” of “free republican governments” against popular abuses.¹²² 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. Judge John Bannister Gibson, who had been a prominent critic of judicial review on the Pennsylvania Supreme Court, backed away from this position in the mid-1840s.¹²³ Then in 1850, on the eve of the state’s first judicial elections and his own election to the Supreme Court, he expanded on judicial review. In a civil case where the legislature set aside a jury verdict and order a new trial, he ruled that this intervention overstepped the legislature’s bounds. Moreover, he offered a general critique of democratic elections: legislatures would sometimes pander to majorities, resulting in “the sacrifice of individual right,” because rights were “too remotely connected with the objects and contests of the masses to attract their attention.”¹²⁴ 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, 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 developed this countermajoritarian theory of judicial review. The Court invalidated the legislature’s order to a private party to sell property because of the heirs’ vested property rights. It observed that if statutes were “unjust and against the spirit of the constitution” against “the whole community,” the community will “procure [its] repeal... And that is the great security for just and fair legislation.” 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

¹²¹ Judge George Comstock, the author of *Wynehamer*, was nominated by the Whigs for the Court of Appeals in 1855. Thomas Kernan, “George Franklin Comstock,” in Rosenblatt, *New York Judges of the Court of Appeals* (2007), 58. Later he became a Democrat, *id.* at 59. He served only one term, because when he ran for re-election in 1861, the Republicans swept the Democrats from office on the eve of the Civil War. *Id.* at 59. See also <http://www.courts.state.ny.us/history/pdf/Library/Judges/Chadbourne.pdf>. Whigs had offered countermajoritarian arguments for judicial review in the 1846 convention.

¹²² *Wynehamer v. People*, 13 N.Y. 378, 387 (1856).

¹²³ *Norris v. Clymer*, 2 Pa. 277, 281 (1845).

¹²⁴ *De Chastellux v. Fairfield*, 15 Pa. 18, 20 (1850). Gibson was a Democrat, and was elected back onto the Supreme Court in 1851.

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 co-ordinate branch of the government will become the subservient handmaid of another, and a quiet, insidious revolution effected in the administration of the government, whilst its form on paper remains the same.¹²⁵

The answer was for courts to set aside judicial review for “the people” in favor of judicial review for individual rights that will not mobilize the people in their defense. In 1848, the Pennsylvania Supreme Court had admitted it had been “too weak,” but in the 1850s, it was making up for lost time by asserting its strength. As elected judges with limited terms, such aggressive defenses of individuals against the people was risky – but they apparently were feeling much stronger once they were elected.

One Ohio decision in 1855 demonstrated this shift in striking down a tax statute that gave special privileges and deductions to particular individuals and corporations. 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 take that part in governing themselves, to which they are entitled under the constitution and laws, and will not exert, in this respect, that weight and influence which they may justly claim, must not be surprised if others take the trouble to govern them, and do not, at all times, do so in a satisfactory manner. But the remedy for any such oppression is not, and should not be, to ask a departure, on the part of a judge, from the strict line of duty, but rather a resort to that vigilance which has been neglected. A community thus suffering under oppression, cannot apply to any Hercules for help, for it is with the people alone, under our system of government, that any such Herculean power resides. It is with them to make or unmake constitutions, laws, and officers.¹²⁶

¹²⁵ *Ervine’s Appeal*, 16 Pa. 256, 268 (1851). Richard Coulter, a Whig, wrote this opinion. Coulter had earlier served four terms in the House of Representatives, 1827-1835, as a “Jacksonian.” 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. John Newton Boucher, John Woolf Jordan, *History of Westmoreland County, Pennsylvania* 347; *Biographical Dictionary of the U.S. Congress; Courts and Lawyers of Pennsylvania*.

¹²⁶ *Cincinnati Gaslight & Coke Co. v. Bowman*, 12 Ohio Dec. Reprint 147, 1 Handy 289, 1855 WL 3906, Ohio Super., (1855). The author, William Yates Gholson was a Republican. Ohio State Journal, Sept. 27, 1859; Joseph Patterson Smith, *History of the Republican Party in Ohio* (1898). He had lived in Mississippi, but he moved more and more towards abolitionism, and as a result, moved to Ohio and then was an early member of the Republican Party.

The people have the power to fight against government abuse, and if they suffer these abuses, 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 is remarkable in any era, but particularly 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 “interest or passion, or perhaps other dubious influences, often mould legislation,” and that some laws were the result simply of “the fluctuating fever of the hour.”¹²⁷ This judge had recently served in the Indiana legislature, so he had first-hand experience with the interests, passions, and dubious influences there. If the people were “smarting under losses from depreciated bank paper, a feeling might be aroused . . . [to] return a majority to the legislature which would declare all banks a nuisance, [and] confiscate their paper and the buildings from which it issued.”¹²⁸ With the experience of the Panics of 1837 and 1839, this example was not far-fetched. The judge acknowledged that judicial review in these cases “looks like assuming to protect the people against themselves,” but apparently the courts’ role was to do just that.¹²⁹

Slavery also produced a background and sometimes vivid imagery in this debate. Recall that these judges on the Indiana supreme court, citing *Prigg v. Pennsylvania* and federal preemption, struck down a state statute that had imposed criminal sanctions for assisting fugitive slaves. 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 led to such a statute, even if it reflected the voters’ preferences. In striking down a prohibition statute, the Michigan Supreme Court warned against allowing individuals to become “abject slaves to the majority.”¹³⁰ The Ohio Supreme Court worried that, “if the rights of *minorities* are not observed, it will not be long before the *majorities* will be in bondage. I look upon this thing of taking private property, or subjecting it to unusual burdens without the consent of the owner, as a great stride toward despotic power.”¹³¹ Both judges were Republicans, so it is not surprising that they were drawing on slavery as a critique of democratic abuses in the 1850s. This Ohio judge was a Republican who later served in Congress from 1863 to 1869.¹³² 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.

¹²⁷ *Beebe v. State*, 6 Ind. 501, 527 (1855).

¹²⁸ *Id.* at 521.

¹²⁹ *Id.* at 521.

¹³⁰ *People v. Gallagher*, 4 Mich. 243, 266 (1856). The judge was Nathaniel Bacon, a Republican.

¹³¹ *Griffith v. Commissioners*, 20 Ohio 609, 623 (1851).

¹³² This judge was Rufus Paine Spaulding, a Republican.

There are almost no examples of countermajoritarian justifications from states retaining appointive judiciaries, and few examples from before 1850.¹³³ One exception was a Delaware court in 1847 explaining that the separation of powers in these terms: “These coordinate 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 injustices of the majority.”¹³⁴ This court was confronting two legal issues that triggered some of the countermajoritarian arguments in the 1850s in elective states: 1) local referenda for 2) liquor prohibition.

Just as there are more judicial review cases from the mid-Atlantic and Midwestern states, there are also more countermajoritarian theories offered from those regions than from New England or the South. Southern courts were, if anything, less active in the 1840s and 1850s than before. The numbers are too small from these states to draw conclusions about appointment and election, but it seems like judicial elections have little correlation if any on judicial review. When southern state did offer a theory for judicial review, they adhered to the traditional justification of defending the people and their constitution against legislative encroachment.¹³⁵

Northern appointed courts accounted for little of the judicial review in the antebellum era, including the burst in the 1850s. Those six states (mainly in New England) struck down eleven statutes in the 1850s. Even though the Whigs had been the proponents of judicial review and stronger courts in the early nineteenth century, the Whig strongholds of New England produced little judicial review. And when their courts did strike down statutes, they offered also offered the traditional majoritarian theory.¹³⁶

C. Explanations

What factors contributed to the sharp rise in judicial review in the 1850s? And what factors shaped the turn to countermajoritarian arguments at the same time? This article offers some tentative answers. The remaining records of these judges are fragmentary at best,

¹³³ There are three cases from southern states in the 1830s: *Wally's Heirs v. Kennedy*, 10 Tenn. 554, 557 (1831); *Jones' Heirs v. Perry*, 18 Tenn. 59, 71 (1836); and *Goddin v. Crump*, 35 Va. 120, 151 (1837).

¹³⁴ *Rice v. Foster*, 4 Del. 479 (1847). Delaware was a slave state, but by the 1850s, it was more a border state.

¹³⁵ *Sadler v. Langham*, 34 Ala. 311; 1859 Ala. Lexis 262 (Ala. Sup. Ct., 1859); *State v. Moss*, 47 N.C. 66; 1854 N.C. Lexis 20; 2 *Jones Law* 66 (N.C. Sup. Ct., 1854); see also *Wiley v. Parmer*, 14 Ala. 627; 1848 Ala. Lexis 440 (Ala. Sup. Ct., 1848). A more mixed case is *Hamilton v. St. Louis County Ct.*, 15 Mo. 3, 23 (1851), which generally focused on the legislature's errors, but also noting that laws can be “oppressive in its operation on one class of citizens.” Still, the focus of the opinion is on the abuses of the legislature, it does not raise doubts about the judgment of the public. A mild exception is One mild exception 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 of “the minority against the majority.” *Ex Parte Martin*, 13 Ark. 198, 207 (1853).

¹³⁶ *Jones v. Robbins*, 74 Mass. 329; 1857 Mass. Lexis 59; 8 *Gray* 329 (Mass. Sup. Ct., 1857); *Opinion of Judges of the Supreme Court*, 30 Conn. 591 (Conn. Sup. Ct. Err., 1862)

but those fragments offer some clues, and they relate to the fragmenting of American politics in the 1850s. To be clear, the sharp increase in judicial review began in a few states in the 1840s, but spread much more broadly in the 1850s, coinciding with the rise of anti-democratic justifications from some of these judges. I suggest that the explicit turn to countermajoritarian theories by some expressed a broader sentiment shared by more of these judges, which contributed to the increase of judicial review. These changes in the 1850s do not map onto which states adopted judicial elections in the 1850s, rather than the late 1840s. New York adopted judicial elections in 1846, and it was a leader in anti-democratic jurisprudence in the 1850s.¹³⁷

1. Partisanship?

One might expect party competitiveness and divided government (between the judiciary and the other branches) to explain the increase in cases of judicial review.¹³⁸ In general, party competition in itself might have increased support for judicial review. Modern comparative studies suggest that political parties support judicial independence and judicial review if they recognize that they will sometimes be the minority party, whereas parties that face little competition oppose judicial challenges to their singular rule.¹³⁹ Parties in a competitive environment accept the benefits of judicial protection when they would be out of power over the costs of judicial obstruction for when they would be in power.

As party identities solidified in the 1830s, party rotation and cycling created opportunities for more conflict between courts and legislatures. As a new party took control of a state legislature, one would expect new legislation to pass, and then come into conflict with the hold-over judges (whether they had been elected or appointed) who would resist the new regime's statutes. Or vice versa: either by appointment or election, a new set of judges from one party might form a majority and strike down old statutes passed by the other party. The party system would draw sharper lines over legislative agendas, and lead to less judicial deference to legislators and less legislative deference to judicial finality.

While there may be some significance to partisan conflict, most of the states accountable for the burst of judicial review do not seem to follow this pattern. New York's high courts were dominated by Democrats in the 1840s and the 1850s, and they were as likely to strike down statutes that had been passed by Democratic legislatures as ones passed by Whig legislatures. Between 1840 and 1847, Democrats had a monopoly on appointments to the Supreme Court of New York, but they struck down more statutes passed by Democratic legislatures than ones passed by Whig or divided legislatures (four, five and two statutes,

¹³⁷ Pennsylvania began its process of adopting judicial elections in 1848, and its judges also led the way in criticizing majority rule.

¹³⁸ See Richard Drew, "The Origins of Judicial Supremacy" (unpublished paper, 2003). I have tried to contact Drew a few times by email and phone, without success.

¹³⁹ Mark Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Analysis," *Journal of Legal Studies* 23 (1994): 741; Mark Ramseyer and Eric Rasmussen "Why Are Japanese Judges So Conservative in Politically Charged Cases?" *American Political Science Review* 95 (2001): 331-344. See also Matthew Stephenson, "When the Devil Turns"

respectively).¹⁴⁰ After the beginning of judicial elections, Democrats won most of the state-wide seats on the New York courts and struck down a larger proportion of Whig statutes (the balance shifted to fifteen, four, and six, respectively), so there is a pattern of elected judges hardening their partisan voting in New York.¹⁴¹

But that pattern does not hold elsewhere. In Pennsylvania, on the other hand, Democrats won almost all of the elections to the court in the 1850s, and all but one of the statutes they struck down were passed by Democratic legislatures. Ohio, Indiana,¹⁴² and Illinois were similar to Pennsylvania, with a majority of Democrats on the courts striking down Democratic legislation. In Tennessee, the supreme court struck down about as many statutes passed by Whigs as by Democrats. Outside of New York, it is difficult to find a partisan slant in these cases.

Furthermore, there was more partisan competition in the 1830s and 1840s than in the 1850s, when the Jacksonian system was collapsing under the weight of slavery and anti-immigration. Partisan identities were less salient in the 1850s than before, at least until the Republican Party consolidated by the end of the decade. As noted above, there also is no party divide among the judges who justified judicial review by criticizing democracy.

2. *Judicial Elections and Faction: “Things fall apart; the center cannot hold”*¹⁴³

Did the adoption of judicial elections contribute to the rise of judicial review and the rise of countermajoritarian theories in the late 1840s and 1850s? Again, the numbers are suggestive, but they do not establish a direct link. Outside forces – such as the economic crisis of 1837-1843 -- could have caused each phenomenon independently. I offer two additional reasons for such a link that seem most significant, and then suggest other influences – some related to judicial elections, and some not.

The first reason for the link, aside from the timing and numbers of cases, was that this was the explicit goal in the conventions, as discussed in Section III.C above. The delegates turned to judicial elections in order to accomplish the very thing that happened: more judicial review. The conventions created a double mandate for more judicial review: the mandate from the conventions themselves for elected judges to strike down more statutes; and the on-going mandates from the voters to continue standing up to the legislatures and striking down more statutes. The conventions’ mandate might be considered an expressive function from the conventions. The delegates were sending a strong signal for judges to assert themselves for the people, and that is exactly what the judges did. But they also had a theory of

¹⁴⁰ This analysis of party control relies on Walter Dean Burnham’s *Partisan Division of American State Governments*, an astounding database tracking party control of legislatures since 1834. See Appendix F for color charts of party control of state legislatures and governorships, along with numbers of cases striking down statutes year by year from 1835 to 1865.

¹⁴¹ There is no evidence that Hunker judges (conservative Democrats) were targeting Radical legislation, but it is difficult to isolate factional influence over particular statutes.

¹⁴² Indiana Democrats seemed to have won most, if not all, of the elections to the state supreme court.

¹⁴³ William Butler Yeats, “The Second Coming” (1920).

institutional design to produce judicial review, with a positive and a negative perspective. That theory had a negative angle: too many legislators and governors had been corrupted, and separating judicial selection from those branches would produce a more independent court more willing and able to block them. Popular elections were simply a means of separating judicial selection and fostering a certain type of judicial independence – relative to the legislature and governor. The delegates also had a more positive angle: the judges would have more democratic legitimacy in ruling on legislation.

These judges had a democratic mandate from the conventions and a democratic mandate from the voters to defend the people against their reckless agents and the evils of corruption. But then why did many of these judges explain their practice of judicial review as defending individuals or smaller communities against the feckless people and the evils of democracy? A second factor does help explain both phenomena: the practice of judicial elections 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 state-wide 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 and judicial elections in the mid-nineteenth 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 conventions delegates complained of cronyism in judicial appointments, rather than special interests, and commentators argued that judicial appointments had been based on “service to the party.”¹⁴⁴ But democratic reformers undermined patronage by making more and more offices popularly elected. Historian Michael Holt observed, “The power to select officials had often provided glue to the majority parties in state legislatures, helping to neutralize any tendencies to factionalism on substantive issues. With patronage powers gone, such restraints on internal fragmentation disappeared.” Holt quotes an observer blaming the disarray of the Ohio Democrats in 1852 on the recent constitutional reforms, which “have broken up their principle of cohesion to any central organization.”¹⁴⁵

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, and by the early 1850s, it was no longer possible. Even though some had thought the Compromise of 1850 had saved the Union, this optimism was quickly squelched. Holt describes the 1850s as a decade-long collapse of the national political order and of most state political orders, leading to total “disintegration” and “apathy, abstention and alienation.”¹⁴⁶ Most fundamentally, he finds Americans of all regions and

¹⁴⁴ Samuel Medary, *The New Constitution* 171 (1849).

¹⁴⁵ Michael F. Holt, *The Political Crisis of the 1850s*, at 107 (1983).

¹⁴⁶ *Id.* at 102-03.

affiliations were disillusioned with their leaders, the party system, and their government. They felt betrayed and became pessimistic that the republic could survive.

The practice of judicial campaigns exacerbated these problems by adding more centrifugal force and less cohesion. In an appointed system with competitive parties, judges had to consider, among other factors, being reappointed by a governor of the same party or possibly the governor of the other party, or perhaps a legislature of their party or the opposing party. The politics of reappointment in a climate of uncertainty pulled judges toward the center, even if those same forces sometime 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 offer 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 the other machine. This political dynamic helps explain the increase of judicial review and the rise of counter-majoritarian 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."¹⁴⁷ The factional infighting spread throughout the state, and their separate newspapers attacked each other daily.¹⁴⁸ In the state Democratic convention, the Hunkers returned to their strength as party insiders, converting their power over appointments into the power over party nominations.¹⁴⁹ To the consternation of the Barnburners, the Hunkers pushed through the nomination of four Hunkers for the four Court of Appeals spots, in part because the Hunker candidates had more judicial experience, and in part because Hunkers continued to control the party machinery. After the convention, the frustrated Barnburners divided the party by running their own candidates for the general election in many races.¹⁵⁰ Turnout for the July judicial elections was poor,¹⁵¹ and the Hunkers swept the four state-wide seats, taking advantage of the most consistent and reliable party machine.¹⁵²

The New York newspapers of the 1850s similarly offer stories about the factions' bargaining over judges in the state conventions, with judges representing different interests

¹⁴⁷ *Albany Argus*, May 1, 1847.

¹⁴⁸ *Albany Argus*, May 25, 1846

¹⁴⁹ There is some confusion to outsiders about what was happening among the Democrats. The Whig *Albany Evening Journal* reported that 'the Barnburner's delegates were admitted and the Hunkers' excluded', pending a reconciliation convention in June. *Albany Evening Journal*, May 20, 1847. This account appears to reflect the factional rift, but not which faction prevailed.

¹⁵⁰ *Argus*, June 5, 1847

¹⁵¹ *New York Herald*, July 1847.

¹⁵² *Albany Argus*, June 8, 1847.

and regions jockeying for their nomination.¹⁵³ In the general election, however, the newspapers only print the party ticket, with no news about the judges campaigning publicly or writing editorials or open letters to the public. The Pennsylvania newspapers in the 1850s and the late nineteenth century show the same pattern, including some intense factional fighting in the 1880s for party nominations, but no campaigning by judges in the general elections. 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 well-respected 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 then reported that he did nothing to campaign for the general election.¹⁵⁴ He simply rode the party machine to victory. Judge Joseph R. Swan was not as lucky. He was a well-respected judge on the Ohio Supreme Court who expected an easy re-election in 1859. However, because he had enforced the Fugitive Slave Law, the Ohio Republican Party refused to renominate him.¹⁵⁵

Judges in the mid-Atlantic, the Midwest, and some border states had driven the boom of judicial review in the 1850s. In the antebellum era, many of these states had become more ethnically and religiously diverse, and their parties also became more diverse – and in particular, the Democratic Party.¹⁵⁶ For some judges, their re-nomination and re-election 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, Judge Albert Cardozo was on the Court of Common Pleas and ruled that a “blue law” limiting the sale of liquor was unconstitutional.¹⁵⁷ 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 sufficient to assert that if I had had different convictions of the law, I should have boldly declared them.” Later, he added, “The liquor law and the judges who had upheld it, will assuredly ultimately meet the condemnation which they deserve at the hands of the people, to who[m] I shall also make an appeal in due time.”¹⁵⁸ Albert Cardozo’s constituency of Germans and Irish voters in his urban judicial district were strongly opposed to the statute. In a later case, the General Term of the New York Supreme Court and then the Court of Appeals upheld the statute, but nevertheless, the episode illustrated 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 force a judge to reconsider his “convictions,” and to adopt a legal theory that a judge should defend local community against a state-wide majority.

¹⁵³ New York Daily 1856, New York Herald 1859; Boston Daily Atlas, 1855

¹⁵⁴ Roberts, *Thomas P. Memoirs of John Bannister Gibson*. Jos. Eichbaum & Co: Pittsburg, PA., 134, 137 (1890)

¹⁵⁵ Emilius Randall and Daniel Ryan, *A History of Ohio: The Rise and Progress on an American State*, 5:135 (1912).

¹⁵⁶ Lee Benson, *The Concept of Jacksonian Democracy*.

¹⁵⁷ See Andrew Kaufman, “The First Judge Cardozo: Albert, Father of Benjamin,” *Journal of Law and Religion*, 11:283-86 (1994) (citing *Holt v. Board of Excise*, an unpublished decision printed in the New York Times, June 22, 1866, at 8, col. 1).

¹⁵⁸ See *id.* (citing letter from Albert Cardozo to John R. Brady, July 26, 1866, 1866 Box, Papers of Charles P. Daly, New York Public Library).

The “countermajoritarian” judges of the 1850s reflect some of the politics of fragmentation in the 1850s. George Comstock, one of the judges to warn against “popular majorities” in striking down a New York prohibition law, had several reasons to question the reliability of American democracy. He was a conservative Whig who was skeptical about another democratic institution, the jury,¹⁵⁹ and he later embraced a jurist who was a skeptic of democracy. 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.¹⁶⁰ But on top of this political temperament, Comstock also won his seat because of the factionalizing of American politics. 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 nomination of the “Silver Grays” (the faction of conservative Whigs) and the American Party, and he prevailed over a split multi-candidate field. As parties were collapsing into battling factions, some judges unsurprisingly saw that the center could not hold. They had less faith in the mechanics of democracy and the claims of popular majorities.

Other factors seemed to shape Comstock’s doubts about popular majorities. Once the Whig Party and American Party folded and the Republican Party emerged, Comstock embraced the Democrats. 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 re-election campaign during a Republican sweep of the state in 1861. During the war, he wrote, “The Federal Government has no more right to invade one section of the Union for a purpose outside of the Constitution, no more right to propagate by force of arms in one State the theories, sentiments and opinions of other States, than it has to invade the Kingdom of Brazil to abolish slavery, or the Turkish Empire to abolish polygamy.”¹⁶¹ Comstock adhered to states’ rights and limited federal power: “Under the Constitution of the United States there is no shadow of right, in peace or war, by its laws or its military power, to spread or to propagate the opinions or sentiments of any class or section, upon social and moral questions.”¹⁶² 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.

The critics of democracy in the 1850s were bipartisan, or really tripartisan and interfactional. Democrats and Republicans joined Comstock and other Whigs to worry about popular majorities’ dangers. 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. He joined the Ohio Republican Party in the 1850s, and was elected to the superior court in 1854, and then the state supreme court in 1859. His son volunteered for the Union army and died in battle. Judge Bacon and Spalding, the judges who had used images of slavery to criticize democratic excesses, also had joined the Republican Party early on. From the opposite vantage point of Comstock’s, these Republicans in the mid-1850s had their own reasons to raise questions about popular majorities.

¹⁵⁹ 4 *Dictionary of American Biography* 332-33 (1930).

¹⁶⁰ Comstock, “Preface to Kent,” *Commentaries on American Law*, (George F. Comstock, ed. 1867).

¹⁶¹ Comstock, “Let Us Reason Together,” in *Papers from the Society for the Diffusion of Political Knowledge* (1864), at 2.

¹⁶² *Id.* at 5.

In these years, pro-slavery forces were pushing for popular sovereignty in western states and territories on the legality of slavery. In 1854, the Kansas-Nebraska Act marked a major step towards popular voting on slavery's status in the west, followed by Bloody Kansas in the mid-1850s. Meanwhile, pro-slavery forces were winning elections. 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 was becoming the strongest weapon for the Republicans against southern state majorities, but abolition would also propel them to see a judge's role in protecting individual rights.

3. Judicial Elections and Districts

Judicial elections also contributed to fragmentation against broader public opinion by creating local judicial districts. Before judicial elections, judges were appointed on a state-wide basis, so that 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 state-wide politics to win re-appointment. In the era of judicial elections, most judges ran for seats by district, shifting the base of support from state-wide 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 York¹⁶³ in 1846; Illinois in 1847, Kentucky in 1849,¹⁶⁴ Michigan¹⁶⁵ and Virginia¹⁶⁶ in 1850, and Maryland¹⁶⁷ and Indiana¹⁶⁸ in 1851.

Districting cannot explain much of the increase in judicial review. The alignment of districts would not be so different from state-wide elections to produce such a huge burst of conflict between court and legislature. Furthermore, judges elected state-wide (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 by individual judges, as they considered their local constituencies more than state-wide 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 state-wide seats. 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 more acceptable jurisprudence.

¹⁶³ See Chapter Five.

¹⁶⁴ Kentucky Constitution of 1849, Article IV, Section 4.

¹⁶⁵ Michigan Constitution of 1850, Article VI, Section 2.

¹⁶⁶ Virginia Constitution of 1850, Article VI, Section 10. (five districts).

¹⁶⁷ Maryland Constitution of 1851, Article IV, Section 4, 9.

¹⁶⁸ Indiana Constitution of 1851, Article VII, Section 2, 3, and 9.

4. *Other Influences of Judicial Elections*

Other aspects of judicial elections might have encouraged more judicial review, and perhaps the counterintuitive turn to countermajoritarian theories, but these factors are more speculative and probably less significant.

The convention debates may have influenced judges' approach to judicial review and individual rights. One might assume that the new constitutions had added more individual rights clauses, which would 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 as individual rights more than as "the people's" rights, in favor of broader suffrage and more direct democracy. At the same time, opponents of judicial elections feared that elected judges would not defend the rule of law and would not protect individual rights. Elected judges seemed to have borrowed from both sides at the convention. They may have been simultaneously embracing the natural rights theory that justified self-determination, suffrage, and direct democracy,¹⁶⁹ while also remaining skeptical of voters and public opinion, just as the critics of judicial elections were. Because the opponents had raised doubts about elected judges' capacity to protect individuals, this first generation of elected judges might have been trying harder to settle these doubts in action and in theory.

Another possibility is that these judges may have accepted the brave new democratized courts, but they 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 most direct representatives? These judges offered the countermajoritarian arguments of liberty and rule of law to bolster their legitimacy: They could both serve 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 had to react against too much democratization. Lawyers and judges were also warding off efforts at broadening access to laymen, who had been seeking to represent clients in court and seeking seats on the bench. The legal profession was building its own identity and power in this era, and part of its ethos was the lawyers' responsibility in defending individual rights. 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 a matter of defending judicial expertise.¹⁷⁰

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

¹⁶⁹ Laura Scalia, *The Jeffersonian Experiment: Remaking State Constitutions, 1820-1850* (DeKalb: Northern Illinois University Press, 1999).

¹⁷⁰ Caleb Nelson, "Reinterpretation," 207-08, Kramer, *The People Themselves*, 174.

have resented the new inconveniences and discomforts of election campaigns, or those campaigns might have opened some eyes to the questionable world of electioneering and party machines. As Bismarck supposedly commented, “Laws are like sausages, it is better not to see them being made.” Perhaps judges found out the same about democracy, once they saw how it was made. The effect was an empirical basis for distrusting democracy.

5. 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 influence of the crises on their own. 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 judicial elections. Many Americans were not only disillusioned with politicians and parties after the 1840s economic crisis and the 1850s slavery crisis. Many were also disillusioned with democracy itself.¹⁷¹

Going into the conventions starting in the mid-1840s, the leading interpretation of the crisis was that legislatures had been captured by special interests or their own interests, against the will of the people. The delegates in the state conventions argued that judicial elections would enlist the courts in restoring the will of the people against corrupt legislators. With or without elections, judges rode that same wave of anti-legislature sentiment. These judges also might have become skeptical of popular democracy in the wake of these events. An equally valid interpretation of the overspending and the debt crisis was that the public helped generate the frenzy for new canals, turnpikes, and railroads, pushing the government into financial crisis. Neighboring towns and bordering regions 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 had motivated judges to turn against democracy, then why did they not turn to anti-democratic arguments earlier, especially in the “spike” of judicial review in the 1840s? Instead, these arguments emerge mostly in the early and mid-1850s.

Legislatures had been passing more statutes over the course of the nineteenth century, so there were more and more targets to strike down over time. However, there were extended bursts of legislative activity in the 1810s, 1820s, and 1830s without a burst of judicial review. Chastened by the financial crisis, the state legislatures in the 1840s and 1850s appeared to level off their activity, and perhaps to slow down. The range of legislation that was challenged in the 1850s does not look so different from the legislation of earlier decades. At the same time, two relatively new types of legislation were appearing at this time, one procedural and one substantive. The procedural initiative was the local or state-wide referendum, and the new substantive innovation was liquor prohibition. Some of the judicial review boom is attributable to these new types of statutes, as well as some of the countermajoritarian arguments, but these cases are still just a fraction of the total.

¹⁷¹ See Holt.

The new constitutions themselves offer another explanation. 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 the 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, they had not made many changes in terms of popular control over the legislature or governor. Those changes generally had come earlier in the century, and 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.

There is also a textual answer. These constitutions from the late 1840s and early 1850s (the Revolutions of 1848) were longer and contained more specific textual clauses addressing specific problems. The states had called for conventions to set constitutional limits on legislatures, and these specific clauses gave judges a mandate to strike down statutes, with relatively less discretion to defer to the legislatures. Most of these cases from the late 1840s and 1850s were based on the same standard constitutional texts that had been retained from the earlier constitutions, especially relating to takings and the obligations of contracts. At the same time, new constitutional clauses on separation of powers, spending powers, and legislative procedures opened up new fields for review. Substantive due process (sometimes drawing on “law of the land” clauses) was one area that expanded a new meaning from an old text.¹⁷² As it turns out, the *Dred Scott* Court would continue on that path in 1857.

Given the growth of state judicial power and the increasing skepticism of legislatures, it is not surprising that the United States Supreme Court followed the elected state judges down the same path in the 1850s. Since *Marbury* in 1803, the U.S. Supreme Court had not struck down another federal statute until *Dred Scott* in 1857. Historians have been puzzled by the Taney Court’s enthusiasm for intervening in such explosive political controversies. None of the justices in *Dred Scott* had been elected judges, but four of the judges in the majority had been elected officials, and may have been more comfortable with political roles.¹⁷³ But more importantly, judges around the country had been increasingly comfortable in a political sphere and increasingly aggressive against other branches. The *Dred Scott* decision was an intriguing mix of judicial supremacy in the defense of property rights (a countermajoritarian function), as well as a defense of local popular sovereignty against federal intervention (a majoritarian

¹⁷² *Wynehamer* (NY 1855), Indiana prohibition.

¹⁷³ Chief Justice Taney had been a state legislator in Maryland before becoming Jackson’s attorney general. Justice Campbell, appointed in 1853, had been an Alabama legislator. Justice Wayne had been a Georgia judge and congressman. Justice Daniel had been a member of the Virginia legislature and then served as lieutenant governor for twenty-three years. Of the other three, Justice Catron had been a Tennessee supreme court judge during that court’s burst of striking down fourteen statutes in six years. Justice Nelson had been a judge on the New York Supreme Court, at the time the state’s highest court. Justice Grier had been elevated from a Pennsylvania trial court to the supreme court. Of the dissenters, Justice McLean had been an Ohio congressman.

function). One historian has linked *Dred Scott* to a “Jacksonian jurisprudence” of popular sovereignty, which might surprise modern readers who think of judicial review as contrary to popular sovereignty.¹⁷⁴ However, considering the judicial politics of the 1840s and 1850s, the Taney Court’s blend of majoritarian and countermajoritarian judicial power was simply following the elected state judges around the country.

Conclusions:

Democracy, the Rule of Law, and Judicial Independence

The rise of judicial elections is but one episode in America’s on-going conflict between law and democracy. The rallying cry of “power to the people” was insufficient in this episode without a more salient claim for the rule of law and limited government. Supporters of judicial elections gained little when the reform was framed as more democracy to weaken the courts. In response, opponents of judicial elections successfully warned against too much democracy. In the 1840s, the proposals for judicial elections gained traction only once their supporters framed them as a way to promote both law and democracy, as elected judges were more independent from the other branches, and more able to protect the people’s constitution against legislative and executive abuses.

Judicial Independence

This study of judicial elections also adds some new layers to the interpretation of Jacksonian Democracy. Perhaps the most important theme is the shifting notions of judicial independence and judicial power. A common impression of the Age of Jackson is that Andrew Jackson clashed with John Marshall on the federal level, and the same battles played out on the state level. The conventional wisdom is that Jacksonians opposed judicial power, judicial review, and judicial independence.

While “judicial independence” now signifies the ability of judges to be free from political pressure and to rely upon their own legal interpretation and/or conscience, in the eighteenth and nineteenth centuries it referred to the independence of judges from centralized power, such as the Crown or executive power, but generally did not suggest independence from public opinion or majority will. The idea of judicial independence *from* public opinion emerged in the Founding Era and developed – on the losing side -- in the debate over judicial elections.

Several scholars have recently commented that there are many different understandings of judicial independence, and have noted that the phrase “judicial independence” is too vague to be helpful, and too easily manipulated to have “independent” substance.¹⁷⁵ These shortcomings are illustrated by one scholar’s recent claim that throughout American history, reformers at each stage changed judicial selection methods – from political

¹⁷⁴ Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857* (2006).

¹⁷⁵ Lewis A. Kornhauser, “Is Judicial Independence a Useful Concept?” In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Stephen B. Burbank and Barry Friedman (Thousand Oaks, CA: Sage, 2002).

appointment to partisan election to non-partisan election to merit selection – in order to increase judicial independence.¹⁷⁶ True, elections made judges less dependent upon the governor and the legislature, but reformers in the antebellum period explicitly intended to make judges more accountable to the public, and in practice, elected judges became beholden to party machines (arguably part of some reformers’ hidden agenda from the beginning). The sources from this period indicate that the advocates of judicial elections generally prioritized judicial dependence upon public opinion, and as a second-order priority some reformers (but not all) hoped that elections would strengthen judicial checks on the other branches.¹⁷⁷

Changes in selection generally yield only relative independence: elections create more independence from one institution or set of political forces, but also create more dependence on other institutions and political forces. The same is true for non-partisan elections and merit-selection. Reforms that yield independence in more absolute terms include lengthening of terms; multiple branches or bodies involved in the selection process; barriers to removal or discipline; fixing salaries and material support; and protections of jurisdiction. In the early nineteenth century, most reforms decreased judicial independence. The rise of judicial elections in the 1840s and 1850s, on balance, increased judicial independence and judicial power. At the same time that judges’ power was increasing relative to the other branches, some elected judges were becoming more beholden to their political party or to the interests and factions within those parties, as well as to the local constituents in their new judicial districts.

Popular Constitutionalism?

As judges became less independent from the people, the rise of judicial elections seems to be a flowering of popular constitutionalism in antebellum America. In Larry Kramer’s account of the Founding and the Early Republic, Americans accepted judicial review in theory in the same majoritarian framework: judges intervened on behalf of the people and their constitution to impede an overreaching legislature and to give the people a chance to confirm or reject the legislative program with further deliberation in the next election.¹⁷⁸ 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 is good (slowing down the political process and giving the people more chances to debate and decide), and judicial supremacy and finality are bad (stopping democracy, or at least slowing it down too much).

On the one hand, the story of elected judges in the 1840s and 1850s is the embrace of popular constitutionalism. The goal was not to cripple the courts, but rather, to empower the

¹⁷⁶ F. Andrew Hanssen, “Learning about Judicial Independence: Institutional Change in the State Courts,” *Journal of Legal Studies* 33 (2004):431- 448. 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. Nevertheless, Hanssen’s argument is that the reformers generally sought more “judicial independence,” but I think he would probably agree with a more precise (perhaps hair-splitting) distinction here.

¹⁷⁷ For example, Mississippi reformers showed no signs of seeking a stronger judiciary, and to the contrary, it seems like they wanted elections to weaken it. New York’s reformers seem mixed on the question.

¹⁷⁸ Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

courts to be an engine of popular constitutionalism, to defend the people against their agents when they step out of line, and to be corrected when the courts step out of line with the people. These judges followed through with more judicial review, and like Judge Joseph Swan in Ohio on the issue of slavery, some judges did not return to the bench when they had been out of line. Even the elected judges' turn to countermajoritarian review is consistent with popular constitutionalism, because in theory, the people could assess these decisions and vote these judges back onto the bench or off the bench. But theory does not seem to be practice in most judicial elections in the 1850s or later in the nineteenth century. Even in competitive races, judges very rarely took their cases to the people and campaigned on judicial issues or on anything else. Judicial candidates mainly campaigned for the support of interests and factions for the support of party elites in the state conventions, and then stood aside as the party machine and straight-ticket voting took over. It is certainly possible that voters followed these decisions closely enough to vote on them, but they would have done so despite judicial campaigns.

Waves of Change in Legal History

During the Illinois Constitutional Convention of 1847, an Illinois newspaper celebrated the adoption of judicial elections: "Power once surrendered to a people is seldom returned."¹⁷⁹ True, once states offered the people a chance to choose their judges, the people have rarely given up this power. Judicial elections probably are not going away any time soon, but the power of the people in those elections has been eroded by special interests.

However, also recall Thomas Jefferson's letter to Samuel Kercheval in 1812, calling for judicial elections. Referring to Connecticut, Jefferson wrote, "I believe there has hardly ever been an instance of change [in Connecticut]; so powerful is the curb of incessant responsibility."¹⁸⁰ Though incessant accountability to the people is indeed powerful, Jefferson was wrong: Connecticut had changed quite a few times, and by the time Jefferson was writing, Connecticut had abandoned judicial elections. Connecticut would return to electing some judges in the middle of the wave in 1850, and it would turn back to appointments after the Civil War. It has retained appointments since then. In 1986, the same fateful year for Judge Rose Bird and her colleagues in California, Connecticut adopted a nominating commission – spreading out the power of appointment with more emphasis on merit and broad-based support. Connecticut proves Jefferson wrong, and proves the Illinois writers wrong. Reform of judicial elections – even its abandonment -- is possible. Institutional change can happen suddenly: judicial elections emerged in five short years, more or less. And the change swept through American for counterintuitive purposes: to create stronger courts that were more committed simultaneously to democracy, individual rights and the rule of law. Perhaps there is another wave to revive the spirit of 1846: a stronger judiciary for the people, by the people, and more able to stand up to the people when necessary.

¹⁷⁹ *Galena Weekly Northwestern Gazette* [Illinois], Sept. 17, 1847.

¹⁸⁰ Thomas Jefferson to Samuel Kercheval, July 12, 1816, in *The Writings of Thomas Jefferson*, eds. Andrew A. Lipscomb et al. (Washington, D.C.: Thomas Jefferson Memorial Association, 1903), 15:34

TIME LINE FOR JUDICIAL ELECTIONS

ELECTIONS	AGAINST ELECTIONS
1777: The territory of Vermont for lower courts	
1812: Georgia for “inferior” courts	
1816: Indiana for associate circuit court judges	

1832: Mississippi (Convention)	
1833:	
1834:	Missouri (A), Tennessee (C)
1835: Georgia for superior court judges (A)	North Carolina (C)
1836: Michigan for circuit judges (Convention)	
1837:	
1838:	
1839:	
1840:	
1841:	
1842:	
1843:	
1844: Iowa for lower courts (Convention)	New Jersey (C)
1845:	TX (C), LA (C), MO (C)
1846: New York (Convention)	
Wisconsin (Convention)	
1847: Illinois (Convention)	
1848-50: Pennsylvania (amendment):	
1848: Arkansas for circuit court judges (amendment)	
1849: California (Convention):	
1850: Missouri (amendment)	
Ohio (Convention)	
Kentucky (Convention)	
Michigan (Convention)	
Texas (amendment)	
AL, CT, and VT for circuit court judges (amendments)	
Virginia (Convention)	
1851: Maryland (Convention), Indiana (Convention)	New Hampshire (C)
1852: Louisiana (Convention)	
1853: Tennessee (Convention), Florida (Amendment)	Massachusetts (C)
1854:	
1855:	
1856:	
1857: Minnesota (Convention), Iowa (Convention)	
1858:	
1859: Oregon (Convention)	
1860:	
1861: Kansas (Convention)	

The left side are states that adopted judicial elections, and the right side are states that did not. States in bold adopted judicial elections for all of their courts.

From 1846 to 1851, 12 states adopt judicial elections for their entire court system, plus five partial adoptions. By 1860, out of 31 states in the Union, 18 states elect all of their judges, plus five electing some. This chart certainly suggests that New York’s adoption was a major turning point.

State Supreme Court Cases Declaring State Laws Unconstitutional

	1790- 1799	1800- 1809	1810- 1819	1820- 1829	1830- 1839	1840- 1849	1850-1859	1860- 1865
New Hampshire	0	0	1	1	0	1	2	0
Vermont 1791	0	0	2	6	2	0	2	1
Massachusetts	0	1	2	0	1	1	4	1
Rhode Island	0	0	0	0	0	0	2	0
Connecticut	0	0	0	3	2	1	0	1
New York	0	0	5	7	4	21(*)	33*	16*
New Jersey	0	0	2	0	1	0	1	1
Pennsylvania	2	0	0	1	1	9	10*	17*
Delaware	0	0	0	1	0	2	0	0
Maryland	0	0	0	2	5	4	1*	2*
Virginia	1	0	1	1	0	0	0*	0*
North Carolina	1	2	3	1	1	0	6	1
South Carolina	0	0	0	0	0	0	0	0
Georgia	0	0	0	0	0	3	3	0
Kentucky 1792	0	5	2	6	4	2	3*	2*
Tennessee 1796	0	0	2	1	14	7	14*	1*
Ohio 1803	-	1	0	0	2	5	16*	3*
Indiana 1816	-	-	0	2	2	2	33*	14*
Mississippi 1817	-	-	0	1	1*	2*	3*	1*
Illinois 1818	-	-	0	0	0	2	5*	6*
Alabama 1819	-	-	-	1	2	3	5	1
Missouri 1821	-	-	-	2	4	1	9*	4*
Totals	4	9	20	36	46	66	152	72
Totals from elected courts only	0	0	0	0	1	7	125	66

U.S. Supreme Court Cases Declaring Statutes Unconstitutional

	1790- 1799	1800- 1809	1810- 1819	1820- 1829	1830- 1839	1840- 1849	1850- 1859	1860- 1870
Federal laws	0	1	0	0	0	0	1	4
State laws	0	1	7	7	3	9	7	23

